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# ON THE LEGAL CONSTRUCTION OF GAY AND LESBIAN IDENTITY AND SOUTH AFRICA'S TRANSITIONAL CONSTITUTION

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*'We are all born naked. The rest is drag.'*<sup>1</sup>

## INTRODUCTION

It is impossible to talk about a single homosexual identity for all people who experience same-sex desire and take part in same-sex activity in South Africa. Whether we call ourselves homosexuals, gay men, lesbians, moffies, dykes, queers, bisexuals, drag queens or even refuse altogether to label ourselves as any of the above, we are less of a happy family than most theorists would like to imagine.<sup>2</sup> Race, gender, class, sex, language, culture and many other factors constructed us differently. While sexual identity has become a fundamental aspect to many gay men and lesbians

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<sup>2</sup> I acknowledge that the use of terms such as 'homosexual', 'heterosexual', 'gay', 'lesbian', 'bisexual', 'moffie' and 'queer' inevitably reflects and shapes our political commitment. Throughout this article I use the terms 'homosexual' and 'heterosexual' as all-encompassing collective nouns without suggesting in any way that they reflect stable identities which unproblematically emerged from nature. The noun 'homosexual' usefully refers to the hypostatized social conception that some people are uniformly and exclusively inclined to same sex eroticism, and 'heterosexual' handily indicates the converse.

I deliberately and consciously use words such as 'we' and 'ourselves', positioning the author of this text as a member the minority group under discussion.

On terminology see generally, Janet E Halley 'Reasoning about sodomy: Act and Identity in and after *Bowers v Hardwick* in (1993) 79 *Virginia Law Review* 1721 at 1723; Anne B Goldstein 'Reasoning about Homosexuality: A Commentary on Janet Halley's "Reasoning about sodomy: Act and Identity in and after *Bowers v Hardwick*" in (1993) 79 *Virginia Law Review* 1781 at 1797; Robert Wintermute 'Sexual Orientation Discrimination as Sex Discrimination: Same-sex Couples and the Charter in *Mossop* and *Layland*' in (1994) 39 *McGill Law Journal* 429 at 431; Brenda Cossman 'Family Inside/Out' (1994) *University of Toronto Law Journal* 1 at 2 fn 4; Janet E Halley 'The politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity' (1989) 36 *UCLA Law Review* 915 at 916 fn 5; Kendall Thomas 'Beyond the privacy principle' (1992) 92 *Columbia Law Review* 1431 at 1433 fn 4; Elvia Rosales Arriola 'Sexual Identity and the Constitution: Homosexual persons as a Discrete and Insular Minority' (1992) 14 *Women's Rights Law Reporter* 263 at 264 fn 5; The Editors of the Harvard Law Review *Sexual Orientation and the Law* (1989) 1 fn 1; Mark Gevisser and Edwin Cameron *Defiant Desire: Gay and Lesbian Lives in South Africa* (1994) x.

all around the world, offering a sense of personal harmony, social location and even at times a political commitment, it would be impossible to isolate 'a' homosexual identity and say exactly how it is constituted.<sup>3</sup>

What is clear, however, is that contemporary sexual debates have increasingly focused on the process through which certain genders are assigned deviant status as socially and historically constituted products of a combination of factors which have together channelled sexual possibilities into one particular sexual orientation or identity.<sup>4</sup> This paper is located within this discourse. The author accepts that 'heterosexuality' and 'homosexuality' are social constructions and not pre-given, atheoretical categories. Far from fixed and immutable categories of gender, I see heterosexual and homosexual identities as mutable, shifting, plastic and volatile concepts. I furthermore recognise the significance of social responses to sexual behaviour in the formation of gendered identities, and believe that these social responses implicate, at the outset, the law, alongside literature, religion, the media, sport, race and ethnicity, class, the cultural representations of homosexuality and many more.<sup>5</sup>

This paper proposes to interrogate the concept of homosexual identity;

3 Jeffrey Weeks 'Questions of Identity' in Pat Caplan (ed) *The Cultural Construction of Sexuality* (1987) 30. Here is a short, and incomplete catalogue of current uncertainties within 'homosexuality': Is homosexuality a matter of acts or desires? If acts, which ones, and under what circumstances? If desires, which ones and under what circumstances? Are the significant acts or desires chosen, or unchosen or both? If the significant acts or desires are in some sense unchosen, how are they determined? Notwithstanding the performance of significant acts or the experience of significant desires, can a person be not-homosexual by virtue of other performances or desires? Is there one truth about every person which can be reliably discovered, or are some people (at least) more mutable and plastic? If there is a single truth, how is it to be discovered? Is homosexuality related or unrelated to nonsexual behaviour that transgresses gender norms? To sexual behaviour that transgresses gender norms? See Goldstein op cit note 2 at 1797-8.

4 Weeks op cit note 3 at 31.

5 Richard Collier *Masculinity, Law and the Family* (1995) 91. See generally on the constructed nature of sexual identities Michel Foucault *The History of Sexuality: An Introduction* (translation by Robert Hurley 1978); Goldstein op cit note 2 at 1797; Chesire Calhoun 'Denaturalizing and Desexualizing Lesbian and Gay Identity' in (1993) 39 *Virginia Law Review* 1859 at 1870; Arriola op cit note 2, at 263-96; William N Eskridge Jr 'A History of Same-Sex Marriage' (1993) 79 *Virginia Law Review* 1419-84; David T Evans *Sexual Citizenship: The material construction of homosexuality* (1993); Thomas op cit note 2 at 1476-1509; Janet E Halley 'The Politics of the Closet: Legal articulation of sexual orientation identity' in Dan Danielsen and Karen Engle (eds) *After Identity: a reader in law and culture* (1995) 24-38; Cossman op cit note 2 at 1-39; Martin Duberman, Martha Vicinus and George Chauncey Jr 'Introduction' in Martin Duberman, Martha Vicinus and George Chauncey Jr (eds) *Hidden from History: Reclaiming the Gay and Lesbian Past* (1989) 1-13; Judith Butler *Gender Trouble: Feminism and the Subversion of Identity* (1990) 16-24, 93-110; Gayle S Rubin 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Henry Abelove, Michele Aina Barale, David M Halperin (eds) *The Lesbian and Gay Studies Reader* (1993) 3, 9.

Although the notion has gained wide acceptance, it is still disputed by so called 'essentialists' who believe that homosexuality is an intrinsic property, a natural force that exists prior to social life and does not vary across history and culture. An essentialist would hold, for example, that a gay person transported from one time and place to any other would still be gay. In other words, the identity category does not vary with social context; homosexuality possess a kind of stability. This is in contrast with the Foucauldian 'constructivist' argument who represents the

to put under the spotlight the role law has played and may still play in constructing this identity; to ask how the law has dealt and may deal in future with homosexual identity when called upon to engage with it; and, given South Africa's constitutional protection on the grounds of sexual orientation, to propose strategies for engaging with the law in ways which could successfully utilise homosexual identities.

## I HOMOSEXUAL IDENTITY AND THE LAW

### 1. THE EMERGENCE OF A HOMOSEXUAL IDENTITY

The idea that homosexuality is a fixed propensity that fundamentally characterizes individuals who desire or participate in homosexual acts is not shared by all cultures. Although sexual desire and physical sexual conduct with members of the same sex have always existed, the characterisation of certain individuals as 'homosexuals' only began with the dramatic economic and social shifts which took place in the Western world during the nineteenth century.<sup>6</sup> According to Foucault it appeared in Western culture, in the late nineteenth century when it was put together as a 'psychological, psychiatric, medical category'.<sup>7</sup> It was at this

belief that gayness is a property that has meaning only within certain times and cultures. Identity categories are social creations. They result from social belief and practice, are themselves complex social practices, and may be evaluated in terms of whose interests they serve. In this view, identity can operate as a means of both empowerment and social control.

For a general discussion on this debate see Daniel R Ortiz 'Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity' (1993) 79 *Virginia Law Review* 1833 at 1836. Ortiz argues persuasively that contributors to this debate very often confuse the question of whether homosexuality is mutable or immutable, with the question whether sexual identity is essential or constructed. The former is an enquiry into the cause of a person's same-sex desire, while the latter is an enquiry into how the identity category itself is formed (at 1838).

6 Foucault op cit note 5 at 43. See also Arriola op cit note 2 at 286; Halley (1989) op cit note 2 at 934 and Rubin op cit note 5 at 9 fn 28-30.

The pinpointing of the late nineteenth century as the 'moment of truth' for the creation of sexual identity has been questioned. Arend H Huussen Jr 'Sodomy in Dutch Republic During the Eighteenth Century' 141-9 in Duberman, Vicinus & Chauncey (eds) op cit note 5 provides some evidence that, for the Dutch Republic at any rate, the appearance of a self-conscious homosexual identity and the visible homosexual sub-culture can be glimpsed at least a hundred years earlier in the late eighteenth century.

7 Foucault op cit note 5 at 42-3. See also Arriola op cit note 2 at 285; Ortiz op cit note 5 at 1836.

The argument about the social construction of homosexual identity is therefore historically specific. Foucault explains that in the context of the bourgeois class struggle at the end of the eighteenth century the bourgeoisie set its own body and sexuality 'against the valorous blood of the nobles' in a process in which the bourgeois subject 'sought to redefine the specific character of its sexuality' against the working class. 'Respectable' working-class sexualities, transformed from pre-industrial licentiousness, thus negotiated with a new familial order built round the divisions of homosexual/heterosexual, normal/deviant, public/private and so forth. It was a dualism which was to be enshrined in law.

Foucault pinpoints its emergence as around 1870. Perhaps he picked this specific date because the word 'homosexual' was coined at around that time. 'Homosexual' was, however, only one of several competing words, each of which expressed a distinct idea. The original definition of 'homosexuality' was not even focused on what we now call 'object choice'. Instead it denoted: a sexual bondage which renders [men and women] physically and psychically incapable – even with the best intention – of normal erection. This urge creates in advance a direct horror of

time that a group of 'sexologists' – including Richard von Krafft-Ebing and Havelock Ellis – fundamentally altered the conception of homosexuality in Western culture by shifting the focus from transient acts to character or personality, moulding 'homosexuality' into an identity, a 'new *specification of individuals*'.<sup>8</sup>

Before that, up to the end of the eighteenth century, three major explicit codes governed sexual practices: canonical law, the Christian pastoral, and civil law. They determined, each in its own way, the division between licit and illicit and were all centred on matrimonial relations. The sex of husband and wife was beset by rules and recommendations, the marriage was under constant surveillance but the rest remained a good deal more confused. There was no clear distinction between violations of the rules of marriage and other sexual activity taking place outside the context of marriage. Breaking the rules of marriage or seeking 'strange pleasures' brought an equal measure of condemnation. On the list of grave sins, and separated only by their relative importance, there appeared debauchery (extramarital relations), adultery, rape, spiritual or carnal incest, but also sodomy, or the 'mutual caress'. As to the courts, they could condemn homosexuality as well as infidelity, marriage without parental consent, or bestiality.<sup>9</sup>

Central to Foucault's argument, is his unmasking the 'myth' of Victorian society as one of increasing sexual repression<sup>10</sup> guided by the legitimate and procreative couple. He shows convincingly that it was also an era obsessed with sexual matters. Scientists, doctors and lawyers began to pay attention to the 'strange freaks of nature' who were attracted to members of their own sex. This 'discursive explosion' about sex of the eighteenth and nineteenth century did two things: it allowed for more discretion for married 'legitimate' couples with their regular

the opposite [sex] and the victim of this passion finds it impossible to suppress the feeling which individuals of his own sex exercise upon him.

See Peter Conrad & Joseph W Schneider *Deviance and Medicalization: From Badness to Sickness* (1980) 183 (cited in Goldstein). It was first introduced by Karl Maria Benkert in two anonymous pamphlets published in 1869. See Wayne Dynes *Homolexis: A Historical and Cultural Lexicon of Homosexuality* (1985) 67.

8 Halley (1989) op cit note 2 at 935.

Sexual identities – homosexual or heterosexual – and behaviour are not always congruent. A man might feel himself to be heterosexual in identity yet he might then engage in activities which others might consider to be homosexual in orientation or vice versa. But homosexual behaviour is both transhistorical and transcultural. What has varied considerably has been the legal and social responses to homosexuality. See for example, Eskridge op cit note 2, at 1435-84 for a comprehensive overview of same-sex relationships in different cultures at different times.

9 Foucault op cit note 5 at 37-8. Foucault admits that acts 'contrary to nature' were stamped as especially abominable, but he maintains that they were perceived simply as extreme form of acts against the law; they were infringements of laws or decrees which were just as sacred as those of marriage, and which had been established for governing the order of things and the plan of beings.

10 See generally Sigmund Freud *Civilization and its Discontents* (J Strachey translation) (1961).

sexuality. It tended to function as the norm, one that was stricter perhaps, but quieter. What came under scrutiny was 'the sexuality of children, mad men and women and criminals; the sensuality of those who did not like the opposite sex; reveries, obsessions, petty manias, or great transports of rage'. The setting apart of the 'unnatural' sexuality led to the assumption of an autonomy with regard to the other condemned forms such as adultery and rape: to marry a close relative or practice sodomy, to seduce a nun or engage in sadism, to deceive one's wife or violate cadavers, became things that were essentially different: on the one hand we had the infractions against the legislation of morality pertaining to marriage and the family, and on the other, offences against the regularity of a natural function.<sup>11</sup>

'So the natural laws of matrimony and the immanent rules of sexuality began to be recorded on two separate registers. There emerged a world of perversion which partook of that of legal or moral infraction, yet was not simply a variety of the latter. An entire sub-race was born. This was the numberless family of perverts who were on friendly terms with delinquents and akin to madmen.'<sup>12</sup>

This new persecution of the peripheral sexualities entailed an '*incorporation of perversions*' and a new '*specification of individuals*'. As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; its perpetrator was nothing more than the juridical subject of it. The nineteenth century homosexual became

'a personage, a past, a case history and a childhood, in addition to being a type of life, a life form and a morphology, with an indiscreet anatomy and possibly mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle: written immodestly on his face and body because it was a secret that always gave itself away. [...] Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.'<sup>13</sup>

Sexual identity thus struck to the core of the homosexual being. This was a new idea, that a person could 'be' a homosexual; it implied a pervasive quality that could be disclosed as clearly by nonsexual behaviour as by particular sex acts. This idea effected the displacement of the act: the old specification of acts came to seem increasingly irrelevant or ill-chosen, precisely because the specific forbidden acts

11 Foucault op cit note 5 at 38-9. 'It was a time,' remarks Foucault, 'for all these figures, scarcely noticed in the past, to step forward and speak, to make the difficult confession of what they were.'

12 Ibid at 40.

13 Ibid at 43.

together constituted an inadequate metonym for this new personage, the homosexual.<sup>14</sup>

## 2 THE ROLE OF LAW IN THE CONSTRUCTION OF HOMOSEXUAL IDENTITY

### 2.1 *Role of law in bringing the species of the homosexual into being*

Law has been significant in bringing the 'species' of the homosexual into being and in creating the categories and concepts of the 'homosexual' and the 'heterosexual'. However, the law did not work alone but formed part of a nexus of cultural prescriptions of deviance, normality and illness which have together involved the production of the 'homosexual personage'.<sup>15</sup> The discursive production of the homosexual 'person' as a deviant man of law – a new subject to be observed, policed and examined – took place in and across legal, medical and psychological discourses.<sup>16</sup>

How did the law facilitate this process? From the outset it must be noted that the law usually has been more concerned with the carrying out of a range of homosexual acts than with homosexual desire or identity as such. The law has not been concerned, at least formally, with individuals who believe themselves to be homosexual. What it has been concerned with, is the denial of the legitimacy of homosexual relations as viable alternatives to the heterosexual norm.<sup>17</sup> The law did this not only by the criminalization of certain homosexual conduct,<sup>18</sup> but also, as Foucault shows, through various other rules and regulations which instilled different ways of looking at marital procreative sex and 'unnatural' sex. Law came to valorise the model of marital bond, the privileging of the

14 Goldstein op cit note 2 at 1789. See generally Halley (1989) op cit note 2 at 936.

Foucault's views have been contested as too extreme. Some historians, for example, are not willing to completely abandon realism and find the idea of sexual identity as a construction politically debilitating. See John Boswell 'Towards the Long View: Revolutions, Universals and Sexual Categories' (1982-3) 58-9 *Salmagundi* 89 at 91-6.

A compromise position assumed by Weeks and Plummer holds that sexuality is historically specific cultural products, but that these socially constructed categories are nevertheless often experienced as real. See Jeffrey Weeks *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (1977) 31 and Kenneth Plummer 'Homosexual Categories: Some Research Problems in the Labelling Perspective of Homosexuality' in K Plummer (ed) *Modern Homosexual* (1981) 44 at 53 and Thomas op cit note 2 at 1502 fn 249.

Claiming that sexual identity is constructed does not necessarily lead to political inertia. When one realises that a claim that there is no such thing as a homosexual, does not afford an escape from identity politics and from the reach of power to a place outside power. Rather it puts into play a different set of power relations and alters the dynamics of personal and political struggle. It can become an act of freedom, not in the sense of liberation, but in the sense of resistance. After all: resistance is existence. See Adam Mars-Jones 'Homophobes and Homofibs' *London Review of Books* (30 November 1995) 12 and generally David Halperin *Saint Foucault: Towards a Gay Hagiography* (1995).

15 Collier op cit note 5 at 106.

16 Ibid at 109.

17 Ibid at 91.

18 If it was, it would have been difficult to explain the emergence of lesbian identities in the absence of specific legal prohibitions on sexual conduct between women.

conjugal sexuality and the denial of the legitimacy of other forms of sexuality outside the heterosexual matrix.<sup>19</sup> It is via this negation that the law has played a role in constructing homosexual identity.

We understand this if we remember that homosexual identity does not necessarily appeal to some common characterological essence that sets those who embrace that identity apart from those who do not; rather, this assertion of homosexual identity derives from a common historical experience of oppression. In other words, the assertion of homosexual identity does not revolve around a claim that homosexuals are *different*, but that they have been treated *differently*.<sup>20</sup> And law has been important in its capacity as a significant social source of stigmatisation of non-heterosexual behaviour.<sup>21</sup>

However it would be far too simplistic to see the law in negative terms as simply constructing homosexuality and heterosexuality as bi-polar categories. To do that would be to wrongly view the power of the law in institutional rather than in relational terms.<sup>22</sup> Foucault insists that we must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'.<sup>23</sup> Foucault attends instead to the 'productivity' of power and proffers an analysis aimed to show that power is not something that 'just says no'. In fact, argues Foucault, the most salient feature of modern power is that it 'produces; it produces reality; it produces domains of objects and rituals of truth'.<sup>24</sup> In other words, law speaks of the body, of

19 Foucault op cit note 5 at 101.

20 Thomas op cit note 2 at 1502 fn 249. Thomas points out that this is the reason why we cannot 'just give up' our homosexual identity despite the fact that it is an ideological category and therefore false. The material reality of homosexual identity has been too forcibly inscribed on the bodies of the individuals to whom it is attached to allow us to escape it.

21 Collier op cit 5 at 91.

22 See generally Thomas op cit note 2 at 1478-80 and Nancy Fraser *Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory* (1989) 27-30.

23 Michel Foucault *Discipline and Punish: The Birth of the Prison* (Alan Sheridan translation) (1977) 194.

24 Foucault op cit note 23 at 194. See also Thomas op cit note 2 at 1480.

According to Foucault op cit note 5 at 91-3, the form of the law is just one of the terminal forms power takes. Power is:

'the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; [it is the process] which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them; [is the] support which these force relations find in one another, thus forming a change or a system, or on the contrary, the disjunctions and contradictions which isolate them from one another; and lastly [it is] the strategies in which they take effect, whose general design or institutional crystallizations is embodied in the state apparatus, in the formulation of the law, in the various social hegemonies. Power's condition of possibility, or in any case the viewpoint which permits one to understand its exercise, even in its more "peripheral effects", and which also makes it possible to use its mechanisms as a grid of intelligibility of the social order, must not be sought in the primary existence of a central point, in a unique source of sovereignty from which secondary and descendent forms would emanate; it is the moving substrate of force relations which, by virtue of their inequality, constantly engender states of power, but the latter are always local and unstable. [...] Power is everywhere; not because it embraces everything, but because it comes from everywhere.'



self and subjectivity, of desire and power, in a more complex way than in simply signifying a sexual status in terms of either/or.<sup>25</sup>

## 2.2 *The role of law in the 'reconstruction' of homosexual identities*

In the complex and unstable process described above, the legal discourse can be both an instrument and an effect of power, but also a hinderance, a stumbling block, a point of resistance and a starting point for an opposing strategy. Discourse transmits and produces power, it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it. In the same way, silence and secrecy are a shelter for power, anchoring its prohibitions; but they also loosen its holds and provide for relative obscure areas of tolerance. The creation of 'the homosexual' made possible a strong advance of social controls on this group; but it also made possible the formation of a 'reverse' discourse: homosexuality began to speak on its own behalf, to demand that its legitimacy or 'naturalness' be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified.<sup>26</sup>

This insight allows us to look at the role of law in a different way. Far from seeing the law merely in negative terms, one discovers how the legal discourse can open up the body to speech and to practice. One sees that the legal discourses surrounding sexual orientation allows all the players to participate in the construction of their own sexual-orientation identities, and to make themselves available for interpretation along this register by others. In debating about sexual orientation, we do not just reflect or deliberate upon it and how it shall be used to effect redistribution of social goods: we also constitute it and enrol ourselves in it. Therefore the role of law in constituting persons by providing a forum for their conflicts over *who they shall be understood to be* is not only symbolic but also deeply material, even though it involves not physical force but the more subtle dynamics of representation.<sup>27</sup>

Power on this understanding is not something 'that is acquired, seized, or shared, something that one holds on to or allows to slip away' (at 94). Foucault urges us to abandon a unitary conception of power as that which is concentrated in the state. One impoverishes the question of power if one poses it solely in terms of legislation and constitution, in terms solely of the state and the state apparatus. Power is quite different from and more complicated, dense and pervasive than a set of laws or a state apparatus. This, of course does not mean that Foucault denies the importance or the efficacy of state institutions. He insists that power emanates not exclusively from the state but from innumerable points, in the interplay of non-egalitarian and mobile relations.

See generally also Michel Foucault 'The Eye of Power' in *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* 146-158 (Colin Gordon et al translation) (1980).

25 Collier op cit note 5 at 109-10. Collier points out that what we are concerned with here is not the first level of engagement, the one in which the law can be understood to serve as a barometer of social reactions to homosexuality. Where we take 'repressive' or 'liberal' laws to be indicators of the degree to which homosexuality is tolerated in a certain society at a particular time. What we are concerned with are the more complex interactions of the law.

26 Foucault op cit note 5 at 101-2.

27 Halley op cit note 2 at 1729.

Althusser talks about interpellation to capture this dynamic.<sup>28</sup> The legal interpellation or hailing of subjects engages us in generating not only how we present ourselves to others, but how we imagine ourselves as persons. It is inextricably material and symbolic because it materially reconfigures how people imagine and present themselves in political engagements. We can illustrate this by imagining the process which took place in South Africa in 1968 with the proposals for anti-homosexuality legislation.<sup>29</sup> I would argue that this process generated at least four subjects in Althusser's sense. First, responding to the debate on the enactment of new laws 'subjected' those who already identified themselves as gay, lesbian or bisexual to a political profile defined by the identity under threat. Opposing the legislation meant engaging in identity politics, and invoked a series of courageous coming-outs that reconstituted the personhood of those involved. Second, the legitimization of homophobia and discrimination on grounds of sexual orientation encouraged many men and women who entertain same-sex erotic desire, whether they act on it or not, to identify publicly as heterosexual. Third, it encouraged men and women whose energies were cross-sex to identify publicly as heterosexual, as explicitly as their sense of decorum would permit. And fourth, for anyone within reach of the last two effects, the legal censure legitimated a sense of indignation that became a form of heterosexual self-consciousness: 'homosexual panic'<sup>30</sup> became a state of mind one could inhabit all day long. Even when the subject of debate seems to presuppose participants with settled sexual-orientation identities, those identities might be under negotiation.

This is a significant insight which might assist in evaluating the impact of the inclusion of gay rights in South Africa's Constitution on homosexual identity.

28 Louis Althusser 'Ideology and Ideological State Apparatuses (Notes towards an Investigation)' in *Lenin and Philosophy and other Essays* (Ben Brewster translation) (1971) 123, 162-3.

'[I]deology "acts" or "functions" in such a way that it "recruits" subjects among the individuals [. . .] or "transforms" the individuals into subjects [. . .] by that very precise operation which I have called interpellation or hailing, and which can be imagined along the lines of the most commonplace everyday police (or other) hailing: "Hey, you there!" Assuming that the theoretical scene I have imagined takes place in the street, the hailed individual will turn round. By this mere one-hundred-and-eighty-degree physical conversion, he becomes a subject. Why? Because he has recognized that the hail was "really" addressed to him, and that "it was really *him* who was hailed" (and not someone else).'

See also Halley op cit note 2 at 1730-1.

29 See section II below. Also Mark Gevisser 'A Different Fight for Freedom: A History of South African Lesbian and Gay Organisation from the 1950s to the 1990s' in Gevisser & Cameron (eds) op cit note 2 at 14, 32-7; and Glen Retief 'Keeping Sodom out of the Laager: State Repression of Homosexuality in Apartheid South Africa' in Gevisser & Cameron (eds) at 99, 101-3.

30 See Retief op cit note 29 at 101-2 for a description of the moral panic which gripped white South Africans in the wake of the events described above.

## II LEGAL CONSTRUCTION OF HOMOSEXUAL IDENTITY IN SOUTH AFRICA

The emergence of a discourse on homosexuality in South Africa does not follow the same historical trajectory as its European colonial antecedents. Not only is the periodisation different, but the social process also transforms the discursive character of sexual relations in a different way. The central role of missionaries in the process of colonial conquest, the rise of the colonial state as the new sovereign power on the subcontinent, and the interest of the mining houses sometimes contested but mostly colluded in the formation of institutions to regulate the distribution of discipline on the bodies of all its subjects.<sup>31</sup>

This makes it difficult, probably impossible, to talk of homosexual identity in South Africa as a monolithic, describable, stable concept.<sup>32</sup> Most probably, different homosexual identities were and still are produced by a unique set of power relations and apparatus in the context of colonialism, capitalist development and racial domination.<sup>33</sup>

What is clear, is that the law has been implicated in this project in various ways, most notably as a tool in the stigmatisation of non-heterosexual behaviour in South Africa.

### THE COMMON LAW, COLONIAL CONQUEST AND CRIMINAL ACTS

The Roman Dutch common law, brought to South Africa by the Dutch colonizers in the seventeenth century, criminalized a number of sexual acts between adults – whether between men, between woman, or between a man and a woman – if not directed towards procreation. ‘Any gratification of sexual acts in a manner contrary to the order of nature’ constituted a crime.<sup>34</sup> These crimes against nature included sexual acts of some sort between men, bestiality, sexual acts between women, heterosexual sodomy and masturbation. They were usually all classified under the rubric of sodomy<sup>35</sup> and were punishable by

31 Zackie Achmat “Apostles of Civilised Vice”: “Immoral Practices” and “Unnatural Vice” in South African Prisons and Compounds, 1890-1920’ (1993) 19 *Social Dynamics* 92 at 107.

32 Ibid at 97. See also Gevisser op cit note 29, at 16-17, where he speculates about the elusive and undefinable nature of gay and lesbian identity or identities in South Africa.

33 Achmat op cit note 31 at 96.

34 *R v Gough and Narroway* 1926 CPD 159 161. See generally on the criminalization of same-sex conduct in South Africa Edwin Cameron “‘Unapprehended felons’: Gays and lesbians and the law in South Africa’ in Cameron & Gevisser (eds) op cit note 2 at 89-98; Edwin Cameron ‘Sexual Orientation and the Constitution: a Test case for Human Rights’ (1993) 110 *SALJ* 450 at 453-6; Frans Viljoen ‘Verligting ‘Verlustiging: Regshervorming in ‘n tyd van Vigs’ (1993) 110 *SALJ* 100; JMT Labuschagne ‘Dekriminalisasie van Homo- en Soëfilie’ (1986) 11 *TRW* 167.

35 *Gough and Narroway* supra note 34 at 161. See also Hunt *South African Criminal law and Procedure vol II: Common Law Crimes* (1970) 262.

In *Cunningham v Cunningham* 1952 (1) SA 167 (C), the court pointed out that none of the older Roman Dutch writers define sodomy, though Damhouder does make some attempt to do so and his description includes masturbation, immorality against nature with equals and inferiors, immorality against nature with animals and immorality with dead woman (at 169).

death.<sup>36</sup> Even heterosexual intercourse between Christian and Jew,<sup>37</sup> Turk or Saracen<sup>38</sup> as a 'crime against nature' was punishable by death, according to some authorities.

These acts were made punishable because they were considered a 'misuse of the organs of creation' against the order of nature because by such acts the possible procreation of children were defeated.<sup>39</sup> Kersteman indicates that these 'unnatural acts' were also punished because they were regarded as so abhorrent to all ideas of decency that they ought to be punished by the state.<sup>40</sup> In the Roman Dutch common law, therefore, almost all sexual activity outside the procreative heterosexual matrimonial sphere, was punishable.

By the beginning of the twentieth century most of the prohibitions in the common law against 'unnatural' sexual activity had become obsolete and today these offences cannot be committed between a man and a woman.<sup>41</sup> For example, today oral sex between a man and woman<sup>42</sup> and sodomy between a man and a woman<sup>43</sup> no longer constitute punishable acts in our law as the courts have found that they had fallen into disuse. Only male-male sexual acts are still the subject of criminal inhibition. These punishable acts include sodomy, other 'unnatural sexual offences' such as 'sexual gratification obtained by friction between the legs of another person', mutual masturbation and other unspecified sexual activity between men.<sup>44</sup>

36 See *Gough and Narroway* supra note 34 at 161. S Van Leeuwen, *Rooms-Hollands Reg* 4.37.10 describes some of the punishments. Some sodomites, he says, are burnt alive in ashes. Others are dealt with 'a little more leniently' and are first punished with the cord and then burnt. Others are 'smothered in prison in a cask of water'.

37 Hunt op cit note 35 at 262.

38 CR Snyman *Strafreg* (1992) 388 fn 3.

39 *Gough and Narroway* supra note 34, at 161. See also Kersteman *Woordenboek sv Sodomie*.

40 See *Gough and Narroway* supra note 34 at 162.

'Die zonde . . . is een vuiligheid, die niet alleenig de lichaams, maar ook de zielen besmet en bezoedeld.'

41 *S v Matsemela* 1988 (2) SA 254 (T) at 258E.

42 *R v K & F* 1932 EDL 71.

43 *R v N* 1961 (3) SA 147 (T) where court pointed out:

'dat die daad laas in die sewentiende eeu aangegee is, dat ons latere skrywers oor die Romeins-Hollandse reg dit nie weer spesifiek noem nie; en dat daar geen aantekening is van 'n vervolging in die verband in hierdie land nie' (at 149A).

44 *Gough and Narroway* supra note 34 at 163 (friction between legs); *R v Curtis* 1926 CPD 385 (mutual masturbation); *S v V* 1967 (2) SA 17 (E) (mutual masturbation). But see *R v S* 1950 (2) SA 350 (SR), where it was held that the mere touching by a male with his hand of the private parts of another male did not constitute an unnatural sexual offence.

By 1992 prosecutions and convictions on charges of sodomy and unnatural sexual offences continued. The following table illustrates the prosecution and conviction rates:

Year	Prosecutions	Convictions	Convictions
1989	401	279	164
1990	479	323	186
1991	476	324	194
1992	428	283	195

(In the second conviction column the convictions involving juveniles under the age of 20 have been excluded. Source: Central Statistical Services *Crimes: Prosecutions and Convictions with Regard to Certain Offenses 1977/782D1991/92*)

But why didn't sodomy and other sexual acts between men fall into disuse? I would suggest that in accordance with the theory of the construction of homosexual identities set out above, the multiplicity of legal, medical and psychological discourses brought an end to the blanket prohibition on all non-marital, non-procreative sex, and instead began to focus on the policing of 'inverts'. In line with this trend, in South Africa the law ceased to punish non-invert sex, but in the form of various ordinances adopted or imposed under the influence of the British colonisers in the late nineteenth and early twentieth century, the law criminalized various forms of same-sex male conduct.<sup>45</sup> In holding that 'gross acts of indecency, [between men] even when not committed in public' should still be prosecuted the court in the case of *Gough and Narroway* referred to the legislative prohibitions enacted in the late nineteenth and early twentieth century in various parts of the country to justify its finding. The judgment specifically referred to s 5 of the Transvaal Act 16 of 1908,<sup>46</sup> which declared that '[a]ny male person who in public or in private aids or is a party to the commission by any male person of any act of gross indecency with another male person shall be guilty of an offence', and s 10 of Natal Act 22 of 1908, which stated that '[a]ny male person who in public or in private commits, or is a party to the commission of or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a crime'. Both these provisions were modeled on a similar English law.<sup>47</sup> The court could also have pointed to s 121 of the Transkei Penal Code<sup>48</sup> which contains a similar prohibition for support of its argument.

From the early twentieth century South African courts were from time to time called upon to apply and interpret prohibitions on same-sex conduct. In this process the court revealed itself as a powerful force in the stigmatisation, in the branding as 'different' of same-sex conduct. A perusal of the various decisions regarding same-sex conduct and desire reveals a widespread and emphatic disapproval and even revulsion

Until 1992 the number of prosecutions seem to have been rising, not dropping. During the period 1990-92 there were annually 22 per cent more prosecutions than the yearly average from 1981-89. Excluding the conviction of juveniles under the age of 20, there were 24 per cent more conviction over the same period. See Edwin Cameron and Kevan Botha 'Sexual Privacy and the Law' in *South African Human Rights Yearbook* 1993 219 at 225.

45 At this point the law did not concern itself with female same-sex acts; this only came later. As has been indicated above, this did not mean that female sexuality was not inscribed by the law in various other ways, specifically around the valorising of matrimonial relations.

46 Substituting s 21 (1) of the Immorality Ordinance 46 of 1903 (Transvaal).

47 Section 11 of 48 and 49 Victoria Chap 69.

48 Act 24 of 1886. The relevant portion of s 121 reads as follows:

'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment. [...] The offence is complete upon penetration.' See *S v M* 1977 (2) SA 357 (TK), where the court found that the prohibition in s 121, is against the penetration of an orifice, not against the placing of the male organ between the legs of another male.

displayed by South African judges against gay men and lesbians.<sup>49</sup> This took the form, at first, of regarding same-sex male conduct both as a defilement and abomination of human nature and thus as 'immoral' and 'depraved'. For example in *Gough and Narroway*<sup>50</sup> the court described homosexual acts as 'abhorrent' and grossly indecent.<sup>51</sup> In the case of *R v Baxter*<sup>52</sup> Solomon CJ found 'acts of indecency' between two consenting adult men 'of so disgusting a nature that I refrain from repeating them'. Even when convicting deviates, the court felt unable to repeat the censured acts. In *R v L*<sup>53</sup> the court quotes a passage from Lord Sumners judgment in *Thompson v The King* to convey its disgust with the act of sodomy, providing a remarkable textbook description of the way the law branded 'the personage' of the homosexual.

'Persons who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity'

Through passages like these (which one can almost imagine being invented by Foucault himself to prove his point) it is not only the men taking part in the acts, but the courts themselves who stamp homosexuals as a 'specialised and extraordinary class'.

Even when the judiciary later came to take a slightly more enlightened view of same-sex conduct and desire, its members tended to see homosexuality in terms of disease and disorder, following the discourses of medical science to reaffirm the 'homosexual' as a specialised and extraordinary class, be it in the name of leniency and goodwill. In *Baptie v S*<sup>54</sup> the court used the terminology of disease to justify its more 'lenient' approach to punishment.

'It is now well understood as a result of recent advances in medical knowledge that offences of this kind, involving perversity, are offences which have a background in the disordered mental condition of the perpetrators and that they can usually be cured by psychiatric treatment.'<sup>55</sup>

More recently judges – whether following a more enlightened trend, or

49 Cameron (1993) op cit note 34 at 457.

50 Supra note 34 at 159.

51 At 163. See also *R v Curtis* 1926 CPD 385 at 387 (letters proving criminal offence of male-male masturbation 'filthy' and 'disgusting').

52 1928 AD 430 at 431.

53 1951 (4) SA 614 (A).

54 1963 (1) PH H96 (N).

55 Cf *S v Mafuya* 1972 (4) SA 565 (O) ('a person with a problem of this sort should, where possible, be helped to overcome his difficulty, and not be punished with a jail sentence'); *S v K* 1973 (1) SA 87 (RA) at 90C-D ('in many of these cases, the desire to commit these unnatural offenses [between adults] stems from some form of mental disease'). *S v Kola* 1966 (4) SA 325 (A) in sentencing a man in terms of s 2 of Law 2 of 1891 (T) for appearing in public place dressed as a woman in order to conceal his identity as a man ('possibly he had a sexually inverted mind, which was congenital, and that he was in consequence a psychological misfit or deviate').

whether reinforcing the basic stereotypes about homosexuals – have continued to ‘classify’ the ‘homosexual’ as different and abnormal, as something apart. In *S v M*<sup>56</sup> the court had to consider the sentence of six months’ imprisonment imposed on a 21 year old man for committing sodomy with other men older than 19. In delivering the judgment the court (per Jansen J) said:

‘The majority of people, who have *normal heterosexual relationships*, may find acts of sodomy unacceptable and reprehensible. We cannot close our eyes, however, to the fact that society accepts that there are individuals who have homosexual tendencies and who form intimate relationships with those of their own sex. It has to be taken into account that homosexuality is more openly discussed and written about. It is common knowledge that so-called gay clubs are formed, where homosexuals meet and have social intercourse.’<sup>57</sup>

The court replaced the sentence of imprisonment with a fine, and discussed whether sodomy should in fact continue to be a crime. A liberal decision then, because it attempted to be more accommodative towards ‘abnormal’ sexual relationships and questioned the advisability of imposing criminal sanctions against homosexuality. But it still accepted as valid and endorsed the view that homosexuality is ‘unacceptable and reprehensible’.<sup>58</sup>

But it was not only the courts who engaged in this stigmatization process. Under National Party rule, Parliament extended prohibitions on same-sex conduct to areas not covered by the common law. In 1957, nine years after the National Party came to power, the government adopted the Immorality Act (later renamed the Sexual Offences Act),<sup>59</sup> in an attempt to stamp out ‘immorality’. Immorality was defined in the Act as any ‘extramarital sexual conduct’. The Act does not prohibit immorality as such, but contains a large number of provisions which criminalize sexual conduct in an attempt to discourage the population from straying from their moral ways.<sup>60</sup> It contains prohibitions on interracial sex,<sup>61</sup> prostitution,<sup>62</sup> cruising<sup>63</sup> and ‘immoral or indecent act(s)’ committed by a man older than nineteen with a man younger than nineteen.<sup>64</sup> Soliciting or enticement by a man older than 19 of a man younger than 19 to commit ‘immoral or indecent’ acts are also criminalized by the Act.<sup>65</sup>

56 1990 (2) SACR 509 (E)

57 At 514b-c (emphasis added).

58 See *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (WLD), for a recent example of similar attitudes.

59 Act 23 of 1957. The change of name was effected by the Immorality Amendment Act 2 of 1988.

60 See Retief *op cit* note 29 at 102.

61 The notorious s 16, which was scrapped in 1985.

62 Sections 2, 3, 4, 9, 11, 12 and 12A.

63 Section 19.

64 Section 14(1)(b).

65 In 1988 the tri-cameral Parliament extended the existing prohibition on ‘immoral or indecent’ acts between men and boys under 19 to those between women and girls under 19 in Immorality Amendment Act 2 of 1988.

In 1966 the apartheid regime discovered the (white) gay subculture when detectives raided a private party attended by 300 gay men.<sup>66</sup> This resulted in the enactment of s 20A of the Sexual Offences Act which prohibited 'any male person' from committing 'with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification'.<sup>67</sup> Section 2 defines a party as 'any occasion where more than two persons are present'. It has been held that two men's jumping apart in a gay sauna when a police major switched on the light prevented 'a party from being constituted'.<sup>68</sup>

Other legislation also affected homosexuals in South Africa. The Publications Control Board Act<sup>69</sup> created a censorship regime whereby a state appointed censorship board could find 'undesirable' and ban any matter when it was deemed to be 'indecent, obscene or offensive or harmful to the public morals'. According to the Act a matter was deemed to be harmful to the morals if in the opinion of the court it dealt 'in an improper manner' with, amongst other things, murder, suicide, death, horror, cruelty, fighting, crime, tipping, sexual intercourse, white slavery, lust, passionate love scenes, homosexuality, sexual assault, rape, sodomy, masochism, sadism, physical poses, scant and inadequate dress, divorce, illegitimacy or human or social deviation or degeneracy.<sup>70</sup>

The prescriptive ordinances and the case law called upon to interpret the common law refer only to male same-sex acts. The courts have never been called upon to decide on whether sexual acts committed between women would be punishable in terms of South African law. In a recent

66 For a general overview of these events, see Gevisser op cit note 29 at 30-7 and Retief op cit note 29 at 101-3. The proceedings of the Parliamentary Select Committee which finally drafted the new provision contains a description of the party:

'Males were dancing with males to the strains of music, kissing and cuddling each other in the most vulgar fashion imaginable. They also paired off and continued their love-making in the garden of the residence and in motor cars in the streets, engaging in the most indecent acts imaginable with each other.'

Quoted in the Report of the Select Committee 7 of 1968 11.

A section of the report on the lifestyles of homosexuals reveals remarkable 'insights': homosexuals usually occupy apartments which they keep very neat and which they furnish fashionably; all true homosexuals drink excessively; in homosexual speech uniform members of the police are known as 'morons'.

67 Act 23 of 1957, s 20A(1).

68 *S v C* 1987 (2) SA 76 (W) at 81J. See generally Gevisser op cit note 29 at 35. In response to the threat of criminalization, some gay South Africans – urban, white and middle class – had organised themselves for the first time in a way similar to that of gay Americans in the 1950s. This is a very good example of the role law can play in the 'hailing' of individuals, requiring individuals to respond in some way to their hailing by the law, either by taking on the identity and organising around it, or by rejecting it and remain in the closet.

69 Act 26 of 1963, later substituted with the Publications Act 42 of 1974.

70 Section 6(1)(c). See *Publications Control Board v Central News Agency Ltd* 1970 (3) SA 479 (A). An example of the censor board in practice is the fact that the gay American news magazine, the Advocate, was banned in South Africa until last year because it promoted homosexuality 'as normal and natural, satisfying and right, and this attitude would be regarded as blatantly shameless and repulsive by the reader'. Quoted in Retief op cit note 29 at 104.



decision the court doubted that such acts would be found to be a crime.<sup>71</sup> In, perhaps, another illustration of the marginalisation of women, lesbians seem not to have 'existed' legally in South Africa until the late 1980s. In one of only two reported cases in South Africa where the court explicitly mentions the word 'lesbian', the Natal Division of the Supreme Court in 1981 accepted without comment that it was defamatory to refer to a woman as a lesbian.<sup>72</sup> In 1988 lesbian conduct was for the first time acknowledged by the legislator when the tri-cameral Parliament extended the existing prohibition on 'immoral or indecent' acts between men and boys under 19 to those between women and girls under 19.<sup>73</sup> This does not mean that lesbians have not been marginalised and stigmatised and has never been viewed as such by the law. This again became evident in the recent judgment of *Van Rooyen v Van Rooyen*,<sup>74</sup> where the court had to define a lesbian mother's rights of access to her two minor children who were in the custody of their father. The judge conditioned weekend access to the proviso that when the children visited, the mother was not allowed to sleep in the same bed as her lover and when she had the children for a holiday, the lover was not allowed to sleep in the house at all. The court's view was that homosexuality/lesbianism is 'abnormal',<sup>75</sup> damaging to children<sup>76</sup> and 'wrong'.<sup>77</sup>

'What the experts say is to me so self-evident that, even without them, I believe that any right-thinking person would say that it is important that the children stay away from confusing signals as to how the sexuality of the male and of the female should develop<sup>78</sup>. . . [T]he issue simply comes down to the fact of the style of living, the attitude towards living, the activities, the behaviour or whatever else is involved in living from minute to minute, all that in the context of the lesbianism'.<sup>79</sup>

The judge reiterated that what the mother did in the privacy of her bedroom had nothing to do with the court. But where the court was called upon to make an access order 'in the best interest' of the children, the mother's conduct and 'lifestyle' had to be taken into account.

Apart from the law's inactivity regarding female same-sex conduct, the contribution of the law in the construction of sexual identities has also been affected by the pre-existing social formations of race, class, age and/or gender present in South Africa. Thus it is apparent that authorities turned a

71 *S v Matsemela* 1988 (2) SA 254 (T) at 258E. See Hunt op cit note 35 at 270; Snyman op cit note 38 at 389 fn 17.

72 *Vermaak v Van der Merwe* 1981 (3) SA 78 (N) at 79F. In this case a certain Mrs Vermaak phoned Mr Van der Merwe and asked whether she could speak to his wife, and received the reply: 'Het jy nie gehoor dat sy bly by daardie donnerse lesbian nie?' (*Haven't you heard that she is staying with that bloody lesbian?*) Mrs Vermaak did not know what a lesbian was and later asked her husband what it meant and he told her.

73 Immorality Amendment Act 2 of 1988.

74 *Supra* note 58.

75 At 329I.

76 At 328H.

77 At 330A.

78 At 328J-329A.

79 At 329E.

blind eye to same-sex relationships in mine compounds<sup>80</sup> and that courts sometimes took into account the race or age of the parties involved when deciding on severity of the sentence.<sup>81</sup> At the same time the law dealt differently with same-sex acts and desires of men and women. The law did not (and does not) speak with one voice; did not (and does not) 'hail' individuals belonging to different social formations in the same way or to the same extent. But one may nevertheless conclude from the available evidence that at least from the early twentieth century the South African legal system has always treated the group of 'homosexuals' differently and has been an important source of stigmatisation of both gay men and lesbians. Furthermore, these attitudes have not disappeared and are still present among at least some judges in South Africa.

### THE CONSTITUTION AND SEXUAL ORIENTATION

South Africa became the first country in the world explicitly to include in its Constitution individual protection on the ground of sexual orientation.<sup>82</sup> In reaction to the authoritarianism and discrimination of the past – to South Africa's unique history of prejudice, exclusion and discrimination – the Constitution contains a commitment to reject past hatred and prejudices as a basis of public conduct and decision making in the form of an equality clause.<sup>83</sup> The equality clause, contained in s 8 of the Constitution, guarantees to every person the right to equality before the law and to equal protection of the law.<sup>84</sup> Furthermore, it contains a specific non-discrimination clause which declares that,

'No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of the provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.'<sup>85</sup>

80 Achmat op cit note 31 at 106-7. See also Dunbar Moodie, Vivian Ndatshe and British Sibuyi 'Migrancy and Male Sexuality on the South African Gold Mines' 1988 *Journal of South African Studies* 228-56.

81 *S v K* 1973 (1) SA 87 (RA) ('must be remembered that . . . the complainant was a humble African domestic servant, of 21 years of age, the sort of man who would be likely to yield easily to persuasion of this sort' (at 88E-F)). But see *S v S* 1965 (4) SA 405 (N) ('race of the victim of the offence is quite irrelevant' (at 408D)).

82 Lourens du Plessis and Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 144. See generally Dion Basson *South Africa's Interim Constitution: Text and Notes* (1994) 21-23; Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus *Fundamental Rights in the New Constitution* (1994) 27; Botha and Cameron op cit note 44 at 282-5.

Section 15 of the Canadian Charter of Rights (adopted in 1984) includes an equality clause which does not mention sexual orientation explicitly, but which recent Canadian supreme court decisions have held to include protection on the basis of 'sexual orientation'. See *Egan v Canada* (1995) 124 DLR (4th) 609; *Canada (Attorney-General) v Ward* (1993) 103 DLR (4th) 1.

83 Henk Botha 'The values and principles underlying the 1993 Constitution' in 1994 *SA Publikereg/ Public Law* 233 at 237; Du Plessis and Corder op cit note 82 at 22. Section 9(3) of the final Constitution adopted by the Constitutional Assembly on 9 May 1996 contains a similar clause. Section 9(4) allows for the horizontal application of the non-discrimination clause.

84 Section 8(1).

85 Section 8(2).

The enumerated list of protected conditions were included after intense lobbying by the multi party women's caucus and the Equality Foundation which specifically lobbied for the inclusion of sexual orientation in the list.<sup>86</sup> It has been argued that the listed grounds in s 2 are either immutable (race, age) or very difficult to change (sex, language, culture), or inherently part of the human personality (belief, religion, conscience) and subject very often to stereotyping and prejudice.<sup>87</sup> They represent traditional forms of discrimination which has been manifest in the country's past. Each has its own legacy of exclusion, prejudice and injustice – with race and gender at the epicentre.<sup>88</sup>

The inclusion of sexual orientation protection in the interim Constitution<sup>89</sup> appears to represent a significant victory for gay men, bisexuals and lesbians in South Africa. At the same time it poses new questions regarding our relationship to law and the strategies we should employ to harness the law to our advantage. In the next part of this paper I will attempt to address these issues.

### III IDENTITY, SEXUAL ORIENTATION AND THE LAW

#### THE MEANING OF 'SEXUAL ORIENTATION': PROTECTED DESIRE AND CONDUCT OR PROTECTED IDENTITY?

When we want to establish the meaning of 'sexual orientation' in s 8 of South Africa's interim Constitution, we will have to ask: Does 'sexual orientation' merely allude to the preferred gender of a person's sexual partner or the indication of a preferred erotic activity, or does it refer to something larger, more profound, namely the sexual identity of a person? To answer this question, two issues at play in this arena must be addressed.

First, we must ask: *can* we ever claim and rally around a specific homosexual identity if we accept that homosexual identity is socially constructed? If we claim our legal protection on the basis of our homosexual identities, does this not reinforce prejudice by making our sexual identities fundamental to our identities as human beings? In other words, are we not just reinforcing the very repression sought to be

86 For a good summary of the history of the drafting of s 8, see Cameron & Botha op cit note 44 at 282-5. See also Du Plessis & Corder op cit note 82 at 144.

87 Cachalia op cit note 82 at 27. It is debatable whether race is an immutable characteristic. Race, I believe, is constructed by the social forces as an inferior socio-economic group on the basis of skin colour. See Arriola op cit note 2 at 287; Ortiz op cit note 5 at 1839. Personally I see sexual orientation as something that is very difficult to change, as well as being a construction which is experienced as a real part of the human personality.

88 Kevan Botha *Submission to Constitutional Assembly Theme Committee 4 on Fundamental Rights: on behalf of National Coalition for Gay and Lesbian Equality* para 1.7, 5.

89 On 10 October 1995 it was accepted by the Constitutional Committee of the Constitutional Assembly to retain the sexual orientation clause in the Bill of Rights which forms part of the 'final' Constitution.

removed by claiming to be what we have been constructed to be?<sup>90</sup> Would it not be more honest to say: sexual identities are socially constructed and not based in reality and therefore irrelevant; people must be protected regardless of their sexual orientation, in other words, sexual orientation in the Constitution should refer not to a person's sexual identity but rather to his or her acts and desires.

Second, if we decide that organisation around identity is acceptable, we must ask whether grouping around our sexual identities would, in fact, be the correct legal and political strategy to take when we engage with the law. In other words, even if sexual orientation refers to identity, rather than to acts and desires, should we not, as a matter of legal strategy, give up any claim to our identities and rather claim that we are just like everybody else, we just happen to be erotically attracted to, and want to engage sexually with, individuals of our own gender?

I answer unequivocally no to the first question and tentatively yes to the second one. In my attempt to answer these questions I will use as a point of reference a recent decision handed down by the Canadian Supreme Court in *Egan v Canada*.<sup>91</sup> The case dealt with a homosexual couple who since 1948 had lived together 'in a relationship marked by commitment and interdependence similar to that which one expects to find in a marriage'.<sup>92</sup> One of the partners applied for a spousal allowance in terms of the Old Age Security Act,<sup>93</sup> something he would have been granted but for the fact that he did not comply with the definition of 'spouse' given in s 2 of the Act. According to the definition a spouse includes 'a person of the opposite sex who is living with that person, having lived with that person for at least a year, if the two persons have publicly represented themselves as husband and wife'. The appellants then challenged the definition of spouse as being in contravention of s 15 of the Canadian Charter of Rights, which states:

'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.'

The majority, per La Forest J, concluded that the appellants had not suffered discrimination on grounds of their sexual orientation and dismissed the appeal, finding that the distinction made in the law between

90 See Jed Rubenfeld 'The Right to Privacy' (1989) 102 *Harvard Law Review* 737 at 781:

'To protect the rights of "the homosexual" would of course be a victory; doing so, however, because homosexuality is essential to a person's identity is no liberation, but simply the flip-side of the same rigidification of sexual identities by which our society simultaneously inculcates sexual roles, normalises sexual conduct, and vilifies faggots.'

91 (1995) 124 DLR (4th) 609.

92 As described by Judge La Forest in the majority opinion, 619D-E.

93 RSC 1985, c O-9.

heterosexual couples and homosexual couples was not based on a irrelevant personal characteristic.<sup>94</sup>

In coming to this conclusion the court seems to take a very restrictive view of what 'sexual orientation' entails, focusing on same-sex desire as the only factor making up the class. It states:

'Whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s 15 protection as being analogous to the enumerated grounds.'<sup>95</sup>

The majority fails to see sexual orientation as a constructed identity category, or even as a maligned minority group, focusing instead on same sex desire and sexual attraction. This leads the court to equate homosexual couples with 'all sorts of other couples living together such as brothers and sisters or other relatives, regardless of sex, and others who are not related, whatever reasons those other couples may have for doing it and whatever their sexual orientation'.<sup>96</sup>

The majority justifies the legislation's singling out of married and common law couples, with reference to the intention of Parliament, which, according to the majority, was to accord support to married couples for reasons deeply rooted in the 'fundamental values and traditions' of the nation. It is anchored in the 'biological and social realities that heterosexual couples have the unique ability to procreate'.<sup>97</sup> These heterosexual couples therefore need support in performing the critical task of raising children, 'something which is of benefit for all of society'.<sup>98</sup> None of the couples excluded from the benefits under the Act is capable of meeting the fundamental social objectives thereby sought to be promoted by Parliament. Although homosexual couples include sexual relations, this 'sexual aspect' has nothing to do with the social objectives for which the Act was adopted.<sup>99</sup> Homosexual couples are not, therefore, discriminated against, 'they are simply included with these other couples'.<sup>100</sup>

94 In Canadian law determining whether an impugned provision infringes the right to equality set out in s 15 of the Charter involves a three-step analysis. The first step looks to whether the law has drawn a distinction between the claimant and others. The second step then questions whether the distinction results in disadvantage, and examines whether the impugned law imposes a burden, obligation or disadvantage on a group of persons to which the claimant belongs, which is not imposed on others, or does not provide a benefit which it grants others. The third step assesses whether the distinction is based on an irrelevant personal characteristic which is either enumerated in s 15(1) or one analogous thereto. Para 9. See also *Miron v Trudel* (1995) 124 DLR (4th) 693 and *Andrews v Society of British Columbia* (1989) 56 DLR (4th) 1. In casu the court found that the first two aspects were present, but not the third.

95 619G-H.

96 624G.

97 625F-G.

98 626B.

99 627E-F.

100 627H.

Because the majority professes to see sexual orientation merely as an issue of acts and desires and not of identity it allows them to do two things:

- (1) To claim that the only thing which distinguishes same-sex couples from other couples living together such as brothers and sisters or other relatives or others who are not related, is the sexual relations the same-sex couple engages in, thereby allowing them to avoid the very issue which is presented by the legislation in this case, namely whether the definition of 'spouse' discriminates against homosexuals.<sup>101</sup> The court can claim that this is not an issue of sexual orientation because the couple involved is not discriminated against directly because of their same-sex acts or desires.
- (2) At the same time the majority, freed from seeing the matter as one of sexual orientation discrimination, is able to rely on the very stereotypes which form part of the discourse on homosexuality – the same stereotypes which necessitate legal protection for homosexuals – to justify its decision. The court seems unable to escape the material reality of the homosexual identity. It falls back on 'biological and social reality' to justify its decision, in other words on the stereotypes<sup>102</sup> which have formed part of the legal and social discourse around homosexual identity.<sup>103</sup> If the court had truly been able to view the world only in terms of acts and desires and not in terms of identity, they would have come to a different conclusion by asking a different question, namely: is it discriminatory to afford benefits to some couples living together in a long-term emotional and sexual relationship and not to others who have different sexual orientations? The answer would then have had to be yes. Instead they claimed innocence regarding homosexual identity and asked: given the fact that same-sex acts or desires are not at play in this case, is it justified to treat heterosexual couples differently from other people who live together in various types of arrangements?

In such circumstances the court is at its most neutral and dangerous, masking their prejudices behind the language of objectivity, of seeing

101 See Cory J 670H, who makes the same point.

102 Cory J, who wrote a separate minority judgment remarked on the strangeness of permitting the government to justify a discriminatory distinction on this basis of presumptions which are, themselves, discriminatory (650D-E).

103 This, I contend, amply demonstrates the court's inability to escape the discourse even as they are trying to shape it. The problem with this approach is demonstrated by the experience in the USA, particularly in *Bowers v Hardwick*, where legal strategies have primarily been to try and ignore gay identity (as we understand it) and say if heterosexual sex is protected, so should gay sex. The actual strategy minimized the distinctiveness of Hardwick's sexual activity. Instead of arguing that privacy should extend to something different, Hardwick and the members of the Court who would have struck down the Georgia law argued that gay sex was *not* really different from those activities privacy already covered. They sought to establish gay sex as a fundamental right by generalizing, abstracting and sanitizing it. In short, they tried to offer a very thin unthreatening, and largely desexualized description of gay identity. Ortiz *op cit* note 5 at 1851.

sexual orientation as a matter of not taking cognisance of same-sex acts and desires. What they do is manage the instability which exists between acts, desires and identity, in justifying their 'heterosexual' legal argument.<sup>104</sup> The majority decision, I would venture, shows that we can consolidate around our homosexual identities even if we accept that homosexual identity is socially constructed. As the court shows, the mere fact that homosexual identity is an ideological category does not mean that it is not real. The material reality of homosexual identity has been too forcibly inscribed on the bodies of the individuals to whom it is attached to bear out the claim that it is not real.<sup>105</sup> In fact, as the majority decision shows, it would be dangerous to insist on denying homosexual identity when engaging with the law. If we state that we are just like heterosexuals, the court might just take us up and treat us as heterosexuals and say: if you were a heterosexual couple living together you would not have qualified for the benefit, so you do not qualify for the benefit. But we will find out that we cannot escape our identities as the court may, as the majority in *Egan* did, profess on a formal level that heterosexuals and homosexuals are the same, but continue to rely on stereotypes and prejudice to justify its decisions.<sup>106</sup>

Consolidating around our homosexual identities does not mean we

104 Halley op cit note 2 at 1759.

105 Thomas op cit note 2 at 1502 fn 249.

106 In the South African context the case of *S v H* 1993 (2) SACR 545 (C) gives an indication of the difficulties even the most enlightened judge may have with really seeing homosexuals as exactly like heterosexuals. In the most 'enlightened' decision on homosexuality yet delivered by a South African court, Judge Ackermann (who has since then been appointed to the Constitutional Court) struck down a one year suspended sentence in a 'case of a private homosexual act between two consenting adult males' because the principles of equality, privacy, autonomy and the absence of public harm militate strongly against criminal proscription and replaced it with one of caution and discharge. The judgment, I would argue, exhibits confusion as to whether it should treat homosexuals as a group or merely to focus on same-sex acts and desires. On the one hand the court stresses that considerations of equality demand that no greater limitation be placed on (private or public) homosexual erotic expression than on heterosexual erotic expression. But on the other hand the court exhibits an almost obsessive restatement of the private nature of the act under discussion. See 545J ('this is a case of a private homosexual act between two consenting adult males'); 546B (there is a growing body of opinion which questions the premises on which the proscriptions 'of homosexual acts between consenting adult men which takes place in private', have traditionally been abused); 547H (changing attitudes demand greater tolerance in sentencing 'adult persons for private consensual acts of intimacy'); 548B (can 'private sexual intimacy per se between consenting adult males' ever cause harm to society?); 549A (the court did not recognise a fundamental right to homosexual acts of consensual sodomy *even in circumstances of privacy*) my italics; 550A-D (endorsing Blackmun's views in *Bowers v Hardwick*; 551J-552B (the right to privacy 'is certainly relevant in the field of the criminal law'); 552H ('I would stress this judgment deals solely with the case of homosexual acts performed in private by consenting male adults'.)

With its excessive focus on the private nature of the act under discussion the court inadvertently reinforces and reiterates the idea that homosexuals are different, something less, something worth protecting as long as it stays in private. It reinforces the idea that homosexual intimacy is shameful or improper; that it is tolerable as long as it is confined to the bedroom.

A much cruder version of the same phenomenon emerged around the issue of adoption rights for homosexual parents. When a gay couple were given permission to foster a baby who

have to accept the rigid identity imposed on us. If we accept that homosexual identity is a mutable, shifting, plastic and volatile concept, and not a fixed and immutable category of gender, we must continually aim to deconstruct the constructed nature of our identities to prevent the legal discourse from blindly accepting 'as given' a specific idea of homosexual identity. In fact, when we engage in the legal discourse, we must continually expose the arbitrary nature of the identities imposed on us and grasp the chance to inscribe our own bodies with new meanings. As I will show below, the inclusion of sexual orientation in the Constitution opens up vast possibilities for us to engage in the creation of our own identities.<sup>107</sup>

This is borne out by the three minority decisions in *Egan*, which are in sharp contrast to the approach taken by the majority. These judgments explicitly acknowledge the fact that the case turns around a minority group, a group of people classified as homosexual.<sup>108</sup> Acknowledging a category of people who have been branded and in turn have branded themselves as 'homosexual' seems to make all the difference, allowing the court to look past the stereotyping and prejudice.

L'Heureux-Dube J found that s 15 will be violated where it can be shown that: (1) there is a legislative distinction; (2) that this distinction results in a denial of one of the four equality rights on the basis of the rights of the claimant's membership in an identifiable group; and (3) that this distinction is discriminatory within the meaning of s 15.<sup>109</sup> A distinction is discriminatory where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.<sup>110</sup> In making a finding on the above matters, the court must consider two categories of factors: (1) the nature of the group adversely affected by the distinction; and (2) the nature of

had tested HIV positive but later tested negative, they were told they would not make suitable parents. Said Child Commissioner Johan Bisschoff: 'I have nothing against them being homosexual and, according to the new Constitution, we cannot be prejudiced, but I do not believe a homosexual couple provides the ideal environment for a child to grow up in.' He said the couple would not be able 'to provide a mother figure or role model for the child' and that the child would grow up 'confused' because of their sexual orientation. See 'Gays may lose baby boy - now that he's not dying' *Sunday Independent* 27 August 1995. See also 'Lesbian couple gets first official adoption' *Mail & Guardian* August 11 to 17 1995.

107 See Goldstein op cit note 2 at 1797.

108 648F (per L'Heureux-Dube J); 656H, 669H (per Cory J).

109 638B-C.

110 638D-E. See also 632C-E, where the court states:

'At the heart of s 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving. A person or a group of persons has been discriminated against within the meaning of s 15 of the Charter when members of the group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.'



the interest adversely affected by the distinction.<sup>111</sup> The more socially vulnerable the affected group and the more fundamental to our popular conception of personhood the characteristic which forms the basis for the distinction, the more likely that the distinction will be discriminatory.<sup>112</sup>

In short, one should simply ask: Does this distinction discriminate against a group of people?<sup>113</sup> Declaring the impugned legislation in violation of s 15, L'Heureux-Dube J found that the legislative distinction excluded the rights of the claimants because they were 'homosexuals'.<sup>114</sup> The distinction drawn here is capable of promoting or perpetuating a view that the appellants are, 'by virtue of their homosexuality, less capable or less worthy of recognition or value as human beings'.<sup>115</sup> Homosexuals are a highly socially vulnerable group, in that they have suffered considerable historical disadvantage, stereotyping, marginalization and stigmatization within Canadian society. In addition to being homosexual, the individuals directly affected by the distinction are all, by definition, also elderly and poor. 'They are therefore at the margins of an already marginalized group within society.'<sup>116</sup> The complete exclusion from this program of same-sex couples has 'a significant discriminatory impact' in terms of perpetuating prejudice, stereotyping, and marginalization of same sex couples, and homosexuals and lesbians individually.<sup>117</sup> It may have serious detrimental effects upon the sense of self-worth and dignity of the members of a group because it stigmatizes them.<sup>118</sup>

What the judge L'Heureux-Dube is doing is singling out the homosexual group as vulnerable exactly because of the fact that members of this group have been branded as 'different'. The judge deconstructs the homosexual identity and this allows the minority to question the stereotypes on which the majority relied to justify their decision.<sup>119</sup> This leads us to the second major insight revealed in the *Egan*

111 638H.

112 640D-E.

113 646G-H.

114 648F. The judge explicitly frames the issue in terms of an identifiable group:

'... I prefer to analyze the problem from the point of view of the group actually affected by the distinction, rather than in the light of the somewhat illusory neutrality afforded by speaking of the ground of "sexual orientation".'

115 648G (my emphasis).

116 649A-B.

117 652A.

118 Per Cory J, 669D.

119 According to the judgment, 'justifying this discrimination by referring to the supposed non-procreative nature of homosexual relationships is dangerously reminiscent of the type of biologically biased arguments' that the court has rejected (650G-H). Furthermore, the presumption that same-sex relationships are somehow less interdependent than opposite-sex relationships is, in itself, 'a fruit of stereotype rather than one of demonstrable empirical reality'.

In his dissenting decision Cory J is more clear in his explanation of the importance of the homosexual identity. Although the same-sex relationship is not necessarily the defining characteristic of being homosexual, only homosexual individuals will form a part of a same-sex common law couple. It is the sexual orientation of the individual members involved which

case: it is not enough to rally around one's homosexual identity; it is also essential to challenge the content of that identity, to expose the stereotypes and stigmatization which have traditionally formed part of that identity, to point out to the court the constructed nature of that identity and to show to the court that protection is necessary exactly because of this 'marginalization'. Because a judge's understanding of homosexuality determines to a great extent his or her views of its proper treatment under the law, it is essential to confront the stereotypical understandings prevalent among the population, including judges.<sup>120</sup>

The minority decision explicitly recognises a discrete and insular minority of homosexuals as a socially vulnerable group which has suffered marginalization, and stigmatization. They afford protection to this group, because of the specific history of marginalization, not because of the acts they perform or the desires they feel in terms of their sexual orientation only, but because they form part of an identifiable minority group worthy of protection.

## CONCLUSION

The inclusion of a sexual orientation clause in South Africa's interim Constitution will influence how gay men and lesbians are viewed and how we view ourselves. It dramatically inserts the issue of sexual orientation into the legal and political discourse, makes visible a specific form of oppression which have more or less always been hidden and forms part of the interplay of identity construction and the law. This does not mean that we will all suddenly be accepted by heterosexual society, that homosexuality will be 'normalised', 'neutralised', made redundant. It does however, have the potential to open up the discourse on the fluid, plastic, homosexual identity. It opens up a front for resistance.

If we accept that the role of law in constituting persons is to provide a forum within which to deal with the conflicts over who they shall be understood to be, it becomes clear that the sexual orientation clause opens up the body as a 'sight of struggle' in dynamic new ways. A constitutional action based on sexual orientation protection will affect the way we are seen and the way we see ourselves, whether the action is successful or not. If we keep in mind my warning on the necessity to confront homosexual stereotypes and to deconstruct homosexual identity whenever we engage with the law, it becomes clear that litigation around sexual orientation issues holds a potentially rich ore to be mined in the process of reconstructing our sexual identities. The law, as an instrument

leads to the formation of the homosexual couple. The sexual orientation of the individual members cannot be divorced from the homosexual couple (672D). But homosexuals, whether as individuals or couples, form an identifiable minority, who have suffered and continue to suffer serious social, political and economic disadvantage (675D).

120 Goldstein op cit note 2 at 1796-1804.

and an effect of power, will speak of the body in different ways, ways that might open up and change the way homosexuality is seen. The potential for the opening up of the discourse is not merely situated in the power of the law, but, equally, situated in the power of those who engage the law.

As this process filters through, it has the potential of empowering men and women who experience same-sex desire and take part in same-sex acts, to revisit the idea of who they are, how they are described and how they describe themselves. It makes possible a legal strategy that goes beyond rights-consciousness, a strategy that focuses upon expanding political consciousness through using the legal system to increase people's sense of personal and political power.<sup>121</sup> Especially for the historically disempowered, the 'conferring' of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that elevates one's status from human body to social being.<sup>122</sup> Already since the adoption of the interim Constitution 43 gay and lesbian organisations have come together as the National Coalition for Gay and Lesbian Equality to organise politically to retain the clause in the Constitution and to challenge the legal discrimination. And identity, not as expressions of secret essences, but as self-creations laid out by history, seems necessary in the modern world as starting-points for a politics around sexuality.<sup>123</sup>

I would therefore argue that gay men, lesbians and bisexuals must organize insistently around their stigmatized identities in order to remain players in the social process of giving those identities meaning, and in order to consolidate a recognizable 'minority' movement in pluralistic politics.<sup>124</sup> As a black drag queen said at the 1994 gay pride march in Johannesburg: 'Darling, it means sweet motherfuck-all. You can rape me, rob me – what am I going to do when you attack me? Wave the Constitution in your face? I'm just a nobody black queen [...] But you know what? Ever since I heard about that Constitution, I feel free inside.'<sup>125</sup>

121 Peter Gabel and Paul Harris 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' in Allan C Hutchinson (ed) *Critical Legal Studies* (1989) 303-4. Gable and Harris indicate the limits of rights consciousness. The liberal-legalist view is that powerless groups in society can gradually improve their position by getting more rights. Rights-consciousness in the long run tends to reinforce alienation and powerlessness. See also Patricia Williams *The Alchemy of Race and Rights* (1992) 150, where she contends that one's sense of empowerment defines one's relation to the law, in terms of trust/distrust, formality/informality, or rights/no rights.

122 Williams op cit note 121 at 153.

123 Weeks op cit note 3 at 47.

124 Halley op cit note 2 at 1771.

125 A black drag queen at the 1994 Johannesburg gay pride March, quoted by Mark Gevisser in an article 'Cry Freedom' which appeared in the July 1995 edition of *Attitude*.