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Roots of Revolution: The African National Congress and Gay Liberation in South Africa

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ROOTS OF REVOLUTION: THE AFRICAN NATIONAL CONGRESS AND GAY LIBERATION IN SOUTH AFRICA

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INTRODUCTION

South Africa's post-apartheid constitutions—the 1993 Interim Constitution[1] and the 1996 Final Constitution[2]—were the first in the world to contain an explicit prohibition of discrimination on grounds of sexual orientation.[3] This remarkable proclamation occurred in a society where homophobic attitudes are widespread[4] and remain virulent enough to produce extreme acts of violence.[5] How did this happen?

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1. S. AFR. (INTERIM) CONST., 1993.

2. S. AFR. CONST., 1996.

3. S. AFR. (INTERIM) CONST., *supra* note 1, art. 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: . . . sexual orientation. . . ."); S. AFR. CONST., *supra* note 2, art. 9, § 3 ("The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . sexual orientation. . . ."). *See* Amy Raub et al., *Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions*, 28 YALE J.L. & FEMINISM 149, 157 (identifying ten countries with constitutional prohibitions of sexual orientation discrimination as of May 2014, all of which were enacted "during the 1990s or later); Daniel Bradley, *Which Constitutions Protect SOGI?*, OUTRIGHT ACTION INT'L (Apr. 6, 2017), https://www.outrightinternational.org/content/which-constitutions-protect-sogi ("In 1996, South Africa became the first national jurisdiction to include sexual orientation protections in its constitution.").

4. *See* CARLA SUTHERLAND ET AL., PROGRESSIVE PRUDES: A SURVEY OF ATTITUDES TOWARDS HOMOSEXUALITY & GENDER NON-CONFORMITY IN SOUTH AFRICA 3 (Neville Gabriel ed., 2016), *available at* http://theotherfoundation.org/wp-content/uploads/2016/09/ProgPrudes_Report_d5.pdf [hereinafter PROGRESSIVE PRUDES] (reporting 2015 survey data indicating that 72% of South Africans condemn same-sex sexual activity as morally wrong).

5. *See, e.g.*, Clare Carter, *The Brutality of Corrective Rape*, N.Y. TIMES (July 27, 2013), https://www.nytimes.com/slideshow/2013/07/27/opinion/sunday/20130727_CORRECTIVERAPEss.html (reporting multiple instances in South Africa of the rape and murder of gay men and lesbians "to 'cure' them of their sexual orientation"); *see also* PROGRESSIVE PRUDES, *supra* note 4, at 3 (reporting 2015 survey data indicating that "about half a million (450,000) South Africans over the prior 12 months, have physically harmed women who dressed and behaved like men in public, and 240,000 have beaten up men who dressed and behaved like women").

Part of the answer can be found in the negotiations that produced these constitutional documents and the skillful role gay rights advocates played in that process. The critical foundation for this result, however, was laid earlier when the leaders of the African National Congress (ANC) were persuaded to take a stand in support of gay rights and to include explicit protection against discrimination on grounds of sexual orientation in the ANC's *A Bill of Rights for a New South Africa*.[6] Published in 1990, this draft Bill of Rights predicted that the anti-apartheid struggle would soon lead to a new constitution for South Africa, and set forth the rights the ANC proposed to be included in that constitution.[7] The explicit anti-discrimination provisions of the ANC's draft Bill of Rights led directly to the inclusion of such provisions in the 1993 Interim Constitution and 1996 Final Constitution, and ultimately to broad judicial and legislative protection for gay rights, from de-criminalization of sexual behavior to marriage equality.

How, then, were the leaders of the ANC persuaded to take a stand in support of constitutional protection for gay rights? Here too, part of the answer can be found in the deliberate efforts of gay rights activists to induce the ANC to support gay rights and to include explicit anti-discrimination protections in the ANC's constitutional proposals.[8] Apart from those efforts, however, a

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6. AFR. NAT'L CONG. [ANC], CONST. COMM., A BILL OF RIGHTS FOR A NEW SOUTH AFRICA 15 (1990) [hereinafter A BILL OF RIGHTS FOR A NEW SOUTH AFRICA] ("Discrimination on grounds of gender, single parenthood, legitimacy of birth or sexual orientation shall be unlawful.").

7. *Id.* at 1.

8. This history has been well documented. *See generally* SEX AND POLITICS IN SOUTH AFRICA (Neville Hoad, Karen Martin & Graeme Reid eds., 2005) (collecting essays and primary source documents pertaining to the efforts of gay rights advocates to secure legal protections from abuse and discrimination in South Africa); Peter Tatchell, *The Moment the ANC Embraced Gay Rights*, *in* SEX AND POLITICS IN SOUTH AFRICA 140 (Neville Hoad, Karen Martin & Graeme Reid eds., 2005) (recounting specific efforts of gay rights advocates to induce the ANC to support the protection of gay rights); Simon Nkoli, *Wardrobes: Coming Out as a Black Gay Activist in South Africa*, *in* DEFIANT DESIRE 249 (Mark Gevisser & Edwin Cameron eds., 1994) (recounting author's efforts within ANC to promote the protection of gay rights); Derrick Fine & Julia Nicol, *The Lavender Lobby: Working for Lesbian and Gay Rights in the Liberation Movement*, *in* DEFIANT DESIRE 269 (Mark Gevisser & Edwin Cameron eds., 1994) (summarizing efforts of gay rights advocates in Cape Town to promote the protection of gay rights); Mark Gevisser, *A Different Fight for Freedom: A History of South African Lesbian and Gay Organisation from the 1950s*

role was played by the leaders of the Women's Section of the ANC, who sought more generally to incorporate in the ANC's constitutional proposals language that would recognize and promise an end to gender oppression. Those efforts—in collaboration with the work of the ANC's Constitutional Committee—led directly to the ANC's inclusion of a gay rights clause in its proposed Bill of Rights.

This article traces that story. Part I lays out the context, explaining the origins of the ANC's Constitutional Committee, its work in presenting alternative models for a future constitutional order, and its success in securing the ANC's commitment to multi-party democracy and an enforceable Bill of Rights, culminating with the publication of the ANC's *Constitutional Guidelines for a Democratic South Africa*.[9] Part II then shows that dissatisfaction with the *Constitutional Guidelines* by leaders of the ANC's Women's Section, and their insistence that the ANC confront and address a broader problem—the oppression of women—led the ANC to include a gay rights clause in its draft Bill of Rights. Finally, Part III identifies gaps in the documentary record and briefly addresses the ambiguities they create.

Much of the documentation of this story comes from the papers of Albie Sachs, which fill more than one hundred boxes in the Mayibuye Archives at the University of the Western Cape in South Africa, and from interviews with him. Albie, as he prefers to be called, was a member of the ANC's National Executive Committee (NEC), a founding member of the ANC's Constitutional Committee,[10] which was formed in January 1986 specifically to develop the ANC's constitutional proposals, and a chief

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to 1990s, *in* DEFIANT DESIRE 14, 74–75 (Mark Gevisser & Edwin Cameron eds., 1994) (summarizing history of gay rights advocates in South Africa to promote the protection of gay rights); Ronald Louw, *Gay and Lesbian Sexualities in South Africa: From Outlawed to Constitutionally Protected*, *in* LEGAL QUEERIES 139 (Leslie J. Moran, Daniel Monk, & Sarah Beresford eds., 1998) (summarizing progress achieved by gay rights advocates in South Africa in securing legal protection of gay rights).

9. ANC, CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA (1988), *available at* https://web.archive.org/web/20180814231849/http://www.anc.org.za/content/constitutional-guidelines-democratic-south-africa [CONSTITUTIONAL GUIDELINES].

10. Other members of the Committee at its foundation were Jack Simons (Chair), Zola Skweyiya (Vice-Chair), Z.N. Jobodwana (Secretary), Penuell Maduna, Kader Asmal, and Teddy Pekane. Additionally, ANC President Oliver Tambo and ANC Secretary-General Alfred Nzo attended the first two sessions

drafter and expositor of those proposals. Albie's hand in developing the ANC's *Constitutional Guidelines*, published in 1988, and the ANC's *A Bill of Rights for a New South Africa*, published in 1990, is confirmed not only by the interviews, but by marked-up preliminary drafts of documents with Albie's hand-written notations, which are preserved among his papers in the Mayibuye Archives. Albie kept preliminary drafts of many of his writings, and retained meeting minutes and other records of the Constitutional Committee along with incoming and outgoing correspondence.[11] Together, these records and Albie's interviews present a detailed picture of the origins and evolution of the ANC's constitutional proposals.

I. THE ANC'S CONSTITUTIONAL GUIDELINES: COMMITMENT TO MULTI-PARTY DEMOCRACY AND AN ENFORCEABLE BILL OF RIGHTS

The ANC's *Constitutional Guidelines for a Democratic South Africa* confirmed the ANC's commitment to true multi-party democracy and an enforceable Bill of Rights. As the following sections of this article show, that commitment was not a foregone conclusion, but instead was produced—in the midst of armed revolutionary struggle—by a remarkable internal debate within the organization.

A. January 1986: "The end of apartheid is not very far away."

On January 8, 1986, the seventy-fourth anniversary of the founding of the ANC, leaders of the organization met in Lusaka, Zambia, the headquarters of the ANC in exile. A special committee of experts—ANC activists who were or had been lawyers and constitutional scholars—had been formed by the ANC's top leaders[12] to take on the unprecedented task of developing a proposed

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of the Committee's inaugural meeting. ANC, Const. Comm., Meeting Minutes 1–3, 9 (Jan. 1986) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 20) [hereinafter Jan. 1986 Meeting Minutes].

11. Indeed, Albie has described himself as a "magpie"—in the United States one would say "pack-rat"—in connection with his retention of documents. Interview with Albert Sachs, at University of the Western Cape, in Belville, South Africa (June 28, 2007), *in* DVD: The Birth of the Constitution, tape 1, at 4:45–5:00 [hereinafter Birth of the Constitution DVD].

12. The ANC leadership consists of six top officers (President, Deputy President, National Chairperson, Secretary General, Deputy Secretary General, and Treasurer General) and the NEC, which are elected for five-year terms by

constitutional framework for the future South Africa.[13] People felt that "the end of apartheid was not very far away."[14] Constitutional proposals were being promoted by think tanks and research groups allied with those in power in the racist South African government, the United States, and the United Kingdom. ANC leaders were concerned that these proposals would seek to "entrench the former positions of the oppressors" and avoid the nonracial, democratic vision of the Freedom Charter—the historic statement of core principles adopted by the ANC and its allies in the struggle against apartheid.[15] The ANC needed to be prepared to respond to these constitutional proposals. Even

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the ANC membership. *National Executive Committee*, AFR. NAT'L CONG., https://www.anc1912.org.za/national-executive-committee (last visited Apr. 19, 2019). A smaller National Working Committee (consisting of the six top officers and one-fourth of the NEC members) is elected by the NEC to serve as its executive committee. *National Working Committee*, AFR. NAT'L CONG., https://www.anc1912.org.za/national-working-committee (last visited Apr. 19, 2019). The ANC's President, Oliver Tambo, and its Secretary General, Alfred Nzo, were directly involved in the creation of the Constitutional Committee and attended its inaugural meeting. *See* Jan. 1986 Meeting Minutes, *supra* note 10, at 1.

13. Jan. 1986 Meeting Minutes, *supra* note 10, at 2.

14. *Id.*

15. Jan. 1986 Meeting Minutes, *supra* note 10, at 1. The Freedom Charter, adopted on June 26, 1955 at the Congress of the People in Kliptown, South Africa, set forth the core principles of the ANC and other organizations fighting for freedom and equality in South Africa. It declares that "South Africa belongs to all who live in it, black and white," that "no government can justly claim authority unless it is based on the will of all the people;" and that "our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities." *Freedom Charter*, AFR. NAT'L CONG., https://www.anc1912.org.za/freedom-charter (last visited Apr. 19, 2019). It calls for "democratic changes" to establish a government based on the following principles:

> The people shall govern; [a]ll national groups shall have equal rights; [t]he people shall share in the country's wealth; [t]he land shall be shared among those who work it; [a]ll shall be equal before the law; [a]ll shall enjoy equal human rights; [t]here shall be work and security; [t]he doors of learning and culture shall be opened; [t]here shall be houses, security and comfort; [t]here shall be peace and friendship.

Id.

more, it needed to be proactive in developing its own proposed constitutional framework for the future South Africa.[16]

The Committee's task was not to draft a detailed "blueprint prescription" for the future constitution, but to identify the overarching principles that the future constitution would have to satisfy.[17] Thus, the Committee was expected to identify "major constitutional problems" and advise the ANC leadership on how those issues should be resolved.[18] The Freedom Charter would serve as the "point of departure," but the Committee would need to "look even beyond the Freedom Charter" in developing its proposed constitutional framework.[19]

The Committee—initially dubbed simply the "Constitution Committee"[20]—set to work immediately. Jack Simons was appointed Chair of the Committee, and promised that a preliminary report would be provided to the NEC by January 14—less than a week away.[21] Certain themes quickly emerged: the Constitution must boldly identify "Equality" "Majority Rule" and "One country—One People" as basic aims.[22] Yet the reality of South Africa as a nation of many peoples must be acknowledged. The Constitution should "affirm[] and respect" the identities of the different cultural groups that comprise the nation and assure the people that those identities will be safeguarded.[23]

Discussion ensued on several issues: (1) federalism versus a unitary state; (2) possibilities for a bi-cameral legislature; (3) the role of the ANC versus trade unions and other organized parties;

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16. Jan. 1986 Meeting Minutes, *supra* note 10, at 2.

17. *Id.*

18. *Id.*

19. *Id.*

20. Jan. 1986 Meeting Minutes, *supra* note 10, at 3. The name of the Committee was subsequently changed to the "Constitutional Committee" of the ANC, and it is so referred to in later publications. *See, e.g.*, A BILL OF RIGHTS FOR A NEW SOUTH AFRICA, *supra* note 6, at xv, 37; *see also* Email from Albert Sachs, Justice, Constitutional Court of South Africa (ret.), to Joseph S. Jackson, Legal Skills Professor, University of Florida Fredric G. Levin College of Law (Aug. 26, 2018, 5:09 PM EDT) (on file with author) [hereinafter Aug. 26, 2018 Email] (confirming that the committee is now referred to as the "Constitutional Committee").

21. Jan. 1986 Meeting Minutes, *supra* note 10, at 3. The promise was made on January 9, 1986 during the course of the Committee's initial meetings. *Id.*

22. Jan. 1986 Meeting Minutes, *supra* note 10, at 4. These basic principles correspond closely with the Freedom Charter's core declarations. *See supra* note 15.

23. Jan. 1986 Meeting Minutes, *supra* note 10, at 4.

and (4) whether the constitution should provide for a Bill of Rights.[24] Committee members agreed that sovereignty "must rest in the national assembly/parliament."[25] They expressed concerns that federalism would weaken the central government[26] and in practice preserve the privilege and economic power of the white minority.[27] Similarly, the group expressed concerns on the question of a Bill of Rights, noting that "protection of minority rights . . . might in practice mean the protection of privileges."[28]

Committee members noted that their task was complicated because no one knew whether the transfer of power would occur through negotiation or revolution.[29] In either event, however, Committee members felt that the new constitution should not grow out of the existing constitutional structures, but must instead represent "a break with the past."[30] They noted that "[t]he old constitution was bad because 70% of the people of [South Africa] were left out."[31] They felt that the ANC needed to "come [up] with new structures expressing people[']s power."[32] The Committee also needed to keep in mind, however, the constituencies it was addressing, and seek to "allay[] the fears of our enemy and [white South African] minorities" without "pandering to their sensibilities."[33]

Committee members were well aware that national constitutions can take a variety of forms, from the "bourgeois constitutions" of countries such as the United States, Canada, and Germany, to the very different constitutions of "revolutionary democratic states."[34] The group did "not necessarily have to arrive at a consensus. Its task [was] to clarify concepts" and "put options to the NEC," so that the NEC would "know the range of possibilities from which it can formulate its opinion."[35]

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24. *Id.* at 5–6.
25. *Id.* at 7.
26. *Id.* at 8.
27. *Id.* at 7.
28. *Id.*
29. *Id.* at 5.
30. Jan. 1986 Meeting Minutes, *supra* note 10, at 6.
31. Jan. 1986 Meeting Minutes, *supra* note 10, at 8.
32. *Id.*
33. *Id.*
34. Jan. 1986 Meeting Minutes, *supra* note 10, at 6.
35. Jan. 1986 Meeting Minutes, *supra* note 10, at 7–8.

By January 14, 1986, the Committee worked out an outline of the Constitution and submitted its report to the NEC.[36] The Committee's proposed Preamble stated that South Africa "is constituted as an independent, non-racial democratic State."[37] The stated objectives of the Constitution were:

> a) To grant to the oppressed majority their just national rights;
>
> b) To outlaw racial discrimination in all its forms;
>
> c) To ensure the complete dismantling of apartheid structures and their replacement by democratic ones;
>
> d) To prevent the resurgence of racist policies, programmes and practices, whether in old form or new;
>
> e) To overcome the effect of centuries of racial domination and inequality by ensuring substantial redistribution of wealth and the complete opening up of facilities for all;
>
> f) To encourage the active involvement of all sectors of the population in government and economic and cultural life;
>
> g) To promote the habits of non-racial thinking, the practice of anti-racist behavior and the acquisition of genuinely shared patriotic consciousness;
>
> h) To create the conditions for the speediest achievement of these goals with the least possible disruption to the tranquility of the country and to the production of the goods and services necessary to enable all members of the community to live a decent life;
>
> i) To guarantee the security necessary for the achievement of these goals.[38]

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36. *Id.* at 14–16. *See also* Birth of the Constitution DVD, *supra* note 11, tape 1 at 50:45–51:27.

37. *Id.* at 14.

38. *See* Birth of the Constitution DVD, *supra* note 11, tape 2 at 1:20–2:50 (quoting objectives of the proposed constitution from the "Statement of the Problem" section of memo entitled "The Preliminary Nature of the Constitutional Document"); *see also* Birth of the Constitution DVD, *supra* note 11, tape 1 at 50:43–51:27, 55:04–55:20 (confirming that memos were attached to Constitutional Committee meeting minutes and provided to NEC); Birth of the Constitution DVD, *supra* note 11, tape 1 at 55:20–56:44 (confirming that memos were drafted by Albie Sachs as rapporteur for the Committee); Birth of the Constitution DVD, *supra* note 11, tape 1 at 56:44–58:31 (confirming that the memos were entitled "The Freedom Charter and the Constitution," "Our

B. Bourgeois Democracy or People's Power?

The Constitutional Committee's January 14 report was referred to a "Subcommittee on the Constitution" (Subcommittee) established by ANC President Oliver Tambo.[39] The Subcommittee prepared a report[40] that was submitted to the full National Working Committee (NWC) of the ANC,[41] and the NWC transmitted the essence of that report to the Constitutional Committee on February 7.[42] The report conveyed a sharply critical perspective, stating that the Constitutional Committee had presented a "conventional liberal-democratic constitution" and it needed to transcend this "limited horizon."[43] The ANC was in the midst of a revolutionary struggle that could lead to a seizure of power and the establishment of a "people's government" by force.[44] By contrast, in the opinion of the Subcommittee, the Constitutional Committee had proposed a constitutional framework that was "very similar to conventional bourgeois democracy and

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Objectives in Drafting a Constitution," and "The Preliminary Nature of the Constitutional Document").

39. Birth of the Constitution DVD, *supra* note 11, tape 2 at 9:13–9:34, tape 3 at 1:48–2:48. The NWC Subcommittee was formed by ANC President OR Tambo on January 14, 1986, and consisted of Pallo Jordan, Simon Makana, and Joe Slovo. ANC, Rep. of the Nat'l Working Comm. Subcomm., at 1 (Feb. 1986) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 15) [hereinafter Feb. 1986 NWC Subcommittee Report]; *see also* Birth of the Constitution DVD, *supra* note 11, tape 2 at 9:34–9:51. According to Albie Sachs, this was a "strong team": Pallo Jordan was "a leading intellectual" of the ANC; Simon Makana had long been the ANC's chief representative in Moscow; and Joe Slovo was the leader of a specialized division of Umkhonto we Sizwe (MK), the armed branch of the ANC. Birth of the Constitution DVD, *supra* note 11, tape 2 at 9:51–10:23.

40. Feb. 1986 NWC Subcommittee Report, *supra* note 39, at 1–4. *See also* Birth of the Constitution DVD, *supra* note 11, tape 2 at 11:08–11:30, tape 3 at 3:18–3:51.

41. The National Working Committee of the ANC functioned as the executive committee of the NEC. *See supra* note 12 and accompanying text.

42. Birth of the Constitution DVD, *supra* note 11, tape 3 at 7:38–8:15.

43. As quoted in Memorandum from Jack Simons to the Constitutional Committee of the African National Congress 3 (Feb. 12, 1986) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 20) [hereinafter Jack Simons Memorandum]. *See also* Birth of the Constitution DVD, *supra* note 11, tape 3 at 3:18–4:20.

44. *See* Jack Simons Memorandum, *supra* note 43, at 2.

not a framework arising from or created by revolutionary struggle."[45] The Subcommittee believed that the Constitution should "translate[] the slogan 'people's power' into reality, ensuring that the government will always be subject to the People."[46] In confronting "the dilemma between civil liberties and popular power," it was emphasized that "priority [must be] given to the defense of popular power."[47] Moreover, the future Constitution should explicitly affirm "the power of the state to limit and redefine the rights of private property."[48]

The NWC's critique sparked a heated response: members of the Constitutional Committee felt they did not need to be schooled in the revolutionary nature of the struggle for liberation.[49] To the contrary, the Committee believed its proposals "embod[ied] propositions, principles and concepts that express our revolutionary demands and the aspirations of the oppressed majority."[50] Specifically, as Committee Chair Jack Simons noted, the Committee's proposals "contemplate an electorate of all adults, more than one party, and a government representing the majority of the voters."[51] The proposals therefore "translate[] into constitutional terms" the idea of "people's power"—namely, "a government able and willing to give effect to the wishes of a majority of the population."[52]

To be sure, the Committee's proposals were preliminary and admittedly incomplete. The Constitutional Committee had refrained from including "provisions relating to the economy" in its proposals because a separate Economic Committee appointed by the ANC leadership had yet to issue its findings.[53] As Committee Chair Jack Simons acknowledged, the Committee had omitted "specific proposals relating to ownership of the means of production and distribution, the transfer of land to the cultivators,

45. Birth of the Constitution DVD, *supra* note 11, tape 2 at 12:30–13:08 (quoting Feb. 1986 NWC Subcommittee Report, *supra* note 39, at 1).

46. Birth of the Constitution DVD, *supra* note 11, tape 3 at 4:53–5:08. *See also* Jack Simons Memorandum, *supra* note 43, at 1.

47. Birth of the Constitution DVD, *supra* note 11, tape 2 at 17:28–17:43.

48. *Id.* tape 3 at 6:13–6:27. *See also* Jack Simons Memorandum, *supra* note 43, at 4.

49. *Id.* tape 3 at 8:19–9:30. *See also* Jack Simons Memorandum, *supra* note 43, at 3–4.

50. Jack Simons Memorandum, *supra* note 43, at 2.

51. *Id.*

52. *Id.*

53. *Id.* at 3.

workers' participation in management and 'affirmative action' to raise living standards of the oppressed to those of the white minority."[54]

Additionally, a constitution can go only so far to guarantee that future governments will give effect to the will of the people. As Committee Chair Jack Simons argued, a true democracy exists "only to the extent that the voters . . . actually participate in decision-making and the process of government at all levels of social organization and in all parts of the social-economic structure."[55] Thus, in order to provide that guarantee, "the Revolution must be made permanent, ceaselessly agitating the people, raising their level of political understanding, organizing local communities, trade unions, churches and other mass organisations for development and the fulfillment of the tasks of the Revolution."[56]

Nevertheless, Committee Chair Jack Simons suggested, the Committee's proposal for a constitution "providing for adult suffrage and majority rule" was "revolutionary in form and content both in itself and as seen against the background of the long struggle of the oppressed majority for emancipation from the white aristocracy."[57] Indeed, "the people's demand for 'one man one vote', a united country, and a government of, for, and by the people"—the "proposed system of government . . . set out in the Freedom Charter"—"forms the crux of the political and constitutional conflict now taking place."[58]

C. What Kind of Constitutional Document Does the ANC Leadership Want?

Matters came to a head in April 1986 when the Constitutional Committee held a follow-up plenary meeting in Lusaka. The NWC's February 7 response to the Committee's report had promised that the NWC would draft and provide "Political

54. *Id.*
55. *Id.*
56. *Id.* at 3.
57. *Id.*
58. *Id.* at 3-4.

Guidelines" to lay out the policies the NWC wanted the Committee to implement in its constitutional proposals.[59] Those guidelines had not been provided to the Committee, and Committee members felt they could not proceed without further direction.[60] Arrangements were made immediately to have NWC representatives join the Committee as it met over the ensuing days.[61] The topics to be addressed were fundamental and included the very basic question: "What kind of Constitutional Document does [the] NEC want?"[62] Did the NEC contemplate that the Constitution would establish a "special position for [the] ANC and its allies," or was "a multi-party system" preferred?[63] If multi-party democracy was contemplated, should there be "limitations or constraints on formation of parties," such as provisions "to ensure that no party is based on ethnicity or race"?[64] Should there be provisions to address the redistribution of land, nationalization of industries, and workers' rights?[65] Furthermore, what would be entailed by an "entrenched bill of rights?"[66]

NWC members Ruth Mompati and James Stuart[67] met with the Committee the very next morning, on April 8, 1986.[68] First on the agenda was clarification of the type of constitution the NEC sought.[69] At the meeting, Albie Sachs outlined three different models or prototypes of constitutions: liberal-democratic, anti-fascist, and people's power.[70] Though discussion ensued, the NWC representatives ultimately declined to provide guidance,

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59. ANC, Const. Comm., Meeting Minutes 1 (Apr. 1986) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 20) [hereinafter Apr. 1986 Meeting Minutes].

60. *Id.*

61. *Id.*

62. *Id.* at 3.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. "James Stuart" was the pseudonym of Hermanus Loots. See *Passing of Hermanus Loots (aka) James Stuart*, AFR. NAT'L CONG. (Jan. 25, 2016), https://web.archive.org/web/20180129223456/www.anc.org.za/content/passing-hermanus-loots-aka-james-stuart.

68. Apr. 1986 Meeting Minutes, *supra* note 59, at 4, 7.

69. *Id.* at 4.

70. *Id.* For a discussion of the differences between these types of constitutions, see *infra* notes 83–113 and accompanying text.

and instead asked Albie to "prepare a brief on his topic for presentation to the NEC."[71]

The outcome was similar when the remaining items on the Committee's list of topics for the NWC were addressed the following day.[72] The NWC representatives listened to the Constitutional Committee members' presentations, took notes, asked questions, and "reserved replies."[73] Committee members were asked to "prepare short notes on [each topic] so as to formally present them to the NEC," and were advised that the NEC's reply would "follow later."[74] The NWC representatives were not prepared to provide concrete direction at that time.

In fact, unbeknownst to the Constitutional Committee, the NWC's Subcommittee on the Constitution met previously on February 20 to draft the "Political Guidelines," and on February 23, a written draft was prepared by Pallo Jordan.[75] That draft, however, had not been shared with the Constitutional Committee.[76] Presumably, the full NWC was not prepared to endorse the Subcommittee's views.[77]

Substantively, some of the points of initial disagreement can be gleaned from the NWC's suggestion that the Constitutional Committee's January 14 report embodied a "conventional liberal-democratic" or "bourgeois" vision of the future Constitution, and that the Committee needed to transcend this "limited horizon" and develop a proposal that would "translate[] the slogan 'people's power' into reality."[78] The ANC was in the midst of an

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71. *Id.*
72. *Id.* at 7.
73. *Id.*
74. *Id.*
75. Feb. 1986 NWC Subcommittee Report, *supra* note 39, at 7.
76. Apr. 1986 Meeting Minutes, *supra* note 59, at 1.
77. When Ruth Mompati, a member of the NWC, met with the Constitutional Committee on April 8, 1986, she confirmed that "Pallo Jordan was to have drafted the Political Guidelines," but "apologize[d] that the Political Guidelines are not yet available." Apr. 1986 Meeting Minutes, *supra* note 59, at 4. Given that Pallo Jordan had, in fact, prepared a draft of the Political Guidelines on February 23 laying out the subcommittee's positions, it would seem to follow that the full NWC had some reservations about the substance of those positions and decided not to release the draft.
78. *See supra* notes 39–46 and accompanying text. Further research may better document the precise nature of the disagreement: the February 1986 NWC Subcommittee Report refers extensively to memos attached to the January 1986 Constitutional Committee meeting minutes. Feb. 1986 NWC Subcommittee Report, *supra* note 39. Copies of those memos are located in Box 20,

armed revolutionary struggle, and it was unclear whether the transfer of power would be achieved by victory in that struggle or through negotiations. Some in the ANC believed that victory by force should be the ANC's main focus, while others placed emphasis on the possibility of achieving a transfer of power through negotiations with the apartheid regime.[79] If power was to be achieved through negotiations, the ANC's constitutional proposals would have to "allay[] the fears of our enemy and minorities."[80] As Albie Sachs later explained, the white ruling class would not cede power absent assurances that they would not "be swept into the sea afterwards."[81] On the other hand, if armed struggle produced a "s[e]izure of power by revolutionary forces and the establishment of a people's government,"[82] the new Constitution could give the future government a free hand to do whatever the people wished.

These different visions are reflected in the varying models or prototypes of constitutions that Albie Sachs summarized in his memos to the NEC.[83] A liberal-democratic constitution would provide assurances to the white ruling class that the future government would have only limited powers, in that such constitutions "regard the State as a necessary evil that has to be controlled through separation of powers and a Bill of Rights."[84] By contrast, a people's power constitution would "regard the State as the major instrument whereby the people achieve their rights to progress and development."[85] Accordingly, "liberal democratic constitutions leave open the question of social and economic programmes, . . . while people's power constitutions expressly im-

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Folders I and II of the Albie Sachs papers in the Mayibuye Archives, but are not yet in the author's files.

79. Birth of the Constitution DVD, *supra* note 11, tape 1 at 27:00–35:30, tape 3 at 28:00–30:00.

80. Jan. 1986 Meeting Minutes, *supra* note 10, at 9.

81. Birth of the Constitution DVD, *supra* note 11, tape 5 at 27:35–27:51.

82. Jack Simons Memorandum, *supra* note 43, at 2.

83. Birth of the Constitution DVD, *supra* note 11, tape 3 at 17:38–19:00. *See also* Apr. 1986 Meeting Minutes, *supra* note 59, at 4. *See supra* notes 70–71 and accompanying text.

84. Memorandum from Albert Sachs titled People's Power Constitutions to the African National Congress, National Exec. Comm. 1 (n.d.) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 20).

85. *Id.*

pose on the State a duty to fulfill a defined socio-economic-cultural programme."[86] Additionally, liberal-democratic constitutions do not accord "overt recognition [to] any political parties," while people's power constitutions "recognize a leading or vanguard role" for "an identified party or alliance of parties," both "in relation to society as a whole and to the State apparatus in particular."[87] Thus, in the context of South Africa, a people's power constitution "would institutionalise the revolutionary alliance headed by the ANC as the vanguard force in society and government" and "impose on the state a duty to carry out a programme of social, economic and cultural transformation."[88] In addition, it would "institutionalise changes in the judiciary, armed forces, security apparatus and civil service, putting them at the service of people's power."[89] A people's power constitution would also "outlaw activities designed to defeat the programme of transformation or to restore or perpetuate apartheid."[90] Furthermore, under such a constitution, "[t]he electoral law would give the alliance headed by the ANC, working together with mass democratic organisations, a leading role in the selection of candidates."[91]

As Albie Sachs later explained, there was general consensus in the Constitutional Committee and in the NWC that a liberal-democratic constitution "did not correspond to what South Africa needed."[92] A liberal-democratic constitution "was seen as very progressive in its day," when it stood in opposition to "absolute monarchs."[93] In practice, however, a liberal-democratic constitution would give "power to the ruling classes, the wealthy propertied classes who really controlled the establishment—the state," despite the fact that such a constitution would give "formal voting power to everybody."[94] "It was felt that . . . we needed a transformation that would be much more profound."[95] Thus, "formal liberal democracy on its own was seen as insufficient."[96]

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86. *Id.*
87. *Id.*
88. *Id.* at 2.
89. *Id.*
90. *Id.*
91. *Id.*
92. Birth of the Constitution DVD, *supra* note 11, tape 3 at 18:50–18:57.
93. *Id.* tape 3 at 18:14–18:45.
94. *Id.*
95. *Id.* tape 3 at 18:50–18:57.
96. *Id.* tape 3 at 18:57–19:07.

On the other hand, at least for some on the Constitutional Committee and in the NWC, a people's power type of constitution also presented concerns. To begin, "it was different from the Freedom Charter."[97] The Freedom Charter called for universal suffrage and a multi-party system backed by an enforceable Bill of Rights: "Every man and woman shall have the right to vote for and to stand as a candidate for all bodies which make laws; [a]ll people shall be entitled to take part in the administration of the country;" and "[t]he law shall guarantee to all their right to speak, to organize, to meet together, [and] to publish. . . ."[98] The vision of the Freedom Charter was a society ruled by "democratic organs of self-government."[99]

The example of Mozambique as a society governed by a people's power constitution provided a stark contrast. In winning independence from Portugal, the Mozambique Liberation Front (FRELIMO) had refused to negotiate the Constitution, and instead the "FRELIMO Central Committee . . . drafted and proclaimed [the constitution] just before independence."[100] The Constitution "established FRELIMO as the sole party . . . the vanguard party," and while it "set out a number of rights" including "the right to vote," in fact "you could only vote for FRELIMO. You could choose your candidates from people endorsed by FRELIMO."[101] It was clear to members of the Constitutional Committee who "had spent [their] lives fighting for 'one person, one vote'" that "the one-party state just didn't correspond to what we would need in South Africa."[102] Additionally, from other examples of societies functioning under people's power constitutions, members of the Constitutional Committee could see "the very heavy down-side of one-party rule"—namely, that "there was no vitality, there was no debate" and leaders, surrounded by advisors who offered nothing but praise, grew out of touch with what was really happening in their country.[103]

97. *Id.* tape 3 at 19:07–19:17.
98. *Freedom Charter*, *supra* note 15.
99. *Id.*
100. Birth of the Constitution DVD, *supra* note 11, tape 3 at 19:54–20:50.
101. *Id.* tape 3 at 20:50–21:41.
102. *Id.* tape 3 at 26:04–26:31.
103. *Id.* tape 3 at 24:32–26:04.

There was a third kind of constitution, however, which Albie referred to as anti-fascist.[104] This type of constitution, according to Albie, was a "relatively modern phenomenon . . . associated with the overthrow of fascism in the Second World War and the destruction of fascist-type dictatorship[s] since."[105] Examples "include the Constitutions of Italy and Japan and the constitutional documents of Eastern Europe, immediately after the war, and the Constitution of Portugal more recently."[106] Albie contended that anti-fascist constitutions "are like liberal democratic constitutions in that they presuppose political pluralism . . . and a mixed economy."[107] "They are unlike 'pure' liberal democratic constitutions," however, in several respects: (1) "they expressly contain measures to prevent any revival of fascism or propagation of fascist values"; (2) "they expressly contain social programmes that presuppose economic and cultural renewal"; and (3) "they ensure that the implementation of the Constitution is not left to the representative of the overthrown dictatorship."[108] Anti-fascist constitutions differ from people's power constitutions most fundamentally in that "they do not give a leading role" to any particular "class or alliance of classes, nor do they attribute to any party or alliance of parties a defined vanguard position."[109]

Applied to the context of South Africa, an anti-fascist constitution would "establish[] the unitary, non-racial and democratic nature of the new state."[110] It would also "be clear on three points: [1] No freedom to organize for the continuation or restoration of apartheid in any shape or form; [2] Total reconstruction of the civil service, army and police force on democratic lines; [and] [3] Re-Distribution of Wealth (including the Land) as a Constitutional principle."[111] This type of constitution could preserve the ANC's revolutionary goals of societal transformation,

104. Memorandum from Albert Sachs titled Anti-Fascist Constitutions to the African National Congress, National Executive Committee 1 (n.d.) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 20) [hereinafter Anti-Fascist Constitutions Memorandum].
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 2.
111. *Id.*

while also providing sufficient protections against abuse of authority by the future government to persuade the white ruling class to negotiate a transfer of power. It was this type of constitution that the Constitutional Committee had envisioned in its January 14 report, despite the NWC's characterization of the Committee's proposal as "conventional" and "bourgeois."[112] As Albie's subsequent memo acknowledged, the revolutionary nature of the Committee's proposal "should have been spelt out more forcefully."[113]

D. September/October 1986: A Substantial Consensus Achieved

The NWC finally provided the "Political Guidelines" drafted by the NWC's Subcommittee on the Constitution to the Constitutional Committee on September 16, 1986.[114] In many respects, the Subcommittee's guidelines closely matched the views the Constitutional Committee had previously articulated, but there also were some differences. Like the Constitutional Committee, the Subcommittee had endorsed as "fundamental" the principle of "one person, one vote," and had called for "[p]olitical pluralism permitting the existence of a multiplicity of political parties," subject to the restriction that "advocacy or practice of racism, fascism, [N]azism, tribalism, chauvinism or regionalism" would be completely outlawed.[115] The Subcommittee also agreed that "[a] Bill of Rights guaranteeing the rights of individuals" and containing "mechanisms for their enforcement" would be "acceptable."[116] Nonetheless, the Subcommittee diverged from the Constitutional Committee in suggesting that "[s]pecial provision shall be made" for "the representation and participation of organs of popular power which are emerging during the course of the struggle," and for "the participation of mass organisations, such as trade unions, in the gover[n]ing and administration of

112. Feb. 1986 NWC Subcommittee Report, *supra* note 39, at 1.

113. Anti-Facist Constitutions Memorandum, *supra* note 104, at 2.

114. Memorandum from the Constitutional Committee, African National Congress to the National Executive Committee, African National Congress 1 (Sept. 20, 1986) (on file with the Mayibuye Archives, African National Congress Papers (Lusaka and London, 1960–1991), at Box 57, Folder 57.1) [hereinafter Sept. 20, 1986 Constitutional Committee Memorandum], *available at* http://www.disa.ukzn.ac.za/sites/default/files/pdf_files/mem19860920.026.021.000.pdf.

115. Feb. 1986 NWC Subcommittee Report, *supra* note 39, at 7.

116. *Id.*

the country."[117] These proposals to assign a vanguard role for the ANC and its allies in the governing of the country correspond more to a people's power type of constitution than to the type of constitution the Constitutional Committee had proposed.[118]

Taking the Subcommittee's guidelines as its "starting point," the Constitutional Committee prepared a "proposed text" for a document on the "Foundations of Government in a Democratic South Africa," and submitted this text to the NWC with a one-page cover memo and a page of notes.[119] This document, drafted by Albie Sachs as the rapporteur for the Committee,[120] became the foundation[121] of the ANC's *Constitutional Guidelines for a Democratic South Africa* published in 1988, which in turn provided the foundation for the ANC's *A Bill of Rights for a New South Africa*.[122]

Substantively, in almost every respect, the Constitutional Committee's proposed text for "Foundations of Government in a

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117. *Id.*

118. In other respects, the differences between the Subcommittee's guidelines and the Constitutional Committee's prior proposals reflect decisions to address or reserve judgment on particular topics, rather than substantive disagreements. While the Constitutional Committee had refrained from including provisions on the economy, the Subcommittee had included several provisions, specifying the following: (1) the State would have the power "to define and limit the rights and obligations relating to the ownership of land and all other forms of productive property;" (2) rights to "personal and non-exploitative property" would be protected; and (3) "workers' participation in the economic management and planning of all enterprises in which they are employed" would be constitutionally guaranteed. *Id.* at 8. The Subcommittee also went beyond the views specifically articulated by the Constitutional Committee in calling for the creation of "[a] legal system and judiciary" dedicated to the objectives of the new Constitution and in suggesting that "the power of the electorate to exercise control over . . . its elected representatives" should be guaranteed by providing for a "right of recall." *Id.* at 7, 8. While the Constitutional Committee had expressed a preference for the head of state to be a president rather than a prime minister and for a voting system of single-member constituencies, the Subcommittee suggested that such choices "be adjourned until fuller study." *Id.*

119. Sept. 20, 1986 Constitutional Committee Memorandum, *supra* note 114.

120. Birth of the Constitution DVD, *supra* note 11, tape 4 at 39:11–39:47.

121. *Id.* tape 4 at 1:00:47–1:01:18.

122. *See* ANC, Rep. of the Constitutional Committee for the African National Congress Conference at Durban, South Africa on 2–6 July 1991, at 2–3 (June 14, 1991) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 29) [hereinafter Durban Conference Report] (summarizing the origins of the proposed Bill of Rights presented to the National Conference of the ANC in July, 1991).

Democratic South Africa" closely tracked the original submissions the Committee had made to the NWC on January 14, 1986, the Political Guidelines laid out by the NWC's Subcommittee on the Constitution on February 23, 1986, and the Freedom Charter.[123] Still, the Committee's proposed text diverged from the NWC Subcommittee on whether the future constitution should specify a vanguard role for the ANC and its allies. While the Freedom Charter provided that "[a]ll who work shall be free to form trade unions, to elect their officers and to make wage agreements with their employers,"[124] and the Constitutional Committee's text stated that "[w]orkers and trade union rights shall receive special constitutional protection,"[125] the NWC Subcommittee had gone further, calling for "the participation of mass organisations, such as trade unions, in the gover[n]ing and administration of the country."[126]

Additionally, the NWC Subcommittee had proposed that "[s]pecial provision shall be made" for "the representation and participation of organs of popular power which are emerging during the course of the struggle."[127] By contrast, the Constitutional Committee's proposed text provided that "[p]articipatory

123. Several provisions that did not correspond with the Subcommittee's "Political Guidelines" were specifically called out in the "Notes" attached to the Constitutional Committee's proposed text. For example, the notes explained that the Committee had "not included a clause on the right [of] voters to recall their representatives"—contrary to the Subcommittee's provision for such a right (Feb. 1986 NWC Subcommittee Report, *supra* note 39, at 7)—since the Committee felt "this is a 'paper right' difficult to define in practice and never, as far as we are aware, actually used in countries where theoretically it exists." Constitutional Committee, African National Congress, Foundations of Government in a Democratic South Africa 4 (n.d.) (unpublished draft) (as attached to the Sept. 20, 1986 Constitutional Committee Memorandum, *supra* note 114) [hereinafter Foundations of Government First Draft].

124. *Freedom Charter*, *supra* note 15.

125. Foundations of Government First Draft, *supra* note 123, at 2–3.

126. Feb. 1986 NWC Subcommittee Report, *supra* note 39, at 7. *See supra* note 117 and accompanying text. Comparably, the 1975 "People's Power" Constitution of Mozambique provided that "power belongs to the workers and peasants, united and led by FRELIMO, and is exercised by the organs of people's power," that "FRELIMO, which is the leading force of the State and Society . . . lays down the basic political orientation of the State and directs and supervises the work of state organs," that "legislation may be initiated by . . . [t]he Central Committee of FRELIMO," and that "The President of the People's Republic of Mozambique is the President of FRELIMO." CONSTITUTION OF THE PEOPLE'S REPUBLIC OF MOZAMBIQUE June 25, 1975, arts. 2, 3, 45, 53.

127. *Id.*

democracy shall be encouraged" by "involving the community, and community and workers organisations, directly in public and economic administration."[128] It is one thing to say "the community" and "community and workers organisations" should be involved "directly in public and economic administration." It is something else to make "special provision" for "the representation and participation" in governance of "organs of popular power which are emerging during the course of the struggle." Under the NWC Subcommittee's formulation, the ANC and its allies could be given a constitutional role equivalent to FRELIMO's role in the Mozambique Constitution,[129] but such a "special provision" for particular organizations does not seem consistent with the Constitutional Committee's proposed text.

The response to the Constitutional Committee's memo and proposed text was swift, and the Committee met with the full NEC on October 2, 1986.[130] NEC members robustly debated the proposed text.[131] Some expressed concerns that the provision on the economy did not go far enough to address the abolition of monopolies and trusts, or the nationalization or socialization of industrial enterprises in South Africa.[132] As a result, some NEC members believed the proposed constitution would not adequately mobilize "the ordinary people, workers, [and] peasants" who were "the major contributors in our struggle."[133] Some objected to provisions on freedom of religion and an open press, suggesting that these could be used to promote racism and counter-revolutionary ideas.[134] Another speaker suggested that the right to vote should not extend to "people found guilty of the

128. Foundations of Government First Draft, *supra* note 123, at 2–3.

129. *See supra* notes 100, 101, 126 and accompanying text.

130. Memorandum by Z.N. Jobodwana on the Joint National Executive Committee & Constitutional Committee Meeting Held on 2 October, 1986 in Lusaka 1, 8. (Oct. 2, 1986) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 15). The minutes identify those present at the meeting as the entire NEC "except 5 members," and "Jack [Simons], Zola [Skweyiya], Teddy [Pekane], [Penuell] Maduna, [and Z.N.] Job[odwana]" for the Constitutional Committee. *Id.* at 1.

131. *See id.* at 1–8.

132. *Id.* at 3–5.

133. *Id.* at 5; *see also id.* at 3, but see *id.* at 4 (suggesting that the proposed text should be kept "general" and should not include a clause on monopolies and nationalization "that will tie us" to any particular course of action).

134. *Id.* at 2–4, 6.

crime of apartheid" and proposed that the ANC "should now prepare a dossier of the names and particulars of all those people."[135] One NEC member went so far as to question whether the ANC should even commit to a multi-party system.[136]

ANC President Oliver Tambo spoke last. He acknowledged that the proposed text needed to mobilize the ANC's supporters and must be examined closely to ensure that "it is not negative to the aspirations of our people."[137] Still, it was "important . . . to come up with something acceptable to the majority of our people, our working people without necessarily frightening the others."[138] Thus, because "the enemy is ever saying [that the] ANC is for [a] one party state," the ANC needed to commit to a multi-party system, and would find it "difficult to keep quiet on this point."[139] Concerns about freedom of religion and an open press could be addressed by clarifying that those rights were "subject to" the provision banning the advocacy or practice of racism.[140]

Tambo appointed the NWC Subcommittee and the Constitutional Committee jointly to re-draft the proposed text, "taking into account the views expressed in these deliberations."[141] A revised version of the Foundations of Government document was subsequently drafted.[142] Language was added to clarify that the constitutional protection of religious freedom, freedom of association, freedom of expression and freedom of the press would be subject to the constitutional provisions mandating the eradication of apartheid and outlawing the advocacy or practice of racism, fascism, Nazism, tribalism or regionalism.[143] To better mobilize the ANC's major supporters, further language was added referring more specifically to "the unjust dispossession of the African people of their land" and providing more specifically that "all legislation restricting land ownership and use on a racial basis and all other apartheid measures designed to deprive the

135. *Id.* at 4.
136. *Id.* at 6.
137. *Id.* at 7.
138. *Id.*
139. *Id.* at 8.
140. *Id.* at 8.
141. *Id.* at 7–8.
142. *See* Constitutional Committee, African National Congress, Foundations of Government in a Democratic South Africa (n.d.) (unpublished draft) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 20) [hereinafter Foundations of Government Second Draft].
143. *Id.* at 2.

people of their land and livestock" would be "aboli[shed]."[144] Moreover, a specific provision was added stating that "victims of forced removals carried out by the apartheid regime shall be given proper redress by the state. In particular they shall be given the right to return to their land or ancestral homes wherever possible."[145] Stylistic changes were made to emphasize the power of the state "to determine the general context in which economic life takes place and to define and limit the rights and obligations attaching to the ownership and use of private productive capacity."[146]

Despite the concerns expressed at the meeting about the ANC's commitment to a multi-party system, the revised draft left that commitment in place.[147] Similarly, despite the discrepancies[148] between the Constitutional Committee's Foundations of Government text and the NWC Subcommittee's earlier proposal, which made "special provision" for "organs of popular power which are emerging during the course of the struggle" and which provided for "mass organisations, such as trade unions" to participate "in the gover[n]ing and administration of the country," the Constitutional Committee's language remained unchanged. Whether the NWC Subcommittee members were persuaded to abandon the idea of establishing a vanguard role in the future constitution for the ANC and its allies, did not perceive a discrepancy, or had chosen to fight that battle another day, they apparently signed off on the language the Constitutional Committee proposed.

Thus, following the October 1986 meeting between the NEC and the Constitutional Committee, the ANC was ready to take a stand as to the type of constitution it proposed for the future South Africa. The ANC's proposal was a constitution that provided for political pluralism and multi-party democracy, backed by an enforceable Bill of Rights. Nonetheless, the proposal went beyond a pure liberal-democratic constitution by entrenching prohibitions of apartheid and other forms of racism and fascism,

144. *Id.*
145. *Id.*
146. *Id.* at 2–3.
147. *Id.* at 2. Similarly, the provisions concerning the right to vote remained unchanged, *id.* at 1, despite the suggestion at the meeting that those guilty of "the crime of apartheid" should be disenfranchised. *See supra* note 135 and accompanying text.
148. *See supra* notes 117, 124–29 and accompanying text.

and by calling for economic and social reforms that would "redress as speedily as possible the economic and social inequalities produced by apartheid," including in particular taking "active steps" to correct "the unjust dispossession of the African people of their land."[149] This was the type of constitution envisioned by the Freedom Charter, and also by the Constitutional Committee.[150] While some in the ANC leadership may have wished to pursue a people's power constitutional framework that would assign a vanguard role to the ANC and its allies, those objections were sufficiently overcome by the end of 1986 to allow the organization to proclaim its commitment to a multi-party constitutional framework backed by an enforceable Bill of Rights.[151]

E. From Foundations of Government to Constitutional Guidelines

Despite the consensus achieved on these fundamental aspects of the ANC's proposed Foundations of Government, more than a year passed before a finalized text was presented to the ANC leadership at an "In-House Seminar on Constitutional Matters and Related Issues" in March of 1988.[152] Further amendments

149. Foundations of Government Second Draft, *supra* note 142, at 2, ¶ n. *See also* Birth of the Constitution DVD, *supra* note 11, tape 3 at 33:08–34:07.

150. *See supra* notes 98, 99, 107–12 and accompanying text.

151. That commitment was announced in the ANC's "January 8 Statement" of 1987. *See* ANC, Statement of the National Executive Committee on the Occasion of the 75th Anniversary of the ANC (Jan. 8, 1987), *available at* https://web.archive.org/web/20180910093630/http://www.anc.org.za/content/statement-national-executive-committee-occasion-75th-anniversary-anc (last visited June 21, 2019) (affirming that (1) "in the new South Africa the people—all the people—shall govern"; (2) "each person shall have the right both to vote and to be voted to any elective organ"; (3) subject to restrictions on "the organised propagation of ideas of fascism, racism and ethnicity," all would "be free to form and join any party of their choice"; and (4) "the revolution will guarantee the individual and equal rights of all South Africans," regardless of "race, colour or ethnic group," to such fundamental freedoms as the freedoms "of speech, assembly, association, language, religion, the press, the inviolability of family life and freedom from arbitrary arrest and detention without trial"). *See also* Birth of the Constitution DVD, *supra* note 11, tape 3 at 15:30–17:00, 33:08–34:25 (confirming NEC's commitment to multi-party democracy and an enforceable Bill of Rights).

152. *See* Letter from Alfred Nzo, Sec'y Gen., to Chief Representatives and Heads of Dep'ts 1 (Dec. 22, 1987) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 20) [hereinafter Alfred Nzo Letter] (confirming scheduling and title of In-House Seminar). *See also* Birth of the Constitution DVD, *supra* note 11, tape 5 at 48:18–50:14.

to the revised version of the Foundations of Government document were proposed by the NWC in March 1987,[153] and most of these were incorporated by the Constitutional Committee in a modified and amended version of the document transmitted the following May.[154] Some degree of frustration is reflected in the transmittal letter from Zola Skweyiya, which states "[i]n this version we try by all means to meet the criticism by the [NWC] and the NEC Constitution sub-committee and reflect their views."[155]

Still, the NWC was not ready to sign off on the text of the document, and in October 1987, the Constitutional Committee again expressed its frustration in a letter to ANC President Oliver Tambo.[156] The Committee noted that it had "been working on this assignment ever since" January 8, 1986—for 21 months—and had "submitted several drafts which we have discussed with the NEC and NEC-Sub Committee on [the] Constitution."[157] Yet "[t]he NEC up to now has failed to give [the Committee] the green-light authorising publication of the document and holding of seminars."[158] The Committee suggested that its latest draft be accepted as the "final version," and that the ANC hold an in-house seminar for fifty to sixty of the ANC's top leaders, including every member of the NEC, to discuss the proposed constitutional framework "in February 1988 or on a later suitable date."[159]

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153. *See* ANC, Rep. to the Dep't of Legal and Constitutional Affairs [D.L.C.A.] on Meeting of Nat'l Working Comm. on 13 March, 1987, at 1–2 (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 15).

154. Letter from Zola Skweyiya, Chairperson, to the Sec'y Gen., African National Congress (May 8, 1987) (on file with the Mayibuye Archives, African National Congress Papers (Lusaka and London, 1960–1991), at Box 57, Folder 57.1); Constitutional Committee, African National Congress, Foundations of Government in a Democratic South Africa (n.d.) (unpublished draft) (as attached to the Letter from Zola Skweyiya, *supra*), *available at* https://www.sahistory.org.za/archive/foundations-of-government-in-a-democratic-south-africa [hereinafter Foundations of Government Third Draft].

155. Letter from Zola Skweyiya, *supra* note 154, at 1.

156. Letter from Jack Simons, Chairman, Constitutional Committee to O.R. Tambo, President, African National Congress 1 (Oct. 7, 1987) (on file with the Mayibuye Archives, African National Congress Papers (Lusaka and London, 1960–1991), at Box 57, Folder 57.1).

157. *Id.*

158. *Id.*

159. *Id.* at 1–3.

Ultimately, the In-House Seminar on Constitutional Matters and Related Issues was scheduled for March 1–4, 1988 in Lusaka.[160] In the interim, however, significant changes were made to the document. ANC President Oliver Tambo personally drafted a detailed critique[161] raising both stylistic[162] and substantive concerns. Two suggestions were far-reaching: first, Tambo noted that substantial overlap existed between the two main sections of the document, with no clear reason "why one thing is an *objective* and not a *principle* and vice versa."[163] He suggested there should be "better separation."[164] Second, noting that one goal of the document was to "demolish the positions of the enemy," Tambo suggested it "should launch a frontal attack on and not evade the group [rights] concept," because "[w]hether we have group or individual rights is absolutely fundamental to our concept of a new constitution."[165]

160. *See* Alfred Nzo Letter, *supra* note 152, at 1 (confirming scheduling of In-House Seminar). *See also* Birth of the Constitution DVD, *supra* note 11, tape 5 at 48:18–50:14.

161. Memorandum from O.R. Tambo, Comments on Constitutional Proposals (n.d.) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 15) [hereinafter O.R. Tambo Memorandum]. The memorandum is unsigned and undated, but O.R. Tambo is identified as the author by Albie Sachs in a handwritten post-it note attached to the archived copy of the memorandum (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 15), and in a response prepared by Jack Simons, which also identifies the date of Tambo's memorandum as December 29, 1987. *See* Jack Simons, A Constitution for Liberated South Africa (Dec. 30, 1987) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 15). The latter also is unsigned, but contains a handwritten notation "From Jack" and is identified by Albie Sachs as "Jack Simons' response to OR's critique" in a hand-written post-it note attached to the archived copy of the memorandum (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 15).

162. For example, Tambo stated, "Some rights . . . are "given 'special' constitutional guarantees by the State. Others are simply 'constitutionally protected.' What is the difference?" He also asked, "Is there any reason for using 'will' rather than 'shall' [in paragraph 2(h)]?" O.R. Tambo Memorandum, *supra* note 161, at 1, 2.

163. *Id.* at 1.

164. *Id.* at 1.

165. *Id.* at 3.

The concept of "group rights" was central to the constitutional proposals of the ruling National Party government of South Africa.[166] In contrast to the ANC's call for majority rule based on universal suffrage on a common voter's roll, the National Party envisioned separate voting by each racial group[167] and government by consensus among the representatives of the separate groups.[168] Since consensus would be required to enact a law, every racial group would have effective veto power over proposed legislation.[169] "White rule" would be maintained through "a white veto over state policies contrary to white group interests."[170]

Constitutional Committee chair Jack Simons concluded that Tambo's comments were "very much to the point, positive, and

166. *See* C.J. VAN R. BOTHA, PLAN OF ACTION OF THE NATIONAL PARTY: ELECTION 6 SEPTEMBER 1989 4–9 (1989) (emphasizing need to develop constitutional structures to guarantee "the political rights of groups" and "to prevent domination of one group by another"); DONALD L. HOROWITZ, A DEMOCRATIC SOUTH AFRICA?: CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY 92 (1992) ("The National Party's five-year Action Plan, prepared for the 1989 general elections, did not rule out universal suffrage, but it emphasized the need for group protection."); *see also* LEWIS H. GANN & PETER DUIGNAN, HOPE FOR SOUTH AFRICA? 176 (1991) ("While de Klerk says he wants every man and woman to have the vote, he also calls for a system that protects group rights and puts checks on black governance."); Padraig O'Malley, *National Party*, NELSON MANDELA CENTRE OF MEMORY, https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv03188/06lv03210.htm (last visited Aug. 14, 2018) (characterizing protection of "minority group rights" as the "cornerstone" of the National Party's 1989 constitutional proposals).

167. *See* HOROWITZ, *supra* note 166, at 92 (noting that National Party Cabinet ministers had strongly suggested that "separate voting rolls for Whites" would be established under the National Party's Action Plan).

168. *See* BOTHA, *supra* note 166, at 5–6 (providing that "legislative and executive processes must function . . . with consensus [among various groups] as the guiding principle" so that "all groups should agree before an important decision can be taken"); GANN & DUIGNAN, *supra* note 166, at 16–17 (stating that the National Party's proposals "called for sharing power among all ethnic groups on 'common affairs'" with "[d]ecision making on 'common affairs' [to] be by consensus only"); *see also* Mark Phillips & Colin Coleman, *Another Kind of War: Strategies for Transition in the Era of Negotiation*, 9 TRANSFORMATIONS 7 (1989) (stating that the 1989 plan for governance by put forward by the National Party would entail "a 'consensus' form of government in which the majority representatives of all four racial groups . . . would have to separately agree on an issue for it to become law").

169. GANN & DUIGNAN, *supra* note 166, at 17 (noting that under the National Party plan "a majority within any ethnic group would enjoy veto powers").

170. Phillips & Coleman, *supra* note 168, at 7.

salutary" and stated that the Committee would "take note of his criticisms and incorporate them in a revised draft."[171] In particular, he suggested that "[t]he 'objectives' [section of the document] might be reworded and put forward as a preamble to the 'principles' [section]."[172] In the next version of the document, which bore the new title "Constitutional Guideline[s] for a Democratic South Africa,"[173] the enumerated "Objectives of a New Constitution" were replaced with a more free-flowing Preamble nearly two pages long.[174]

Substantively, the new Preamble closely tracked the "Objectives" of the prior draft. It called for "an end to the tyranny and oppression under which our people live, thus enabling them to lead normal and decent lives as free citizens in a free country."[175] The new Preamble called for the creation of "a just and democratic society" that would "sweep away the century's old legacy[176] of colonial conquest and White domination, and abolish all laws imposing racial oppression and discrimination."[177] It called for "the structures and institutions of apartheid [to] be dismantled and [to be] replaced by democratic ones,"[178] and it stated that "[s]teps must be taken to ensure that apartheid ideas and practices are not permitted to reappear in old or new forms."[179] The

171. Simons, *supra* note 161, at 1.

172. *Id.*

173. Constitutional Committee, African National Congress, Constitutional Guideline[s] for a Democratic South Africa (n.d.) (unpublished draft), *available at* https://www.sahistory.org.za/archive/constitutional-guideline-for-a-democratic-south-africa [hereinafter Constitutional Guideline[s]].

174. *Id.* at 1–2.

175. *Id.* at 1. *Cf.* Foundations of Government Third Draft, *supra* note 154, at 1 (stating objective of "granting to the oppressed majority . . . their just national rights").

176. The reference to the "century's old legacy" of colonial conquest and White domination (rather than "centuries-old legacy") appears to be a typo rather than a deliberate pun or double-entendre; in later drafts the reference is corrected to "centuries-old legacy." *See* CONSTITUTIONAL GUIDELINES, *supra* note 9.

177. *Id. Cf.* Foundations of Government Third Draft, *supra* note 154, at 1 (stating objective of "outlawing . . . racial discrimination in all its forms").

178. *Id. Cf.* Foundations of Government Third Draft, *supra* note 154, at 1 (stating objective of "ensuring . . . the complete dismantling of apartheid structures and their replacement by democratic ones").

179. *Id. Cf.* Foundations of Government Third Draft, *supra* note 154, at 1 (stating objective of preventing "the resurgence of racial policies, programmes and practices, whether in old form or new").

Preamble specified that "the effects of centuries of racial domination and inequality must be overcome by constitutional provisions for corrective action which guarantees a rapid and irreversible redistribution of wealth and opening up of facilities to all."[180] It called for the new Constitution "to promote the habits of non-racial thinking, the practice of anti-racist behaviour and the acquisition of genuinely shared patriotic consciousness,"[181] and to facilitate "the active involvement of all sectors of the population . . . at all levels in government and in economic and cultural life."[182]

Responding to Tambo's call for a "frontal attack" on the concept of group rights, the Preamble stated unequivocally that "[t]he constitution must give firm protection to the fundamental human rights of all citizens."[183] This, however, must be done by providing "guarantees of equal rights for all individuals, irrespective of race, colour, sex, or creed" and by "entrenching the principle of non-discrimination" in relation to the "equal cultural and linguistic rights" of "all national groups," rather than by providing "constitutional protection for group rights."[184] In light of "the conditions of contemporary South Africa—where 87% of the land and 95% of the [country's] productive capacity" was "in white hands"—constitutional protection for group rights would "entrench[] racial privilege" and consign "the mass of the people" to "remain as outsiders in the land of their birth."[185]

The Preamble invoked the Freedom Charter as a "political and constitutional vision of a free, democratic and non-racial South Africa" and stated that the time was "now approaching" for the Freedom Charter to be "converted from a vision of the future into

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180. *Id. Cf.* Foundations of Government Third Draft, *supra* note 154, at 1 (stating objective of overcoming "the effects of centuries of racial domination and inequality by ensuring substantial redistribution of wealth and complete opening up of facilities for all").

181. *Id.* at 1. *Cf.* Foundations of Government Third Draft, *supra* note 154, at 1 (stating identical objective of promoting "the habits of non-racial thinking, the practice of anti-racist behaviour and the acquisition of genuinely shared patriotic consciousness").

182. *Id.* at 2. *Cf.* Foundations of Government Third Draft, *supra* note 154, at 1 (stating objective of encouraging "the active involvement of all sectors of the population in government and economic and cultural life").

183. *Id.* at 2.

184. *Id.*

185. *Id.*

a constitutional reality."[186] Unlike the prior draft, the Preamble explained explicitly that the document set forth the ANC's "basic guidelines for the foundations of government in a post-apartheid South Africa," and invited "[e]xtensive and democratic debate on these guidelines" in order to "achieve agreement" among "the widest sections of our population."[187]

Substantive and stylistic changes were also made to the Principles section of the prior draft. Stylistically, the paragraphs were reorganized and grouped under headings identifying the topics covered.[188] Minor changes were made to the phrasing of some provisions,[189] and others were eliminated as redundant,[190] but more significant substantive changes were made as well.[191]

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186. *Id.* at 1.

187. *Id.*

188. *Id.* at 2–5.

189. Paragraph (b)(ii) was amended to state that regional and local delegation of power would occur for purposes of "more efficient administration" rather than "more efficient and effective administration." *Id.* at 2. Paragraph (f) [paragraph (g) in the new draft] on national identity and linguistic and cultural diversity was divided into two sentences by the replacement of a semi-colon with a period. *Id.* at 3. Paragraph (j) [paragraph (k) in the new draft] was amended by replacing "regionalism" with "the incitement of ethnic or regional exclusiveness or hatred" as a form of advocacy or practice that would be outlawed. *Id.* at 4. Paragraph (p) [paragraph (q) in the original draft, paragraph (s) in the new draft], which had provided that "workers and trade union rights shall receive special constitutional protection," was amended to state: "A Charter of workers and trade union rights shall be incorporated into the constitution." *Id.* at 4.

190. Paragraph (e) of the prior draft was removed, presumably on the theory that it was unnecessary to state explicitly that "[t]he system of universal and equal franchise" would also apply "to the election of all regional and local bodies." *See* Foundations of Government Third Draft, *supra* note 154, at 1. Paragraph (i) was amended to eliminate language that imposed a duty on the state and all social institutions "to take measures to overcome [apartheid's] consequences," see *id.* at 2, presumably on the theory that this duty was adequately covered by the more specific provision [in what was now paragraph (j) of the new draft] that required the State and all social institutions "to take active steps to redress as speedily as possible the economic and social inequalities produced by apartheid." Constitutional Guideline[s], *supra* note 173, at 3.

191. To begin, an entirely new provision was added to address international relations, stating: "South Africa shall be a non-aligned state committed to the principles of the Charter of the Organisation of African Unity and the Charter of the United Nations and to the achievement of world peace and nuclear disarmament." *Id.* Additionally, the provisions dealing with the economy and affirmative action were substantively amended in certain respects. The "family sector" of the economy was now described as the "small-scale" family sector;

In particular, the provisions on individual rights were amended in several respects. Freedom of "thought" was added to the list of "basic rights and freedoms" that "the democratic state shall guarantee."[192] While the prior draft called for "equal rights for women" only in the context of "a uniform system of family law relations" addressing "marriage, divorce and succession,"[193] the new text specified: "Women shall have equal rights in all spheres of public and private life."[194] Where the prior draft specified merely that the "uniform system of family law relations" would include some "provision for the protection of children," the new text stated unequivocally that "[t]he family, parenthood and children's rights shall be protected."[195]

Most significantly (for purposes of what ultimately became the Equality Clause of the South African Constitution), the provision calling for the Constitution to include "a Bill of Rights based on the Freedom Charter" that would "guarantee[] the fundamental human rights of all citizens" and "provid[e] appropriate mechanisms for their enforcement," was amended to specify that

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"village industries" and "small-scale family activities" were now included in the forms of economic enterprise to be supported by the state; and "[t]he entire economy"—not just the public sector, as stated in the prior draft—was to be "placed under democratic control and direction to ensure that it serves the interests and well-being of all sections of the population." *Id.* On affirmative action, language was added to state explicitly that the obligation of the State and all social institutions to redress "as speedily as possible the economic and social inequalities produced by apartheid" was "a constitutional duty." *Id.* at 3. With regard to the provisions dealing with forced removals and the unjust dispossession of people from their land, the new draft removed the specific requirement that victims be given "the right to return to their land or ancestral homelands wherever possible," and instead stated more generally that "special attention" would be given "to the unjust dispossession of the African people of their land and to all the victims of forced removals." *Id.* In the version ultimately considered by ANC leaders at the March 1988 In-House Seminar on Constitutional Questions, even this requirement was deleted, and the issue was covered by general language requiring the state to "eradicate, speedily, the economic and social inequalities produced by racial discrimination." ANC, CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA 1 (n.d.), *available at* http://www.sahistory.org.za/archive/constitutional-guidelines-for-a-democratic-south-africa [hereinafter CONSTITUTIONAL GUIDELINES PRINTED DRAFT] (printed draft).

192. Constitutional Guideline[s], *supra* note 173, at 4. In addition, "freedom of . . . press" was changed to "freedom of . . . the press." *Id.*

193. Foundations of Government Third Draft, *supra* note 154, at 3.

194. Constitutional Guideline[s], *supra* note 173, at 4.

195. *Id.* at 5.

those rights would be guaranteed "irrespective of race, colour, sex or creed."[196] In specifying that rights would be guaranteed "irrespective of race, colour, sex or creed," the provision called for the future Constitution to lay out explicitly what were prohibited grounds of discrimination, rather than simply laying out a general requirement of the equal protection of the laws.[197] This opened the door for additional prohibited grounds of discrimination to be explicitly set forth in the Constitution, including discrimination on grounds of sexual orientation.

By March 1988, a printed version[198] of *Constitutional Guidelines for a Democratic South Africa* was created. It was this version that was submitted to and debated by ANC leaders at the In-House Seminar on the Constitution in Lusaka, Zambia on March 1-4, 1988.[199] Compared with the prior draft, substantial improvements were made in the formatting and appearance of this document,[200] but its substance remained very much the same. Most of the paragraphs of the Preamble were taken almost verbatim from the prior draft, with changes no more significant than the insertion or deletion of a comma.[201] The

196. *Id.* at 3.

197. *Cf.* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

198. The prior drafts were typewritten rather than printed.

199. Birth of the Constitution DVD, *supra* note 11, tape 5 at 40:33–46:39.

200. The cover page displayed a banner at the top outlining the title of the document in capital letters, the ANC's coat of arms and motto ("United Action for People's Power"), a photographic image of a crowd of people, and an outline map of South Africa with the ten basic principles of the Freedom Charter:

> The People Shall Govern, All National Groups Shall Have Equal Rights, The People Shall Share in the Country's Wealth, The Land Shall be Shared Among Those who Work it, All Shall be Equal Before the Law, All Shall Enjoy Equal Human Rights, There Shall be Work and Security, The Doors of Learning and Culture Shall be Opened, There Shall be Houses, Security and Comfort, [and] There Shall be Peace and Friendship.

CONSTITUTIONAL GUIDELINES PRINTED DRAFT, *supra* note 191, at 1.

201. The first and fifth paragraphs of the Preamble were unchanged; in the second paragraph, a comma was deleted. In the third paragraph, a comma was inserted, and the "(S.A.)" designation was removed from the name of the African National Congress. In the last paragraph, two commas and the word "the" were inserted. Finally, in the fourth paragraph, the word "White" was made lower-case, "re-appear" was changed to "appear," "old or new forms" was

changes to the Principles section were more extensive, but even these were relatively minor in most respects.[202] Of the changes

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changed to "old forms or new," and the words "the" and "be" were reiterated to change "the structures and institutions of apartheid must be dismantled and replaced by democratic ones" into "the structures and the institutions of apartheid must be dismantled and be replaced by democratic ones." *Id.* at 2–3.

Some paragraphs were edited more substantially. Most significantly, a paragraph acknowledging the "multi-cultural and multi-faith diversity of South African society," but cautioning against "the entrenchment of racial privilege under the guise of protecting group rights" was deleted, and the core points were stated directly: "The constitution must give firm protection to the fundamental human rights of all citizens. There shall be equal rights for all individuals, irrespective of race, colour, sex or creed. In addition, it requires the entrenching of equal cultural, linguistic and religious rights for all." *Id.* at 2. A second paragraph on group rights was edited for style, but its substance remained the same, conveying the essential point that "constitutional protection for group rights would perpetuate the status quo," given that "87% of the land and 95% of the [country's] instruments of production" were "in the hands of the ruling class, which [was] solely drawn from the white community." *Id.* The paragraph concluded by stating that constitutional protection for group rights "would mean that the mass of the people would continue to be constitutionally trapped in poverty and remain as outsiders in the land of their birth." *Id.*

202. Stylistic changes with little or no impact on substance were made to paragraph (b)(i) (changing "administration and executive" to "executive and administration"); paragraph (b)(ii) (changing "regional and local delegation" to "delegation" and changing "smaller administrative units" to "subordinate administrative units"); paragraph (g) (changing "will" to "shall"); paragraph (h) (changing "will" to "shall" and re-framing the provision as two sentences); and paragraph (n) (changing "The entire economy shall be placed under democratic control and direction to ensure that it serves the interests [of everyone]" to "The state shall ensure that the entire economy serves the interests [of everyone]"). *Id.* at 3–4. Additionally, semi-colons at the end of paragraphs were replaced with periods, and the order of paragraphs (m)-(r) [paragraphs (n)-(s) in the new draft] on the economy was revised. *Id.*

Paragraph (d) was changed in two respects, but arguably neither had a substantial impact on the import of the provision: First, "[a]ll organs of government, justice and security" became "[a]ll organs of government, including justice, security and armed forces." *Id.* at 3. While the explicit reference to "armed forces" was new and removed any doubt, the prior language presumably would have been understood to extend to the armed forces implicitly. Second, language requiring that these organs of government "be transformed so as to make them representative" was changed to a more direct requirement that they "be representative." *Id.* No change in meaning seems to have been intended. Finally, paragraph (k) was amended by removing "tribalism" from the list of outlawed doctrines, but its essence may still have been covered by the prohibition of "the incitement of ethnic or regional exclusiveness or hatred," which remained in the provision. *Id.* at 4.

with substantive effect,[203] two merit particular note. First, the commitment to "a multi-party system" was reinforced with explicit language guaranteeing political parties "the right to exist and to participate in the political life of the country," subject to restrictions on the advocacy or practice of racism and other outlawed doctrines.[204] Second, language was added to the provision on women's rights to require the state to "take affirmative action to eliminate sexual inequalities."[205]

F. March 1988: Moment of Truth

The In-House Seminar on Constitutional Matters and Related Issues was ultimately scheduled for March 1–4, 1988 in Lusaka, Zambia, headquarters of the ANC in exile.[206] Approximately sixty to seventy-five participants were expected to attend, including "members of the NEC, Heads of Departments and Sections, Chief Representatives, and delegates from ANC training centres."[207] ANC "Departments" were administrative units, such as the Department of Health, the Department of Education, and the Department of Legal Affairs. ANC "Sections" were divisions of ANC members, such as the ANC Women's Section and the ANC Youth Section. "Chief Representatives" were ANC leaders stationed around the world like ambassadors, in cities such as Moscow and London, and "ANC training centres" was a euphemism for the camps of Umkhonto we Sizwe, the military wing of

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203. One change broadened the commitment to eradicate "apartheid" to encompass the wider problem of "race discrimination in all its forms." *Id.* at 3. Another change deleted the specific requirement that "special attention" be given to remedy "the unjust dispossession of the African people of their land," but other language was broadened to require the state to "eradicate, speedily, the economic and social inequalities produced by racial discrimination." *Id.* at 3–4. A third change added language to the provision on workers' and trade union rights to guarantee specifically "the right to strike and collective bargaining." *Id.* at 4.

204. *Id.* at 4.

205. *Id.* The remaining substantive changes tweaked the state's obligation to promote "managerial and entrepreneurial skills," added "national liberation" to the list of international goals to be pursued by the state, and broadened the goal of "nuclear disarmament" to "disarmament" more generally. *Id.*

206. Alfred Nzo Letter, *supra* note 152, at 1. *See also* Birth of the Constitution DVD, *supra* note 11, tape 5 at 48:18–50:14.

207. *Id. See also* Birth of the Constitution DVD, *supra* note 11, tape 5 at 48:18–50:14.

the ANC that was engaged in armed conflict with the apartheid regime.[208]

At the In-House Seminar, representatives of the Constitutional Committee, the NWC Subcommittee on the Constitution, the ANC Women's Section and other ANC Departments presented papers specifically addressing the proposed Constitutional Guidelines or discussing the general policy issues that the Constitutional Guidelines encompassed.[209] In the discussions that followed, Seminar participants discussed and debated every section of the proposed Constitutional Guidelines. According to the reports that were prepared by the Seminar's Resolutions Committee and by the Constitutional Committee, "[t]he discussion was generally of a high level and the interest of the participants was extremely strong."[210] Notably, although leaders of the

208. Birth of the Constitution DVD, *supra* note 11, tape 5 at 48:18–50:14.

209. *See* Memorandum from the Constitutional Committee, African National Congress to O.R. Tambo, President, African National Congress, Constitution Guidelines and the In-House Seminar 1 (Apr. 12, 1988) (on file with Mayibuye Archives, African National Congress Papers (Lusaka and London, 1960–1991), at Box 57, Folder 57.3) [hereinafter Apr. 12, 1988 Memorandum] (referring to papers presented at the Seminar); *see also* Mayibuye Archives, African National Congress Papers (Lusaka and London, 1960–1991), at Box 57, Folder 57.2 (archiving papers submitted in connection with the March 1988 In-House Seminar, including Albert Sachs, Towards a Bill of Rights in a Democratic South Africa, Submission for the In-House Seminar on Constitutional Matters and Related Issues (Mar. 1–4, 1988) and Kader Asmal, Electoral Systems – A Critical Survey, Submission for the In-House Seminar on Constitutional Matters and Related Issues (Mar. 1–4, 1988)). Other titles observed by the author upon examination of the Archives on Dec. 10, 2012 include, *Statement by the Women's Section on the Gender Question*; *Constitution, Law, and the Gender Question*; *A New Look at the African Petty Bourgeoisie*; *ANC Policy Options on the Media*; *Vocational Training in a Constitution of a Democratic South Africa*; *Constitutional Framework for Manpower Development in a Post-Apartheid South Africa*; and *Cultural Considerations for a Democratic South African Constitution*. Only some of the papers were submitted for typing, copying and distribution to the Seminar participants in advance; the vast majority "arrived either a day before or on the actual day of delivery," and some "were received after the seminar" or were "still forthcoming" a month later. Apr. 12, 1988 Memorandum, *supra* at 3.

210. ANC, Rep. of the In-House Resolutions Committee 1 (n.d.) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 20), *available at* http://www.disa.ukzn.ac.za/sites/default/files/pdf_files/rep00000000.026.021.000d.pdf [hereinafter Rep. of the Resolutions Committee]. *See also* Apr. 12, 1988 Memorandum, *supra* note 209, at 1 ("the papers delivered and the subsequent discussion thereof were of a high standard").

ANC Women's Section urged that the Guidelines be revised to give "the struggle against sexism . . . equal treatment, attention and emphasis" as other forms of discrimination, the other Seminar participants were not persuaded, and "wholly accepted" the section on Women's Rights as it stood.[211]

The provisions calling for multi-party democracy and an enforceable Bill of Rights sparked substantial discussion.[212] Some participants pressed the question "whether in a liberated South Africa there should be . . . freedom for [political] parties that . . . are reactionary and anti—people."[213] "After a lengthy discussion" in which the limitations on racist political parties "were elaborately explained," however, the Seminar participants "accepted the perspectives espoused in this section" of the Guidelines.[214]

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211. Apr. 12, 1988 Memorandum, *supra* note 209, at 3.

212. *Id.* at 1–2; Rep. of the Resolutions Committee, *supra* note 210, at 1. The provisions on the economy and the absence of any provision on "the land question" also sparked controversy. Apr. 12, 1988 Memorandum, *supra* note 209, at 1–2; Rep. of the Resolutions Committee, *supra* note 210, at 1.

As to the land question, there was "general consensus" that the Guidelines needed to address the issue directly "to erase the impression that the ANC was running away from . . . its historic commitment to restore the land to those who work it." Apr. 12, 1988 Memorandum, *supra* note 209, at 2. *See also* Rep. of the Resolutions Committee, *supra* note 210, at 1 (describing "almost universal feeling that the land question needs to be directly addressed"). *Cf. Freedom Charter*, *supra* note 15 ("The land shall be shared among those who work it!"). The Seminar participants felt that the Guidelines should confirm the ANC's "determination" to institute "land reforms" and "assuage the expectations of the oppressed and exploited landless majority who are victims of forced removals by guaranteeing that justice will be done." Apr. 12, 1988 Memorandum, *supra* note 209, at 2.

On the economy, "[s]trong reservations, exceptions and criticism were levelled" against "the failure of the Guidelines to spell out a clear commitment to nationalization"—failure that was compounded by the "complete absence of reference to . . . the Land Question and Land distribution." *Id.* Moreover, the Guidelines' reference to a "mixed economy" was viewed as condoning "the continued existence of capitalism in a post-apartheid South Africa." *Id.* When it was pointed out, however, that a mixed economy was a "transitional stage of economic development" that "almost all of the People's democracies in Eastern Europe [had] passed through," the participants' "skepticism was allayed" and "[t]he formulation in the Guidelines was accepted." *Id.*

213. Rep. of the Resolutions Committee, *supra* note 210, at 1.

214. Apr. 12, 1988 Memorandum, *supra* note 209, at 1.

Regarding the Bill of Rights, Seminar participants achieved "general acceptance" of the Guidelines' provisions "[a]fter elaborate explanations and the circulation of . . . Albie's paper on The Bill of Rights and the Role of Affirmative Action."[215] Resistance to an enforceable Bill of Rights had been expressed previously within the ANC. Some referred to the idea as a "Bill of Whites" because it could entrench the property rights of the white ruling class[216] and prevent the ANC from instituting land reforms and other progressive measures when it came to power.[217] Indeed, an Anti-Bill of Rights Committee had been formed by some black law students in Durban.[218]

Albie explained, however, that the content of a Bill of Rights could be progressive and entrench social and economic rights rather than preventing economic reforms.[219] He presented three arguments for embracing such a Bill of Rights. First, it would improve the ANC's image and reputation, undermining the claims of those who viewed the ANC as a "gang of terrorists."[220] Second, and more importantly, a Bill of Rights "was our answer to group rights."[221] Political opponents of the ANC were pressing for a future constitution that would entrench veto rights for the white minority as the mechanism that would prevent abuse of power by the new government. Embracing a Bill of Rights would allow the ANC to proclaim that the rights of white persons will be protected—not as whites, but as individuals.[222] It would protect everyone from abuse of power without giving any group a

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215. *Id.*

216. *See* Makau wa Matua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 68–69 (1997) (arguing that a "constitutional rights framework" could be deployed to "preserv[e] the social and economic status quo" and protect "'the private property rights . . . of the white minority'" in South Africa).

217. DRUCILLA CORNELL, KARIN VAN MARLE, & ALBIE SACHS, ALBIE SACHS AND TRANSFORMATION IN SOUTH AFRICA: FROM REVOLUTIONARY ACTIVIST TO CONSTITUTIONAL COURT JUDGE 91 (2014); *see also* Birth of the Constitution DVD, *supra* note 11, tape 1 at 41:43–42:36; Interview by the Mayibuye Archives with Albert Sachs, in Belville, South Africa (Dec. 5–8, 2011), part 2 at 30:40–31:30 [hereinafter 2011 Albie Sachs Interview].

218. 2011 Albie Sachs Interview, *supra* note 217. *See also* ALBIE SACHS, THE SOFT VENGEANCE OF A FREEDOM FIGHTER 164–66 (2d ed. 2000) [hereinafter SOFT VENGEANCE].

219. 2011 Albie Sachs Interview, *supra* note 217, part 2 at 30:40–33:30.

220. *Id.* part 2 at 33:30–40:15.

221. *Id.*

222. *Id.*

special veto that would frustrate the majority's political agenda. Third, embracing a Bill of Rights would "protect[] us against ourselves."[223] Time after time, "in newly independent African countries," people "who had fought bravely for independence" and then "achieved positions of power" had gone on "to behave in ways that were not acceptable."[224] Therefore, a Bill of Rights was needed "to prevent an abuse of power" once power had been achieved by the ANC.[225]

Albie's heart was pounding as he made this argument. He was not at all sure how his suggestions would be received.[226] Nonetheless, his words did not provoke outrage or indignation. Instead, the argument was accepted as reasonable and persuasive.[227] The ANC leadership had embraced the concept of an enforceable Bill of Rights.

G. Constitutional Guidelines: Final Revisions

Five weeks later, agents of the South African Security Forces planted a car bomb on Albie's vehicle in Maputo, Mozambique, and Albie was nearly killed by the explosion.[228] Ultimately, he lost an arm and sight in one eye.[229] Initial medical treatment and surgery in Mozambique was followed by further medical treatment and months of rehabilitative therapy in London.[230]

The Constitutional Committee held a meeting in London and asked Albie and Kader Asmal[231] to take a first cut at drafting a

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Id. See also* ALBIE SACHS, THE FREE DIARY OF ALBIE SACHS 34–35 (2004) [hereinafter FREE DIARY].

227. 2011 Albie Sachs Interview, *supra* note 217, part 2 at 33:30–40:15. *See also*, FREE DIARY, *supra* note 226, at 34–35.

228. For a compelling account of the experience, see SOFT VENGEANCE, *supra* note 218.

229. His sense of humor, however, remained intact. Years later, speaking to a group of lawyers in South Africa about the upcoming selection of the inaugural justices of the Constitutional Court, Albie said, "I would give my right arm" to be chosen. He was: Nelson Mandela appointed him to the Court. Emily Bazelon, *After the Revolution*, LEGAL AFF., Jan.–Feb. 2003, *available at* http://legalaffairs.org/issues/January-February-2003/feature_bazelon_janfeb2003.msp (last visited June 23, 2018).

230. SOFT VENGEANCE, *supra* note 218, at 288.

231. Kader Asmal was a member of the Constitutional Committee from its foundation and a long-standing human rights and anti-apartheid activist. *See*

Bill of Rights.[232] Albie has said that the assignment was the "best medicine," better than all the antibiotics and other therapies he received.[233]

Meanwhile, the Constitutional Committee prepared a report on the In-House Seminar for ANC President Tambo[234] and completed a revised draft of the Constitutional Guidelines to address the concerns that were identified.[235] Two revisions were made in connection with the treatment of gender.[236] First, the Preamble's

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generally KADER ASMAL, POLITICS IN MY BLOOD: A MEMOIR (2011); *see also Professor Kader Abdul Asmal*, S. AFR. HIST. ONLINE, https://www.sahistory.org.za/people/professor-kader-abdul-asmal (last updated Sept. 6, 2018).

232. ASMAL, *supra* note 231, at 114; *see also* FREE DIARY, *supra* note 226, at 38–39; Interview with Albert Sachs, in Cape Town, South Africa (Dec. 18, 2012), part 1 at 1:05:45–1:06:40 [hereinafter 2012 Albie Sachs Interview].

233. 2012 Albie Sachs Interview, *supra* note 232, part 1 at 1:05:45–1:06:40.

234. Apr. 12, 1988 Memorandum, *supra* note 209.

235. It was this draft that was published. CONSTITUTIONAL GUIDELINES, *supra* note 9. The Constitutional Guidelines were republished in the *South African Journal on Human Rights* (*Constitutional Guidelines for a Democratic South Africa*, 5 S. AFR. J. HUM. RTS. 129 (1989)), and in the *Columbia Human Rights Law Review* (*Constitutional Guidelines for a Democratic South Africa*, 21 COLUM. HUM. RTS. L. REV. 235 (1990)). Except with respect to formatting and what appear to be typographical errors, the versions are the same and match the version published on the ANC's website. *See* CONSTITUTIONAL GUIDELINES, *supra* note 9. The most notable difference between the versions is that in one, the last four paragraphs were not renumbered, so the paragraph designations run from (a) to (w), with two paragraphs labeled (t) and (u), while in the other versions this error is corrected and the paragraph designations run from (a) to (y).

A substantively correct but textually inaccurate version was published in the *Fordham International Law Journal*, citing a "leaked" version of the Constitutional Guidelines. *See* Winston P. Nagan, *Law and Post-Apartheid South Africa*, 12 FORDHAM INTL. L.J. 399, 427, 447–51 (1988). Numerous textual discrepancies between this version, on one hand, and the archived preliminary drafts and subsequently published versions, which are consistent with each other, on the other, confirm that this version does not accurately set forth the text of a preliminary or final version of the Constitutional Guidelines issued by the ANC. The textual discrepancies in this version do not materially affect the substance of the provisions, with one notable exception: the provision in paragraph (b)(i) calling for sovereignty to be exercised "through one central legislature, executive and administration" was incorrectly stated to provide as well for "one central . . . judiciary." *Id.* at 447.

236. Apart from the treatment of gender, several other significant changes were made: a sentence was added to state explicitly that "the state shall have the duty to protect the right to work, and guarantee education and social security." CONSTITUTIONAL GUIDELINES, *supra* note 9. A provision was added in the section on the economy, stating: "The private sector of the economy shall be

reference to promoting "the habits of non-racial thinking" was amended to include "non-sexist" thinking as well.[237] Second, the provision on "Women" was amended to broaden the state's "affirmative action" obligations. Instead of merely providing for affirmative action to eliminate sexual "inequalities," the revised text also called for affirmative action to eliminate "discrimination between the sexes."[238]

Ultimately, as published in 1988, the ANC's *Constitutional Guidelines* embodied the fundamental principles of the Freedom Charter and confirmed the ANC's commitment to multi-party democracy, an enforceable bill of rights, and progressive social and economic reforms. The document further confirmed the ANC's commitment to combating sexism, eliminating inequalities based on sex, and guaranteeing fundamental rights regardless of sex. It said nothing explicit, however, to guarantee gay rights, or to prohibit discrimination based on sexual orientation.

II. THE ANC'S *BILL OF RIGHTS FOR A NEW SOUTH AFRICA*: GAY RIGHTS AND THE EFFORT TO END THE OPPRESSION OF WOMEN

The final revisions to the Constitutional Guidelines corresponded well with the concerns voiced at the March 1988 In-House Seminar. The concerns articulated by the Women's Section, however, were only partially addressed. The paper titled "Constitution, Law, and the Gender Question" presented at the Seminar had called for amendments to multiple paragraphs in order to explicitly "pay attention to the gender issue."[239] More

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obliged to co-operate with the state in realizing the objectives of the Freedom Charter in promoting social well-being." *Id.* Furthermore, a new section on "Land" was also inserted, which provided:

> The state shall devise and implement a Land Reform Programme that will include and address the following issues: (i) Abolition of all racial restrictions on ownership and use of land. (ii) Implementation of land reforms in conformity with the principle of Affirmative Action, taking into account the status of victims of forced removals.

Id.

237. CONSTITUTIONAL GUIDELINES, *supra* note 9.

238. *Id.*

239. Constitution, Law, and the Gender Question, Submission for the In-House Seminar on Constitutional Matters and Related Issues (Mar. 1–4, 1988), at 4 (on file with the Mayibuye Archives, African National Congress Papers

generally, the paper pointed out that the oppression of women was due "not only to the apartheid regime," but also to "attitudes, values and tradition[s] . . . rooted in conservative non-progressive culture . . . both black and white."[240]

Several ramifications flowed from this. First, the constitutional protection of religion "should never be understood to give rights that override the constitutional human rights . . . of women."[241] Second, constitutional protection of the family "should extend protection to all members" but "especially to women" and "[t]he right to privacy of the family should not be allowed" to create "[a] 'theatre for the secret oppression of women and girls'."[242] Third, "[w]omen's right[s] to paid work and free choice of employment must be guaranteed and not be hampered by such things as 'what does your husband say of it.'"[243] Similarly, "equality in training, access to work and equality in remuneration for similar work" should be guaranteed and "mechanisms for [enforcement of] these should be addressed by the charter [of workers' rights]."[244] Fourth, "[w]omen's social rights have often been eroded by the denigration of their person, sexual harassment and commercialization of women" and "[t]he constitution should allow for channels of enforcement to eliminate such practices."[245] Finally, "[w]omen's right[s] to shelter, land, property and residence have historically been tied to men—their fathers, husbands and male kin" and "there is need to 'de-link' these rights of women from men."[246]

Moreover, "the speakers dealing directly with this theme" at the In-House Seminar were passionate in their advocacy and "urged strongly" that the Constitutional Guidelines be revised to

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(Lusaka and London, 1960–1991), at Box 57, Folder 57.2). The referenced paragraphs imposed constitutional duties to "eradicate race discrimination," (paragraph (i)), to eradicate "the economic and social inequalities produced by racial discrimination" (paragraph (j)), to outlaw "the advocacy or practice of racism," (paragraph (k)), and to "promote the acquisition of managerial, technical and scientific skills . . . especially [among] the blacks," (paragraph (r)). CONSTITUTIONAL GUIDELINES PRINTED DRAFT, *supra* note 191, at 3–4.

240. Constitution, Law, and the Gender Question, *supra* note 239, at 2.
241. *Id.* at 3.
242. *Id.* at 4.
243. *Id.*
244. *Id.*
245. *Id.* at 5.
246. *Id.*

give greater emphasis to "the struggle against sexism."[247] Nonetheless, most of the Seminar participants were not persuaded. The draft Guidelines' existing provision on Women's Rights was "wholly accepted" by the Seminar participants, save only "the author of the paper on the Gender Question" who "felt that the struggle against sexism should receive equal treatment, attention and emphasis in the Guidelines with all other forms of discrimination."[248] In the end, only two relevant changes were made to the Guidelines: (1) a new reference was included in the Preamble calling for the promotion of "non-sexist" habits of thinking, and (2) new language was added to the section on "Women" identifying the elimination of "discrimination between the sexes" as an affirmative action obligation of the state.[249]

Nevertheless, leaders of the ANC Women's Section continued to press their case. Following the revisions to the Constitutional Guidelines stemming from the March 1988 In-House Seminar, a memo was prepared addressing "Matters of Particular Concern," summarizing a meeting where participants "went through the guidelines, clause by clause."[250] The changes they proposed were substantial: to add references to "gender oppression" and "women's subordination" in the Preamble; to state that South Africa shall be a "non-sexist" (as well as nonracial) state; to include repeated explicit references to sex-based discrimination and equal rights "for men and women"; to amend the paragraph on workers' rights to incorporate guarantees of "equal wages, living wage and the right[s] of women workers"; to add a new section or clause on "Children" as "a special and very sensitive group of the population" that "must not [be dealt with] in passing"; and "[i]n the same way as workers have been promised a Charter to protect their rights," to have the Constitutional

247. Rep. of the Resolutions Committee, *supra* note 210, at 2.

248. Apr. 12, 1988 Memorandum, *supra* note 209, at 3.

249. CONSTITUTIONAL GUIDELINES, *supra* note 9.

250. Memorandum, Matters of Particular Concern 1 (n.d.) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 81). An archived copy of the memo was stapled to the revised draft of the Constitutional Guidelines, and the body of the memo refers to provisions on "Land" that did not appear in prior versions, confirming that the meeting occurred after the revisions generated by the March 1988 In-House Seminar were made. *See id.* Presumably, the meeting involved members of the ANC Women's Section, since the substantive concerns expressed in the meeting parallel concerns raised by the Women's Section at the March 1988 In-House Seminar.

Guidelines provide for a "Charter or Bill of Rights to protect women's rights.[251]

Ultimately, this pressure to address women's oppression more effectively sparked a thorough and extended examination of the issue. Following the March 1988 In-House Seminar, the Constitutional Committee recommended that further seminars be conducted as soon as possible on "The Land Question," "The Economy," and "Culture."[252] When the Constitutional Committee met in December 1988, however, the list of seminars to be planned included an additional meeting on "Women."[253]

The ANC set up "an interdepartmental committee" to "define the terms of reference for this seminar" and to share "the preparatory work."[254] The ANC Women's Section was "assigned the leading role."[255] The Seminar preparatory committee "elaborated the seminar objectives" to go "beyond the issue of constitutional guidelines" and "to encompass also issues relating to national policy, the situation of women in [the ANC], the integration of gender issues in [ANC] departmental work and the protection of the family."[256] In short, the Seminar would undertake "an in-depth examination of the current position of women in society" and "their experience in the mass democratic movement and in the African National Congress," with "the purpose of strengthening existing policy on women's emancipation and ensuring that the rights of women are protected in a post-apartheid

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251. *Id.* at 1–2. Additional concerns were expressed, inter alia, for "the movement to draw up a family code" and to "define some of the concepts that cannot be elaborated by a constitution" through legislation. *Id.* at 2.

252. Apr. 12, 1988 Memorandum, *supra* note 209, at 3.

253. Memorandum, Proposed Agenda for the Constitutional Comm. for 9 December 1988 (n.d.) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 81).

254. Memorandum by Interdepartmental Comm., African Nat'l Cong., Seminar on Women and Children in a Future Constitutional Order 1 (n.d.) (on file with the Mayibuye Archives, African National Congress Papers (Lusaka and London, 1960–1991), at Box 57, Folder 57.3) [hereinafter Seminar on Women and Children Memorandum].

255. *Id.* Zanele Mbeki (the wife of future ANC President Thabo Mbeki) was put in charge. 2012 Albie Sachs Interview, *supra* note 232, at 10:10–12:38. *See also* Email from Albert Sachs, Justice, Constitutional Court of South Africa (ret.), to Joseph S. Jackson, Legal Skills Professor, University of Florida Fredric G. Levin College of Law (Nov. 25, 2012, 4:00 PM EST) (on file with author) (confirming Zanele Mbeki's role in organizing the Seminar).

256. Seminar on Women and Children Memorandum, *supra* note 254, at 1.

South Africa."[257] The plan was to examine "every aspect of the law and legal institutions" in order "to eliminate pernicious gender discrimination."[258]

Importantly, the Seminar was to be a policy-making conference.[259] The specific objectives of the Seminar were, inter alia, "[t]o formulate Policy Guidelines on the gender question in the South African struggle" and "[t]o entrench issues specific to women in the Constitutional guidelines for a post Apartheid South Africa."[260] It was expected that "all ANC departments will be represented at the highest level since national policy issues will be formulated and departmental work relating to women will be reviewed."[261] Time was to be allocated at the end of the Seminar for plenary sessions to finalize the report and recommendations of the Seminar.[262]

The Seminar ultimately took place in Lusaka on December 8–12, 1989.[263] In the course of the Seminar discussions, "Legal Issues" were addressed, and the topic of "Homosexual and gay

257. *Id.* at 2.

258. *Id.*

259. 2011 Albie Sachs Interview, *supra* note 217, part 3 at 23:23–24:35, part 13 at 8:55–10:10; 2012 Albie Sachs Interview, *supra* note 232, part 1 at 10:10–16:20.

260. Seminar on Women and Children Memorandum, *supra* note 254, at 3.

261. *Id.* at 6.

262. *Id.* at 5–6.

263. Some records indicate that the Seminar was originally scheduled for November 20–24, 1989. *See id.* at 7–8; *see also* Memorandum from Alfred Nzo to Heads of Departments, African National Congress, Seminar on Women, Children and the Family in a Future Constitutional Order 1 (n.d.) (on file with the Mayibuye Archives, African National Congress Papers (Lusaka and London, 1960–1991), at Box 61, Folder 61.4) (referring to Seminar "to be held 20-24 November 1989 in Lusaka"). The "Programme" or agenda for the "In-house Seminar on Women, Children and the Family in a Future Constitutional Order," however, confirms that the Seminar took place at the Mulungushi International Conference Center in Lusaka, Zambia between December 8–12, 1989. *See* Programme, African National Congress, In-House Seminar on Women, Children and the Family in a Future Constitutional Order (Dec. 8–12, 1989) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 71). *See also* Press Statement, African National Congress, Seminar on "Women, Children and the Family in a Future Post-Apartheid Constitutional Order" 1 (n.d.) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 71) (confirming date of Seminar).

rights" arose.[264] Notes taken during the Seminar summarize those discussions as follows:

> The issue of homosexual marriages is not on our agenda. With regards to gay rights [it was stated] that for qui[te] some time there was an impression that there were no gays in South Africa.
>
> They are to be considered from the prevalent socio-economic conditions. Examples:
>
> * children in jail
>
> * miners
>
> It was agreed that they are to be considered by their contribution to the community and struggle but should not be persecuted for they have human rights to make their sexual preferences.
>
> Recommendation:
>
> The movement to adopt a policy for miners to stay with their families and discourage single sex hostels.[265]

According to these "very rough" notes of the Seminar proceedings,[266] the ultimate conclusion to be incorporated in the "Commission Reports" on "Legal Issues" would state that it was

> [a]greed that: . . . [n]atural homosexuals and lesbians are to be tolerated for the immediate future. Those engaging in this practice because of social reasons such as being in jail or confined in any other manner, should be encouraged through reeducation and creation of a proper social climate, to abandon the practice.[267]

Additionally, it was agreed that: "[t]he ANC must be bound by all these provisions with immediate effect."[268]

From a modern perspective nearly thirty years later, a policy decision to "tolerate[] for the immediate future" persons who

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264. Memorandum, Draft Report for the Seminar on Women and Children 16 (n.d.) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 95A) [hereinafter Draft Report] (a rough draft summary of the Seminar proceedings and discussions).

265. *Id.*

266. The final page of the document includes a note addressed to "zanele," stating that "these notes are very rough and may be misleading." *Id.* at 25.

267. *Id.* at 20.

268. *Id.* A final note was added on the last page of the report, addressed to "zanele," indicating that the report was a "rough" draft. *Id.* at 25.

were characterized as "natural homosexuals and lesbians," but to "reeducat[e]" those who engaged in same-sex conduct "because of [external] conditions such as being in jail" seems rather limited and grudging. This "very rough" summary of the Seminar proceedings, however, may be misleading. The document's final note explicitly cautions that "some of the comments made . . . were purely individual,"[269] and did not necessarily capture the policy decisions taken by the ANC at the Seminar.[270] Indeed, Albie Sachs has confirmed that this summary of the Seminar proceedings should be seen "as picking up on different voices in the discussion rather than representing formal decisions on each point."[271] With regard to gay rights, the formal decision that was reached, which Albie "remember[s] quite vividly because of its signal importance at the time," was "an unequivocal decision against discrimination on grounds of sexual orientation."[272] Though some voices at the Seminar might have preferred a more limited commitment, others were fully consistent with this unqualified principle: as confirmed by the notes, it was agreed that gay people "should not be persecuted," because "they have human rights to make their sexual preferences."[273]

This was the moment the ANC embraced gay rights.[274] Since the Seminar was a policy-making conference, the decision taken to prohibit discrimination on grounds of sexual orientation "became part of ANC policy."[275] Albie and others on the Constitutional Committee "who regarded the issue as one of principled importance" were therefore free to incorporate this principle into the ANC's proposed Bill of Rights.[276] As Albie recalls, there was

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269. *Id.*

270. For example, the Seminar discussions recorded in the document included a suggestion that "the opinion of the husband must be sought" when a married woman wished to terminate a pregnancy. *Id.* at 25. As the document's final note indicated, however, that suggestion "was almost howled down" by the other Seminar participants. *Id.*

271. Email from Albert Sachs, Justice, Constitutional Court of South Africa (ret.), to Joseph S. Jackson, Legal Skills Professor, University of Florida Fredric G. Levin College of Law (July 12, 2017, 4:37 AM EDT) (on file with author) [hereinafter July 12, 2017 Email].

272. *Id.*

273. Draft Report, *supra* note 264, at 16.

274. *Cf.* Tatchell, *supra* note 8.

275. July 12, 2017 Email, *supra* note 271.

276. *Id.*

no opposition or resistance on the Constitutional Committee.[277] Some, like Albie and Kader Asmal, "felt strongly on the issue. Others were happy to go along with inclusion of the clause, even if it was not a matter of special importance to them. . . . The broad feeling would have been: let people be who they are."[278]

Likewise, no one opposed or resisted the gay rights clause when the proposed Bill of Rights was considered by the ANC leadership or when the proposed Bill of Rights was presented to the ANC membership in July 1991 at the ANC National Conference in Durban.[279] The draft Bill of Rights "was presented as a whole" to the NEC "and endorsed by the NEC as a whole without specific discussion of the sexual orientation clause."[280] Ultimately, the principle of non-discrimination on grounds of sexual orientation was accepted at the ANC National Conference "without a murmur of dissent."[281]

Regrettably, as described below, there are some gaps in the paper trail documenting the inclusion of the gay rights clause in the Constitutional Committee's proposals, at least insofar as Albie's papers in the Mayibuye Archives reveal.[282] Nevertheless, the record strongly suggests that the clause is directly traceable to the December 1989 In-House Seminar on Women, Children and the Family in a Future Constitutional Order.

First, the Introductory Note to *A Bill of Rights for a New South Africa* explicitly cites the Seminar recommendations as the

277. *Id.*

278. *Id.*

279. July 12, 2017 Email, *supra* note 271. *See also* Durban Conference Report, *supra* note 122, at 1–4 (confirming that the draft Bill of Rights was presented to the July 1991 National Conference of the ANC in Durban).

280. July 12, 2017 Email, *supra* note 271. This occurred "before the big national conference at the UDW Sports Centre in Durban in 1991." *Id.*

281. ASMAL, *supra* note 231, at 115. Albie recalls presenting and explaining the proposed Bill of Rights to a regional meeting of the ANC in Fort Hare and specifically bringing up for discussion the provisions on capital punishment and gay rights because he felt they should not "be slipped through but rather engaged with." July 12, 2017 Email, *supra* note 271. As Albie recalls, no opposition was expressed; however, one person caught up with him after the meeting and asked whether sexual orientation "referred to a man who was going with a man." *Id.* Albie confirmed this was the case, and "probably added that it could be a woman with a woman." *Id.* The individual was satisfied and expressed no further concerns. *Id.*

282. *See infra* notes 306–11 and accompanying text.

source of provisions on "Gender and Family."[283] The Introductory Note states that provisions ensuring equal rights between men and women were included "throughout the document and not just in a special clause tacked on near the end," and that this was done "in direct response to the recommendations of the ANC in-house Seminar on Gender Rights and on the Family."[284] The paragraph then specifically refers to the gay rights clause: "Attention [in the Bill of Rights] is also given to the principle of non-discrimination against single-parent families or against children born out of wedlock, or on the grounds of persons being gay or lesbian."[285]

Second, the connection between the gay rights clause and the Seminar is drawn even more closely in the reports of a follow-up seminar conducted the following year, shortly after *A Bill of Rights for a New South Africa* was published. The follow-up seminar on "Gender Today and Tomorrow – Towards a Charter of Women's Rights" took place from November 29 to December 2, 1990 and was "the first organized forum at which the ANC's working document on A Bill of Rights was tabled for discussion."[286] Brigitte Mabandla, a member of the ANC Constitutional Committee, summarized the draft Bill of Rights for the Seminar participants, and noted that "the principle of non-discrimination and non-sexism permeates the draft Bill of Rights."[287] Mabandla identified Article 7, which contains the gay rights clause, as "the principal clause on gender equality" and emphasized that "it focuses specifically on equality between men

283. A BILL OF RIGHTS FOR A NEW SOUTH AFRICA, *supra* note 6, at xi.

284. *Id.* Other contemporaneous documents confirm the importance of the Seminar in connection with the development of the ANC's constitutional proposals. On May 2, 1990, the NEC of the ANC released a formal "Statement on the Emancipation of Women in South Africa" stating that "the NEC is giving urgent consideration to the recommendations of a recent internal Seminar [on] the emancipation of women and the promotion of women's development in our country," including recommendations for "amendments to the ANC Constitutional Guidelines." Press Release, National Executive Committee, African National Congress, Statement on the Emancipation of Women in South Africa (May 2, 1990) [hereinafter Statement on the Emancipation of Women in South Africa].

285. A BILL OF RIGHTS FOR A NEW SOUTH AFRICA, *supra* note 6, at xi.

286. Brigitte Mabandla et al., *Introduction*, *in* BRIGITTE MABANDLA ET AL., WOMEN'S RIGHTS: A DISCUSSION DOCUMENT 4 (1990).

287. Brigitte Mabandla, *Constitutional Protection of Women's Rights in a Democratic South Africa*, *in* BRIGITTE MABANDLA ET AL., WOMEN'S RIGHTS: A DISCUSSION DOCUMENT 44 (1990).

and women and explicitly outlaws discrimination in all its forms."[288] Crucially, she then described the provisions of Article 1 and Article 7 as "creative formulations meant to incorporate the demands of women made at the ANC inhouse seminar . . . in 1989."[289] Thus, Mabandla's statement directly confirms that the gay rights clause can be traced to the views expressed at the 1989 Seminar, although the reference to "creative formulations" perhaps suggests that the clause captures the spirit, rather than the precise language, of the positions taken.[290]

Third, Kader Asmal, who collaborated with Albie to produce the first draft of the ANC's Bill of Rights in 1988, has confirmed that the gay rights clause was not included in that first draft. Both he and Albie have described the circumstances when they initially sat down together to create the first draft of the ANC's proposed Bill of Rights.[291] The work was done at Kader Asmal's home in Dublin, following Albie's hospitalization in London after the car bombing that took his right arm and the sight in one eye.[292] They sat down and wrote out the first draft by hand, without models or sources to draw on.[293] Albie began with the substantive rights to be guaranteed, and Kader dealt with the mechanisms for their enforcement.[294] They then switched and reviewed each other's work.[295] Kader's memoir states that the sexual orientation clause was not part of this first draft prepared in 1988: "[T]he section on equality was extended to include rights of sexual orientation, something we hadn't considered back in 1988."[296]

Fourth, the various drafts of the ANC's *A Bill of Rights for a New South Africa*, which are preserved among Albie's papers in the Mayibuye Archives, are all consistent with the assertion that

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288. *Id.*

289. *Id.*

290. *Id. See also infra* notes 329–36 and accompanying text.

291. ASMAL, *supra* note 231, at 114; FREE DIARY, *supra* note 226, at 38–39; 2012 Albie Sachs Interview, *supra* note 232, at 1:05:45–1:11:12.

292. ASMAL, *supra* note 231, at 114; FREE DIARY, *supra* note 226, at 38; 2012 Albie Sachs Interview, *supra* note 232, at 1:05:45–1:11:12.

293. ASMAL, *supra* note 231, at 114; FREE DIARY, *supra* note 226, at 38–39; 2012 Albie Sachs Interview, *supra* note 232, at 1:05:45–1:11:12.

294. ASMAL, *supra* note 231, at 114; FREE DIARY, *supra* note 226, at 38; 2012 Albie Sachs Interview, *supra* note 232, at 1:05:45–1:11:12.

295. ASMAL, *supra* note 231, at 114; FREE DIARY, *supra* note 226, at 38; 2012 Albie Sachs Interview, *supra* note 232, at 1:05:45–1:11:12.

296. ASMAL, *supra* note 231, at 114–15.

the sexual orientation clause originated with the December 1989 Seminar. The Constitutional Committee first published *A Bill of Rights for a New South Africa*[297] in November 1990[298] and later published revised versions in 1992[299] and 1993.[300] Several of the documents preserved among Albie's papers constitute pre-publication preliminary drafts, while others constitute proposed revisions to the version published in 1990.[301] All of the pre-publication drafts contain the sexual orientation clause exactly as it was published in November 1990: "Discrimination on grounds of gender, single parenthood, legitimacy of birth or sexual orientation shall be unlawful."[302] This is consistent with the idea that the ANC adopted the policy of non-discrimination at the December 1989 Seminar, and that this policy was then incorporated into all subsequent drafts of the ANC's draft Bill of Rights, rather

297. A BILL OF RIGHTS FOR A NEW SOUTH AFRICA, *supra* note 6.

298. Durban Conference Report, *supra* note 122, at 2–3.

299. *See* ALBIE SACHS, ADVANCING HUMAN RIGHTS IN SOUTH AFRICA 215–35 (1992) (setting forth ANC, Draft Bill of Rights: A Preliminary Revised Text (May 1992)).

300. ANC, Constitutional Committee, ANC Draft Bill of Rights: Preliminary Revised Version (Feb. 1993) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 29).

301. The documents can be identified as pre-publication drafts or post-publication proposed revisions, and to a large extent can be placed in chronological order relative to each other, by comparing their printed text and handwritten notations, both with each other and with the text of *A Bill of Rights for a New South Africa* as published in November 1990. For example, one document is a Bill of Rights draft with no handwritten notations; another is a copy of the first document with handwritten notations added. Constitutional Committee, African National Congress, A Bill of Rights for a New South Africa, Undated Pre-Publication Drafts and Post-Publication Proposed Revisions (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 91A–91B). The text of *A Bill of Rights for a New South Africa* corresponds much more closely with the notated draft than with the original. Thus, both documents can be identified as pre-publication drafts, with the un-notated draft occurring earlier in sequence than the notated draft.

Additionally, some of the documents include specific references to dates they were created, which helps in placing the documents in sequence. For example, one document consists of typewritten notes regarded proposed revisions to specific provisions of the Bill of Rights, such as: "p.6 [clause] 28. Change 'after its dissolution' to read "on" its dissolution." The document begins: "Today is Monday 13th May, 1991. Albie." Thus, drafts in which clause 28 has been amended to read "on its dissolution" instead of "after its dissolution" can be dated to May 13, 1991 or later. *Id.*

302. A BILL OF RIGHTS FOR A NEW SOUTH AFRICA, *supra* note 6, at 15.

than arising from later discussions within the Constitutional Committee as a suggested change to a preliminary draft.

Finally, Albie has explicitly stated, and the records confirm, that the December 1989 Seminar constituted a policy-making conference.[303] As the planning documents for the Seminar confirm, "all departments of the ANC" were to "be represented at the highest levels."[304] Therefore, "[o]nce the Conference had taken the decision" to prohibit discrimination on grounds of sexual orientation, "it became part of ANC policy. As such those of us on the Constitutional Committee who regarded the issue as one of principled importance could directly introduce the theme into the draft Bill of Rights."[305] In short, the December 1989 Seminar made it ANC policy to prohibit discrimination on grounds of sexual orientation, and that led directly to the inclusion of the clause prohibiting such discrimination in the ANC's draft Bill of Rights.

III. GAPS IN THE RECORD

As noted above, gaps in the record exist among Albie's papers in the Mayibuye Archives, both in connection with the December 1989 Seminar and in connection with the ANC's draft Bill of Rights. With regard to the Seminar, a number of documents indicate that the Seminar's resolutions and policy recommendations were to be set forth in a formal report.[306] Nevertheless, apart from the "very rough" summary of the Seminar proceedings, there is no draft or final report setting forth the resolutions or recommendations adopted, or records of further deliberations or discussions of the working group that might have finalized

303. 2011 Albie Sachs Interview, *supra* note 217, part 3 at 23:23–24:35, part 13 at 8:55–10:10; 2012 Albie Sachs Interview, *supra* note 232, part 1 at 10:10–16:20.

304. Seminar on Women and Children Memorandum, *supra* note 254, at 3.

305. July 12, 2017 Email, *supra* note 271.

306. Both the "Programme" or agenda for the Seminar, and an internal memorandum regarding the plans for the Seminar, indicate that time was to be set aside for the preparation of the Seminar Report and Recommendations. See Programme, *supra* note 263, at 8; Seminar on Women and Children Memorandum, *supra* note 254, at 5–6. Additionally, the May 2, 1990 Statement of the National Executive Committee of the African National Congress on the Emancipation of Women in South Africa states that recommendations from the Seminar "will be circulated in the Seminar's report." Statement on the Emancipation of Women in South Africa, *supra* note 284.

such a report.[307] Additionally, the "very rough" summary of the Seminar proceedings refers to proposed "clause-by-clause" amendments to the Constitutional Guidelines, and such amendments "corresponding to [Albie's] record of the proceedings" are set forth in an Appendix to Albie's 1990 book, *Protecting Human Rights in a New South Africa*.[308] Nevertheless, no marked-up copies of the *Constitutional Guidelines* or similar records setting forth these proposed amendments are archived with the Seminar documents.[309]

With regard to the ANC's draft Bill of Rights, neither the original handwritten first drafts prepared by Albie and by Kader Asmal in 1988, nor any typed or printed versions generated from the handwritten originals, are preserved among Albie's papers.[310] Nor are there any marked-up copies of those original drafts demonstrating the evolution of the draft Bill of Rights from its original form in 1988. Both Albie and Kader Asmal were aware of the historic significance of the drafts they wrote out by hand in 1988,[311] and it is nearly inconceivable that these documents would have been discarded.

These gaps in the record are problematic in several respects. First, the "rough notes" of the December 1989 Seminar proceedings do not set forth a clear, unequivocal prohibition of discrimination on grounds of sexual orientation. They confirm that the subject of homosexual rights was discussed, and that it was agreed that gay men and lesbians "should not be persecuted" be-

307. At least, there are none that this author has been able to discover. As previously noted, Albie's papers comprise more than one hundred boxes of documents, and it is possible that such records could be found in boxes that this author did not examine. *See supra* notes 10–11 and accompanying text. In any event, such records are not archived with Albie's records from the Seminar, or with Albie's records of the work of the Constitutional Committee.

308. Draft Report, *supra* note 264, at 25. ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA 197–201 (1990) [hereinafter PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA].

309. Again, it is possible that the records are there, but are stored separately from the boxes of documents that this author examined. *See supra* note 307.

310. It is clear that none of the drafts, which are preserved, date back to the original 1988 first draft, because all of the drafts contain a provision prohibiting discrimination on grounds of sexual orientation, and such a provision was not included in the 1988 first draft. *See supra* note 296 and accompanying text.

311. *See* FREE DIARY, *supra* note 226, at 38–39; 2012 Albie Sachs Interview, *supra* note 232, part 1 at 1:05:45–1:11:12; ASMAL, *supra* note 231, at 114.

cause "they have human rights to make their sexual preferences."[312] This understanding could be taken merely to imply that same-sex sexual behavior would not be criminalized, and not to entail a broader commitment to a universally applicable principle of non-discrimination. Indeed, the specific language of the policy decision reported in the "rough notes"—to "tolerate[]" "natural homosexuals and lesbians" while "encourag[ing]" others "to abandon the practice"[313]—seems consistent with a limited commitment to decriminalization. Such a limited commitment also seems consistent with the statement that "[t]he issue of homosexual marriages is not on our agenda."[314]

Second, the version of the *Constitutional Guidelines* set forth in Albie's 1990 book, *Protecting Human Rights in a New South Africa*, which includes italicized text reflecting amendments proposed at the December 1989 Seminar,[315] does not include a provision prohibiting discrimination on grounds of sexual orientation.[316] As Albie explained in a footnote:

> The italics represent amendments proposed at a seminar jointly organized by the Women's Section and the Constitutional Committee of the ANC. The changes were adopted after four days of discussion informed by comments and papers received from inside and outside South Africa. About seventy persons, roughly two-thirds women, one-third men, attended. The italicized amendments correspond to the author's record of the proceedings and should not be regarded as the official text.[317]

The omission of a gay rights clause from this version of the *Constitutional Guidelines* does not prove that the anti-discrimination policy was not adopted at the Seminar. It could merely reflect the fact that the policy did not fit neatly as an amendment to any existing provision of the *Constitutional Guidelines* and was therefore not addressed when the clause-by-clause review was conducted. Nevertheless, the omission does leave the contemporaneous written record ambiguous as it now stands.

Third, other sources describing the December 1989 Seminar make no mention of the issue of gay rights or of a policy decision

312. Draft Report, *supra* note 264, at 16.
313. *Id.* at 20.
314. *Id.*
315. PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA, *supra* note 308, at 197–201.
316. *See id.* at 197–201.
317. *Id.* at 198 n.*.

to bar discrimination on grounds of sexual orientation.[318] For example, in "Promoting Gender Equality in South Africa," Brigitte Mabandla identifies "the protection of women's rights and the promotion of gender equality" as the core demands made at the Seminar.[319] She identifies "a wide range of issues" discussed at the Seminar and lists "[s]ome of the basic demands" made.[320] Neither the list of issues nor the list of demands refers to gay rights. Further, in laying out what the future South African Bill of Rights should include, Mabandla omits any reference to sexual orientation, specifying instead that the Bill of Rights "must forbid discrimination on the basis of gender and protect single parenthood."[321] Again, these omissions do not prove that a policy prohibiting sexual orientation discrimination was not adopted at the 1989 Seminar. Mabandla's summary does not purport to capture all of the Seminar's recommendations. It does, however, suggest that gay rights did not constitute a principal focus of the Seminar participants.

In these circumstances, it would be helpful to have access to any existing additional records concerning the original drafts of the ANC's proposed Bill of Rights, the December 1989 Seminar, and the work of the ANC's Constitutional Committee in the period between the December 1989 Seminar and the publication of the ANC's draft Bill of Rights in November 1990. Possibly, some of these records no longer exist. In this timeframe, other events of extraordinary significance took place. Nelson Mandela was released from prison and the ANC was unbanned in February 1990, and the ANC relocated its headquarters from Lusaka, Zambia to Johannesburg, South Africa.[322] The Constitutional

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318. *See, e.g.*, Susan Bazilli, *Introduction*, *in* PUTTING WOMEN ON THE AGENDA 1, 2 (Susan Bazilli ed., 1991) (describing the December 1989 ANC In-House Seminar as encompassing "all aspects of ANC policy with regard to women and gender" and the formulation of "national policy for the emancipation of women," but not mentioning gay rights); Brigitte Mabandla, *Promoting Gender Equality in South Africa*, *in* PUTTING WOMEN ON THE AGENDA 75 (Susan Bazilli ed., 1991) [hereinafter Mabandla, *Promoting Gender Equality in South Africa*] (summarizing issues discussed and demands made at the December 1989 ANC In-House Seminar, but not mentioning gay rights).

319. Mabandla, *Promoting Gender Equality in South Africa*, *supra* note 318, at 76.

320. *Id.* at 76–77.

321. *Id.* at 78.

322. Christopher S. Wren, *South Africa's New Era; South Africa's President Ends 30-Year Ban on Mandela Group; Says It Is Time for Negotiation*, N.Y.

Committee was enlarged to include human rights lawyers practicing in South Africa, and took on an important role in helping the ANC prepare for direct negotiations with the apartheid government.[323] In May 1990, those negotiations produced the historic Groote Schuur Minute, formalizing the agreement between the ANC and the apartheid government to end their armed conflict and to proceed to negotiations toward free and fair elections.[324] Also in this timeframe, the leaders of the ANC released a formal Statement on the Emancipation of Women in South Africa addressing the role of women in the ANC and in a post-apartheid South Africa.[325]

In the context of all these events, some of the records of the Constitutional Committee's work could have been lost.[326] If the records are preserved somewhere, however, the custodians of these records should make them available so that the story presented here can be better documented and supplemented or revised.

CONCLUSION

The ANC's decision to establish constitutional protection against discrimination on grounds of sexual orientation originated with the December 1989 In-House Seminar on Women, Children and the Family in a Future Constitutional Order. Notes of the Seminar proceedings confirm that the subject of gay rights was addressed, and that it was agreed that gay men and lesbians "have human rights to make their sexual preferences" and "should not be persecuted."[327] Since the Seminar was a policy-making conference attended by the top leaders of the ANC,

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TIMES, Feb. 3, 1990, at 1; John F. Burns, *South Africa's New Era; Mandela To Go Free Today; DeKlerk Proclaims Ending of 'Chapter' After 27 Years*, N.Y. TIMES, Feb. 11, 1990, at A1; Sheila Rule, *Mandela Named Effective Leader of the African National Congress*, N.Y. TIMES, Mar. 3, 1990, at A1.

323. ANC, Const. Comm., Meeting Minutes 1–2, 5 (Apr. 29, 1990) (on file with the Mayibuye Archives, Albie Sachs Collection, at Box 81).

324. *The Groote Schuur Minute*, S. AFR. HIST. ONLINE, https://www.sahistory.org.za/archive/the-groote-schuur-minute (last visited March 30, 2019).

325. Statement on the Emancipation of Women in South Africa, *supra* note 284.

326. Indeed, Albie has confirmed that "we can't even find the Asmal kitchen table" on which he and Kader Asmal wrote the first draft of the ANC's proposed Bill of Rights, "let alone the pieces of paper themselves." Aug. 26, 2018 Email, *supra* note 20.

327. Draft Report, *supra* note 264, at 16.

this decision "became part of ANC policy" and enabled members of the Constitutional Committee to "directly introduce the theme into the draft Bill of Rights."[328]

As proposed by the Constitutional Committee, the gay rights clause was clear and unequivocal: "[d]iscrimination on grounds of . . . sexual orientation shall be unlawful."[329] Whether such a far-reaching anti-discrimination principle was adopted explicitly at the Seminar, as Albie recalls,[330] or instead was a "creative formulation[]" of the Constitutional Committee,[331] cannot be confirmed by the documentary record as it now stands. No reference to gay rights was included in the clause-by-clause amendments to the ANC's *Constitutional Guidelines* generated at the Seminar, and that topic also is missing from later summaries of the Seminar proceedings. The omissions suggest that gay rights were not a principal focus of the Seminar participants. Moreover, the decision reported in the rough notes of the Seminar proceedings, to "tolerate[]" and not to "persecute[]" gay men and lesbians, could be taken as a limited commitment to decriminalize homosexual conduct.

Nevertheless, a fair reading of the record suggests that the decision taken at the Seminar was not so limited. Supporters of gay rights explained that "[t]he issue of homosexual marriages is not on our agenda."[332] Rather, the issue they were addressing was more fundamental, and went to the core identities of gay men and lesbians as persons. As a matter of "human rights," they were entitled "to make their sexual preferences."[333] People have a right to "be who they are."[334]

Given this understanding of the claim being pressed, the policy adopted at the Seminar should not be seen as limited to decriminalization of homosexual conduct. If people have a fundamental human right to their sexual orientation, then discrimination on grounds of sexual orientation is wrong.[335] The Constitutional

328. July 12, 2017 Email, *supra* note 271.
329. A BILL OF RIGHTS FOR A NEW SOUTH AFRICA, *supra* note 6, art. 7, cl. 2.
330. *See supra* note 272 and accompanying text.
331. *See supra* notes 289–90 and accompanying text.
332. Draft Report, *supra* note 256, at 16.
333. *Id.*
334. July 12, 2017 Email, *supra* note 271.
335. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (statute infringing fundamental right to marry subjected to exacting equal protection scrutiny); Skinner v. Oklahoma, 316 U.S. 535 (1942) (statute infringing fundamental right to procreation subjected to exacting equal protection scrutiny).

Committee's anti-discrimination clause thus vindicated the essential thrust of the policy adopted at the Seminar, even if the precise words were never articulated by the Seminar participants. That no objection to the proposed clause arose within the Constitutional Committee, and "not a murmur of dissent" surfaced among the ANC leadership or membership when the draft Bill of Rights was presented to them, supports this conclusion.[336]

In the end, the story of the ANC's decision to include a gay rights clause in its draft Bill of Rights is nothing short of remarkable. In the midst of an armed conflict with the existing regime, ANC leaders engaged in a vigorous scholarly debate over the form a future constitution should take, overcame a desire to make "special provision" for themselves and their allies, and committed to true multi-party democracy and an enforceable Bill of Rights. Leaders of the ANC's Women's Section, initially unable to persuade the ANC to address the problem of sexism and women's oppression more effectively, continued to press their case, ultimately sparking a thought-provoking examination of the problem and of the policies needed to correct it. That examination led the ANC to conclude that gay men and lesbians have a human right to be who they are, and to adopt a policy prohibiting discrimination on grounds of sexual orientation. Whatever personal feelings the ANC leaders may have had about the issue, they were able to agree as a matter of principle that their struggle to end oppression and transform South African society was broad enough to encompass gay rights.

336. *See supra* notes 277–81 and accompanying text.