

# South Africa

## Constitutional Authority and its Limitations: The Politics of Sexuality in South Africa

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*“While the newly enfranchised have much to gain by supporting their government, they also have much to lose.” Adebe Zegeye (2001)*

### **A history of the future: Constitutional rights**

South Africa’s Constitutional Court is housed in an architecturally innovative complex on Constitution Hill, a 100-acre site in central Johannesburg. The site is adjacent to Hillbrow, a neighborhood of high-rise apartment buildings into which are crowded thousands of migrants from across the country and the continent. This is one of the country’s most densely populated, cosmopolitan and severely blighted urban areas. From its position atop Constitution Hill, the Court offers views of Hillbrow’s high-rises and the distant northern suburbs where the established white elite and increasing numbers of newly affluent non-white South Africans live. Thus, while the light-filled, colorful and contemporary Constitutional Court buildings reflect the progressive and optimistic vision of post-apartheid South Africa the location is a reminder of the deeply entrenched inequalities that continue to define the rights of the majority of people in the country and the continent.

From the late 1800s to 1983 Constitution Hill was the location of Johannesburg's central prison, the remains of which now lie in the shadow of the new court buildings. Former prison buildings include a fort built by the Boers (descendants of Dutch settlers) in the late 1800s to defend themselves against the thousands of men and women who arrived following the discovery of the area's expansive gold deposits. Following the British victories in the Boer Wars and the colonization of the Boer republics of Transvaal and the Orange Free State in the early 1900s, the fort became a prison. Until separate native (black African) and women's jails were completed the fort only housed white male prisoners. Prisoners and non-prisoners diagnosed with venereal infections were detained in a separate facility on the site. Bricks from some of the prison buildings were incorporated into the new Constitutional Court buildings, literally investing the complex with the histories of prior judicial systems. The remaining prison buildings have been, or soon will be, turned into museums, shops, restaurants, and government or NGO offices. The former woman's jail, for example, is now home to the country's Commission on Gender Equality.

Among the thousands of political activists who did time in the prison were Nelson Mandela, Winnie Mandela, Mahatma Gandhi, Albert Luthuli, Fatima Meer, and Joe Slovo. However, unlike the prison on Robben Island, which only held political prisoners, the Johannesburg central prison mostly housed "common criminals." A large percentage of inmates were guilty of transgressing apartheid laws limiting movement, affiliation, commerce, and sexuality such as "pass" offenders (Black Africans without permission to be in the city's white areas), curfew breakers, women who illegally brewed beer, and men and women arrested for prostitution, homosexual behavior, or for having sex with someone of a different race.

The Constitutional Court buildings alternately integrate and contrast old and new structures thus signaling both a break with apartheid-era injustices as well as a confrontation with their persistent legacy. The Court reflects this as it strives to establish new precedents out of the country's deep fractures. The competing discursive claims and worsening social and material disparities that define sexuality and gender systems frequently renew these fractures. The distances between constitutional principles and the norms of the majority are especially wide in these cases.

The South African constitution invites contradictions. A prime example is the tension between the rights to “freedom and security of the person” and those protecting “cultural, religious and linguistic communities.” The former include the right to “bodily integrity,” such as the right “to make decisions concerning reproduction,” while the latter guarantee the right “to enjoy one’s culture and religion” and “to form, join, and maintain cultural, religious, and linguistic associations and other organs of civil society.” Political, religious and community leaders appeal to these rights in debates about abortion, traditional circumcision rites, virginity testing, and medical treatment for persons living with HIV/AIDS. Some of these debates have already reached the country’s highest courts and many others are working their way up the judicial hierarchy.

A second difficulty with the constitution is the remedies it suggests for past injustices. The discussion of property rights, for example, assures redress for persons or communities “whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices” yet suggests that tenure or compensation will only be “to the extent provided by an Act of Parliament.” The same section explicitly excludes land tenure claims prior to June 19, 1913 thereby protecting unjust ownership rights to lands that were illegitimately seized prior to that date. Since land ownership by way of inheritance is often gender based, these sections of the constitution are of particular concern to the country’s women’s movement.

The ambiguity in sections of the constitution is a legacy of the drafting process, which consisted of submissions by ordinary citizens, civil society groups, and political parties within and outside of the Constitutional Assembly. The political landscape changed dramatically in the years leading up to South Africa’s first democratic elections; coalitions formed in the liberation struggle rapidly reorganized into highly-motivated interest groups, such as the cross-party Women’s League and the National Coalition for Gay and Lesbian Equity, that made the development of the constitution their primary concern (Ballard et al., 2006). Although these groups played extra-parliamentary roles, their long-standing alliances with political representatives, many of whom were resistance leaders prior to entering parliament, ensured a considerable level of influence in the Constitutional Assembly.

Thus, even though Nelson Mandela’s African National Congress (ANC) won the first democratic elections in 1994, it could not dominate constitutional talks but had to negotiate a

document that would embrace competing visions. There were three major sets of challenging political demands: the National Party, which ruled in the apartheid era, emphasized group rights and protection of racial and cultural minorities; the predominantly Zulu Inkatha Freedom Party called for a federalist structure that would guarantee regional autonomy in its home province, KwaZulu-Natal; and right-wing groups wanted a *Volkstaat* (homeland) for the most conservative segment of the Afrikaner population. These demands were softened in the negotiation process by the inclusion of protections — like those afforded cultural, linguistic, and religious groups — resulting in a constitutional flexibility that, for Zegeye (2001), registers a commitment to a democratic political system willing to embrace multiple identities. The pull between the central government and racial, cultural, linguistic, ethnic, and ideological minorities has been kept in check up to this point by the ANC's national popularity. Nevertheless, divisions between these groups, including hints of nationalist desires by some, are hard to ignore.

The vague wording in sections of the constitution was also strategic; rather than jeopardizing the drafting process by debating contentious moral issues (such as abortion), the parties sought to ensure themselves sufficient leverage to influence interpretations and application of constitutional principles in the legislative and judiciary branches of government (Hassim, 2006a). A two-thirds legislative majority and support from each of the country's nine provincial governments are required to amend the constitution, which encourages cooperative and coalitional politics while offering an important level of protection for minorities.

Despite its vagueness in places, the constitution unequivocally affirms human and citizenship rights. The values expressed in the opening paragraphs of the document include: “human dignity, the achievement of equality, and the advancement of human rights and freedoms,” “non-racialism and non-sexism,” and “a common South African citizenship.” These principles encourage a nation of equal citizens with rights whose patriotic attachment is to shared political practices and values rather than to narrow nationalist agendas (Zegeye, 2001). The terms of citizenship are systematically elaborated in the 33 sections of the “Bill of Rights” — the heart of the document and the section used to justify claims that South Africa has the most progressive constitution in the world.

While all rights affect sexuality and gender rights, the following have featured significantly in sexuality-related court rulings, legislation, and advocacy campaigns:

1. *Right to equality* (section 9) protects against discrimination on the grounds of “race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.”
2. *Inherent dignity* (section 10) and the *right to life* (section 11) are absolute rights.
3. *Right to bodily and psychological integrity* (section 12) includes the right “to make decisions concerning reproduction,” “to security and control over the body,” and, “not to be subject to medical or scientific experiments without . . . informed consent.”
4. *Privacy rights* (section 14) extend to person, home, property and communications.
5. *Freedom of expression* (section 16) is guaranteed for the press and other media, information and ideas, artistic creativity, and academic freedom and freedom of scientific research. It does not extend to the “advocacy of hatred that is based on race, ethnicity, gender, or religion.”
6. *Right to choose one’s trade, occupation or profession* (section 22).
7. *Right to health care* (section 27) includes access to “health-care services, including reproductive health care.”
8. *Children’s rights* (section 28) include access to “basic nutrition, shelter, basic health-care services and social services,” and protection from “maltreatment, neglect, abuse or degradation . . . [and] exploitative labor practices.”
9. *Education* (section 29) in one or more of the country’s 11 official languages, taking into account “equity,” “practicability,” and “the need to redress the results of past racially discriminatory laws and practices.”
10. *Right to access of information* (section 32) held by the state and any information “that is held by another person and that is required for the exercise or protection of any rights.”
11. *Language, cultural, and religious rights* (sections 30 and 31).
12. *The rights of the arrested, detained, and accused persons* (section 35) are among the most extensive and detailed and include rights to a fair trial, human dignity, and, “at state expense,” provision of “adequate accommodation, nutrition, reading material, and medical treatment.”

On the basis of these rights, the Constitutional Court has handed down judgments in a number of landmark cases. The first of these, *State v. Makwanyane*, concerned the constitu-

tionality of the death penalty. The death penalty is a potent metaphor for the brutal racism of the apartheid-era legal system, which held murder, rape, aggravated robbery and housebreaking, and treason to be capital crimes. The sentence was often handed down — 537 people were hanged between 1985 and mid-1988, a disproportionate number of who were black Africans (Amnesty International, 1989; Devenish, 1990). This disparity is clear in the proportions of white and black men executed following their convictions for raping women of another race. Between 1947 and 1966, for instance, none of the 288 white people convicted of raping black people received the death penalty, yet 122 of the 844 Black Africans convicted of raping whites were hanged (Rule and Mncwango, 2006). In *State v. Makwanyane* the Court's unanimous ruling that the death penalty is unconstitutional was the clearest confirmation possible that the racist South African police state was officially over. Although not explicitly concerned with sexuality, the limit this decision places on the state's power over the bodies of its citizens provides a crucial foundation for the protection of the rights to bodily integrity, dignity, and life, each of which is integral to gender and sexual rights.

No official executions were performed in the Johannesburg central prison — they took place north of Johannesburg in the central prison in Pretoria, the country's administrative capital. But many other forms of violence occurred at the Johannesburg central prison, much of which, as former inmates attest, was explicitly sexual or clearly sexualized. Black male prisoners, for instance, were frequently required to do the *tauza*, a naked "dance" designed to show guards they had nothing concealed in their anuses. Women were subject to similar humiliations as recorded by anti-apartheid activist Fatima Meer who writes of seeing naked black African women having their vaginas searched for contraband (Gevisser, 2004). During her incarceration following the 1976 student uprising, Winnie Mandela organized a protest against rules denying women prisoners the right to wear underwear or to use sanitary napkins. Other accounts of life in the prison tell of the rape of both men and women by prison workers and fellow inmates. To these must be added the testimony given to the country's Truth and Reconciliation Commission in the late 1990s — survivors, victims' families, and perpetrators told of how sexual violence was used to intimidate, torture, humiliate, and kill anti-apartheid activists in prisons and other detention facilities across the country.

The manipulation of sexuality for the purposes of social control did not only occur in these facilities. As in the colonial period, sexual control pervaded the apartheid system. The gov-

ernment's Afrikaner majority, descendants of early Dutch and Huguenot settlers, applied a deep and rigid Calvinist morality to the colonial system it inherited. This moral code, like the policy of white supremacy, was justified by idiosyncratic interpretations of selected biblical passages. This mix of religious and imperialist morality channeled the white minority's anxieties (and fantasies) about "rapacious" black sexuality into passionate support for the apartheid system. The Prohibition of Mixed Marriages Act and the Immorality Act were intended to protect and preserve the "purity" of the white race and together formed one of the four legislative pillars of the apartheid system. The other key pieces of apartheid legislation were the Population Register, which defined the racial-classification system, and the Group Areas Act and the Reservation of Separate Amenities Act, which together segregated the entire country and its institutions along racial lines, directing where citizens could live, work, travel, go to school, engage in commerce, receive medical care, be imprisoned, be entertained, participate in or watch sports, and so forth.

The racial geography forced black men and women seeking work to migrate to the predominantly white urban centers, thereby continuing the migratory labor system established by the British colonial administrators to support the country's industrial sector. As a result, millions of black men spent the majority of their adult lives housed in all-male hostels adjacent to gold mines or factories, while women remained in the rural areas, or lived in townships on the outskirts of cities or in small rooms on their employers' properties working as cooks, nannies, and cleaners. The impact of this labor system on black families, and the sexual economies it promoted, are immeasurable.

Legislation governed almost every other sexual domain. Draconian censorship laws ensured that even the mildest sexual content was removed from all forms of media. Sex work and pornography were banned and state propaganda equated left-wing politics with sexual perversion in order to vilify individual activists and entire organizations. Homosexuality was criminalized for both men and women with sex between an adult and person of the same sex who was 19 years or younger being a separate statutory offence. The age of consent for heterosexuals was 16.

In stark contrast to its militant control of most aspects of sexuality, the apartheid government championed the privacy and patriarchal authority of the domestic sphere, showing little concern for sexual violence against women and children unless a black person perpetrated it against a white person. With the certification of the constitution in 2006, this separation between public and private gave way to a regime of sexual regulation that is now, first and foremost, a matter of rights and responsibilities. The gender and sexual rights articulated in the constitution are complemented by the constitutional rights to freedom of expression and assembly, providing a network of intersecting rights that has enabled legislators and judges to defend gender and sexual rights against competing moral claims from religious, cultural, political or other authorities. The Constitutional Court has both provoked and reinforced this trend in the majority of its rulings. The establishment of a regime of sexuality based on citizenship rights has not resulted in gender equity, but it has transformed sex into “a sphere — perhaps even pre-eminently the sphere — within which newfound freedoms are vigorously asserted,” (Posel, p. 55).

Since 1995, individuals, civil society groups, and state institutions have successfully used the constitution to argue for sexual and gender rights. The realization of these rights in the lives of most citizens is hampered, however, by the country’s extraordinarily high rates of gender-based violence and its widespread AIDS epidemic. It is estimated that one rape occurs every 26 seconds in South Africa, and between 1994 and 2002 the incidents of child rape increased by 64 percent, with a total of 31,780 cases reported in the 18 months between January 2000 and July 2001 (*Drum*, November 15, 2001, in Posel, 2004). The HIV prevalence rate is estimated at 11 percent, meaning that approximately 5.5 million of the country’s 45 million people are living with HIV/AIDS. Women account for more than half of the cases (Quin, 2007). Gender-based violence and AIDS are used as platforms for bitter disputes over the legacies of the racist colonial and apartheid systems and political and community leaders frequently blame their political foes for the situation. Members of the ANC government, including President Thabo Mbeki, have disputed the reported prevalence rates, accusing some journalists, activists, and community leaders who have taken up the issue of inflating them. They took these attacks a step further, suggesting that their critics are “still trapped in the multiple ghettos of the apartheid imagination,” an image borrowed from Constitutional Court Justice Albie Sachs, who was describing the challenge of building a post-apartheid society.

## The limits of freedom: Gender-based violence and commercial sex work

The shift in emphasis from privacy to rights has significantly increased public debate regarding sexual violence. The Constitutional Court first addressed the issue in *state v. Baloyi* in 1999, which determined the constitutionality of the 1993 Prevention of Family Violence Act. Justice Sachs argued that the “hidden and repetitive” nature of domestic violence gave the state the right to act proactively as it did when it passed the law. The gender-specific quality of such violence, he said, “reflects and reinforces patriarchal domination, challenges the non-sexist foundations of the constitution and violates the right to equality.” The state’s potential (and potentially troubling) reach was further elaborated in *Carmichele v. Minister of Safety and Security* in 2001. Carmichele sued the minister for damages resulting from a brutal attack on her by a man released from custody despite the fact that he was awaiting trial for attempted rape. In their unanimous decision supporting the applicant’s case, the justices held that the constitution obliges the state to prevent gender-based discrimination, protect the dignity, freedom, and security of women, and ensure that women are free of the threat of sexual violence.

To date, none of the obligations listed in *Carmichele v. Minister of Safety and Security* have been successfully fulfilled. This is not for lack of legislative action, however. Since the country’s 1995 ratification of the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), a slew of policy and legislative initiative regarding sexual violence has come before parliament. In 1988 parliament passed the Domestic Violence Act, regarded as one of the most progressive in the world. The act expands the definition of domestic violence and provides for legal protection orders in any domestic relationship (Cooper et al., 2004). In 2002 the government approved the provision of HIV post-exposure prophylaxis to rape survivors through the public-sector health services, and in 2004 it initiated a review of sexual assault legislation in order to amend the definition of rape and to enforce heavier sentences for convicted rapists. Critics have justifiably argued that without enforcement or widespread access to resources these initiatives are pointless.

Gender-based violence is one of the greatest social crises facing the country, for in addition to the extreme suffering it causes, in and of itself, it also fuels other crises, most notably the

AIDS epidemic. Violence against women and girls makes it impossible for them to assume the rights and responsibilities of citizenship, undermining the constitutional recognition of women's equality (Bentley and Brookes, 2005). Practically every organization in the country committed to gender and sexual rights has, like the Constitutional Court, recognized the fundamental harm gender-based violence does to democratic principles. But these condemnations only underscore the fact that "hortatory conviction" has limitations, as the statistics demonstrate (Bennett, 2005).

The Law Reform Commission estimates there are 1.7 million rapes per year but on average only 54,000 rape survivors report the crime to the police. Even with this under-reporting, half of all cases before South African courts are for rape (National Prosecuting Authority in Smith, 2004). According to South African Police Service crime statistics on reported rapes there were 113.7 rapes reported per 100,000 of the population in 2003 to 2004. In 1994 to 1995, the rate was 115.3 per 100,000 and in the intervening years the rate has gone as high as 126.7 per 100,000 (1996-1997), with the average over the 10 years being 107.96 per 100,000. In other words, there has been no reduction in reported rapes over the first constitutional decade. Rather, the number of reports has increased by 17.8 percent during that period.

In a study of coercive sex among young women aged 12-17, researchers with the AIDS prevention project Love Life (2000, p. 19) found that 39 percent of respondents said they had been forced to have sex. Thirty-three percent said they were afraid of saying no to sex and 55 percent agreed with the statement, "There are times I don't want to have sex but I do because my boyfriend insists on having sex." As these results indicate, many intimate relationships are characterized by violence. Results from a 2003 survey by South Africa's Human Sciences Research Council (HSRC) reveal that nearly 20 percent of all South Africans have experienced violent physical assault in their domestic relationships, either as perpetrators or victims, with women twice as likely as men to be the victims (Dawes, 2004).

In many cases, domestic violence becomes lethal. Vetten (1996) estimates that in the province of Gauteng, where Johannesburg is located, every six days a woman is murdered by her intimate partner. Using data from a sample of 25 mortuaries across the country, Matthews et al. (2004) estimate that 50.3 percent of female homicides in 1999 were committed by the

victim's intimate partner. Nationally, an average of one woman is killed every six hours by her current or ex-husband or boyfriend, same-sex partner, or current, rejected, or would-be lover. The rate of reported murders in South Africa has declined from 66.9 per 100,000 in 1994-1995 to 42.7 per 100,000 in 2003-2004 (23.7% overall reduction), but with an average of 50 murders per day, South Africa still has the second highest murder rate in the world (McGreal, 2007).

The level of violent crime in South Africa has inflamed national debate on a broad range of concerns. When in 2004 the journalist and rape survivor Charlene Smith described rape as “a way of life” in South Africa, President Mbeki publicly vilified her. In an article written for the ANC's website, the president accused Smith of portraying “our cultures, traditions and religions as Africans [in ways that] inherently make every African man a potential rapist . . . [a] view which defines the African people as barbaric savages.” He said the panic regarding crime in South Africa confirmed, “the psychological residue of apartheid has produced a psychosis among some of us such that, to this day, they do not believe that our non-racial democracy will survive and succeed,” (quoted by BBC, 2004, May 10). In an interview conducted by the South African Broadcasting Corporation in early 2007, President Mbeki again played down reports of high levels of fear about crime. He was criticized for these statements shortly afterwards when the African Union presented him with a report on good governance in which it warned that crime, particularly against women and children, was undermining South Africa's democracy (McGreal, 2007). In his most recent State of the Nation speech, delivered on February 11, 2007, Mbeki cautiously acknowledged the country's crime problem and outlined a number of new initiatives to deal with sexual offences, including funding for more courts.

Given the Constitutional Court's position on gender-based violence and its assertions concerning government's responsibility in the matter, the judgment handed down in *State v. Jordan* (2002) is surprising. The case addressed the constitutionality of laws criminalizing sex work, which the justices unanimously determined did not infringe on the rights to human dignity and economic activity. They also concluded that even if the laws did limit the right to privacy, such limitation was “justifiable.” A minority of the justices argued that because the law considers the patrons of sex workers to be accomplices rather than equally culpa-

ble it “reinforces sexual double standards and perpetuates gender stereotypes in a manner impermissible in a society committed to advancing gender equality.” The implied remedy in this argument is the increased criminalization of sex work. At various points in their opinions the justices emphasized that the criminal status of sex work is determined by the legislature, suggesting that the court would look favorably on decriminalization but would require the legislature to initiate the process.

Advocacy groups, like the Point Road Women’s Association in Durban and the Cape Town-based Sex Worker Education and Advocacy Taskforce (SWEAT), have argued that criminalizing sex work increases women’s vulnerabilities and they are basing their current campaigns on the public-health benefits of legalization. There are historical precedents in South Africa for public-health approaches to the issue. One of the most notable is the Cape parliament’s colonial-era 1885 Contagious Diseases Act, which made provision for the establishment of disease surveillance mechanisms in certain towns, including the registration of sex workers and compulsory medical examinations. Sex work is currently criminalized under the 1957 Sexual Offences Act. Discussions of the public benefits of decriminalization have resurfaced repeatedly over the past 60 years, particularly in light of the fact that the sex-work industry continued both within the country and in neighboring states (known as the “pleasure periphery”). Given the racist nature of the public-health system, and the fact that the majority of sex workers were black and their clients were white, these discussions were closely attached to the state’s interest in population control. For example, one Cape Town City Council member suggested that if men had access to state brothels, birth rates in the area would drop (Wojcicki, 2003).

Basing legalization on public health arguments is risky, as implied by Jayne Arnott, SWEAT Director, and Althea Macquene, SWEAT Advocacy and Lobbying Coordinator, in their 2006 submission to the South African Law Commission’s Project on the Sexual Offences Act. In the section on sex work and HIV/AIDS Arnott and Macquene describe the abuse of sex workers resulting from “invasive interventions by researchers and pilot program related to HIV/AIDS,” asserting that sex workers are not protected by the public-health system but actually need protection from it. They report cases of researchers taking the police with them to find sex workers on the streets at night and criticize the almost exclusive concentra-

tion on street-based sex workers, which undoubtedly skews the research data. Their biggest concern is that “these interventions, particularly the research, [do] not seem to be leaving anything behind in terms of assistance.” From this report it would appear that some public-health researchers are reinforcing the stigma imposed on sex workers, thereby reinforcing criminalization rather than helping to remove it.

Other gender-rights issues have overwhelmed advocacy for the rights of sex workers. Only a few of the country’s women’s rights groups have made sex-worker rights one of their core concerns, and the Commission on Gender Equality’s 1998 position paper advocating for legalization on the basis of the constitution’s human rights and employment rights clauses failed to provide the momentum required to move the issue to the center of the political stage. When viewed with an understanding of how the women’s movement has developed since the certification of the constitution, however, these responses are not as inconsistent as they may at first appear — rather, they are symptomatic of broad trends in the relationship between civil society and the government as opposed to being a sign of a specific constituency’s commitment to a particular concern.<sup>1</sup>

The Women’s Charter for Effective Equality, drawn up by the Women’s National Coalition and approved at its national conference on February 27, 1994, calls for the decriminalization of sex work and the protection of sex workers’ health and safety. If used to interpret the Bill of Rights, the Charter’s detailed and precise rights claims will ensure a robust women’s-rights agenda. However, a long-term view of the South African women’s movement suggests that apart from the period in the early 1990s, when the Women’s National Coalition was in operation, the movement is relatively weak, favoring “inclusive” rather than “transformative” politics (Hassim, 2006b). The emphasis on inclusion has ensured great success with women’s enfranchisement, parliamentary representation, and changes in electoral systems and quotas. On the other hand this strategy has stunted initiatives in support of structural transformations, such as social movements of the poor.

<sup>1</sup> For further reports on sex workers as targets of HIV/AIDS policies, see also in this publication: Vianna, A. R. B., & Carrara, S., *Sexual politics in Brazil: A case study*, pp. 37-39; Ramasubban, R., *Culture, politics, and discourses on sexuality: A history of resistance to the anti-sodomy law in India*, pp. 98-99, 107, 114-118; Le Minh, G., & Nguyen, T. M. H., *From family planning to HIV/AIDS in Vietnam: Shifting priorities, remaining gaps*, pp. 292, 299-302.

The gains from the “inclusive” strategy were substantial and rapid. More than one million more women than men registered to vote in the 1999 elections, and 29.8 percent of the seats in the national legislature went to women, 27 percent more than in the previous election (Vincent, 1999). The ANC imposed on itself a minimum one-third quota of women candidates on the national list and President Mbeki has committed himself to having women hold at least half of the cabinet posts in his government. The ANC has also distinguished itself from other parties by articulating a women’s platform. It supports “legal guarantees of women’s rights, free health care for pregnant women and for children, the establishment of special courts to hear cases of abuse against women and children, safeguards for the rights of survivors of abuse, provision of victims of abuse with shelter and counseling, and full equality for lesbian and gay people,” (Vincent, 1999, p. 32).

These accomplishments notwithstanding, the costs of the “inclusive” strategy have been substantial. Most notable is the fragmentation and stratification of women’s civil society organizations post-1994. NGOs devoted to the implementation and elaboration of the rights-based democratic framework — like the Gender Advocacy Program and the Gender Research Project at the Center for Applied Legal Studies — have been strengthened, but the movement has been weakened overall by the shift of many of its top leaders to state and bureaucratic positions and a reduction of oppositional politics concerning women’s issues (Hassim, 2006a). The concentration on policy has resulted in an institutionalization of interests and the depoliticization of key issues, most critically the racial and gendered biases in the economy. The strong faith in state policies has resulted in a neglect of everyday practices and social norms, the kinds of “in-depth, micro-discussions of sexuality, gender, and culture” that would, in the words of Bennett lead to the “macro-question” at the heart of gender-based violence: “Why do they do this to us — they are our brothers, fathers, lovers, uncles, husbands, neighbors, co-workers, *amaqabane* [comrades], they are our friends?” (Bennett, 2005, pp. 28-29). But neither legal nor policy discussions are likely to address questions concerning the ontology of gender-based violence and will, therefore, produce a limited set of responses to the problem.

This situation has enabled party allegiances to trump the kinds of collective action required to provoke structural change, which is sustained by party leaders with sufficient authority to

undermine issue-specific or candidate-specific voting patterns or election platforms (Vincent, 1999). Consequently, social movements focused on practical needs — like electricity, water, housing and employment — seldom link these concerns to women’s rights. To illustrate the fractures resulting from party allegiances, Hassim (2006b) describes one of the few recent examples of collective action in defense of women’s economic interests. A few years ago the New Women’s Movement (NWM), which was formed in 1994 to represent the interests of poor women, mobilized women activists to oppose cuts in state maintenance grants proposed by the Lund Committee on Child and Family Support. The Committee was convened to recommend policies based on the government’s White Paper on Social Welfare, which explicitly prioritized poverty reduction. The NWM’s allies in the campaign included Black Sash, a sophisticated, multi-racial, women-led, activist NGO that has been in existence for 50 years and has excellent social justice credentials, including a long-standing collaboration with the ANC Women’s League. After extensive, divisive debate, the ANC Women’s League Western Cape branch asserted that the NWM and Black Sash “represented the interests of relatively privileged colored women” (Hassim, 2006b, pp. 356) and openly supported Geraldine Fraser-Moleketi, the Minister of Welfare who was responsible for implementing the Lund Committee’s recommendations. The episode deepened fractures in the women’s movement along race, class, and political party lines.

The ANC’s inconsistent position on social welfare programs is greatly influenced by the conservative force of neoliberal economic policies, which guides the country’s national and international economic policies. Social justice activists actively criticize these policies and lament their distortion of the government’s commitment to progressive economic policies in the 1990s. Privileged South Africans and government, industry, and economic leaders in the global North, on the other hand, actively support them. Northern states have rewarded South Africa for its peaceful transition to a post-apartheid democratic state and its commitment to neoliberal policies by granting it expansive moral authority and helping to bring it into influential international forums. South African representatives have been appointed to numerous global and transnational bodies, including the board of governors of the IMF and World Bank, Non-Aligned Movement, UN Conference on Trade and Development, Organization of African Unity, Southern African Development Community, and World Commission on Dams. These memberships provide potentially critical forums for the pursuit of

progressive policies globally and the promulgation of liberation narratives from all manner of “apartheids.” The rhetoric used by South African delegates has often been progressive while their actions have frequently tended toward liberal and even conservative positions.

As Mbeki noted in his opening comments at the 2002 United Nations World Summit on Sustainable Development in Johannesburg: “We have converged . . . to confront the social behavior that has . . . produced and entrenches a global system of apartheid. The suffering of the billions who are the victims of this system calls for the same response that drew the peoples of the world into the struggle for the defeat of apartheid in this country.” However, given the economic policies Mbeki has sponsored in South Africa and internationally, especially under the New Partnership for African Development (NEPAD)<sup>2</sup> initiative, it is unclear what he actually means by “global apartheid” or how he intends to redress it. NEPAD has offered half-hearted critiques of structural adjustment programs, calling them a “partial solution.” It has critiqued what it terms “the inadequate attention given to social services” but has both tacitly and directly supported privatization initiatives, the introduction of user fees, and other policies that have depleted social services. NEPAD has also encouraged public-private sector partnership capacity-building programs through the African Development Bank and other regional development institutions, to assist national and sub-national governments in structuring and regulating transactions in the provision of infrastructure and social services. Until April 2002, no trade union, civil society, church, women’s or youth organization, political party, parliamentary group, or other potentially democratic or progressive forces in Africa were consulted and virtually every major African civil society network and organization that analyzed NEPAD attacked the plan’s process, form, and content (Bond, 2004). CODESRIA, the Council for the Development of Social Science Research in Africa, and the Africa branch of the Third World Network, have concluded that NEPAD has a neoliberal economic policy framework. This framework, they charge, repeats the structural adjustment policy packages of the preceding two decades and overlooks the disastrous effects of

<sup>2</sup> The New Partnership for Africa’s Development (NEPAD) describes itself as “a vision and strategic framework for Africa’s renewal” ([www.nepad.org](http://www.nepad.org)). The 37th Summit of the Organization of African Unity (OAU), in July 2001, formally adopted the NEPAD strategic framework for developing an integrated socio-economic development framework for Africa. President Mbeki and his counterparts in Algeria, Egypt, Nigeria, and Senegal, were given the mandate to develop the framework. NEPAD’s key objectives are to: eradicate poverty; place African countries, both individually and collectively, on a path of sustainable growth and development; halt the marginalization of Africa in the globalization process and enhance its full and beneficial integration into the global economy; and accelerate the empowerment of women. Bond (2004, p. 103) considers NEPAD a continuation of the Washington Consensus’ structural adjustment programs, which he describes as “a multifaceted tragedy.”

those policies.<sup>3</sup> It has also excluded the African people from the conception, design, and formulation of the partnership, and has adopted social and economic measures that have contributed to the marginalization of women.

### **Marriage: New traditionalists and old traditions**

The issues discussed so far confirm Posel's (2004, p. 60) observation that, "The constitution has created the spaces for moral and cultural alternatives in the midst of — rather than displacing — the taboos of old." Discomfort with sexuality has not been reduced; rather it has increased and is often expressed with great anger. As Posel implies, sex is indeed far more visible than would have been possible a little over a decade ago. Yet this newfound openness has ardent detractors. Conservative groups, such as Doctors for Life International, Christian Lawyers, Christians for Truth, United Christian Action, Frontline Fellowship, and the Marriage Alliance, have strongly opposed legislation liberalizing sexuality issues. These groups have formed close ties with conservative political parties, particularly the African Christian Democratic Party (ACDP), which was established by the Pentecostal minister, Reverend Dr. Meshoe. ACDP and the South African Pentecostal movement are allied with U.S.-based Pentecostal organizations. Reverend Meshoe, for example, attended the Shekinah Bible Institute in Kingsport, Tennessee, was awarded an Honorary Doctorate by Bethel Christian College in the U.S., and serves as an associate member of that College's Board of Regents.

Steve Swart, one of four ACDP members of parliament, lectures extensively on Pentecostal positions concerning policy and law and writes political analyses for conservative organizations. In a piece posted on the website of Frontline Fellowship, one of the most aggressive conservative organizations in the country, Swart argues that South Africa's "moral degeneracy" is the consequence of the "secular humanist values" enshrined in the constitution, which he likens to France's Declaration of the Rights of Man. While the French document privileges "moral and intellectual relativism," the American Bill of Rights declares, "All men are endowed by their Creator with certain inalienable rights." The absence of a reference to the "Creator" in the South Africa Constitution is "evidence" of the state's secular humanist

<sup>3</sup> For an overview and analysis of these policies, see also in this publication: de Camargo, K., & Mattos, R., Looking for sex in all the wrong places: The silencing of sexuality in the World Bank's public discourse.

leanings and general anti-Christian bias. As further “evidence” of this “bias,” he cites a requirement of the 1996 South African Schools Act that home-schooled children be assessed at their nearest public school and be instructed about multiple faiths. A third sign of this “anti-Christian agenda” is the lack of a provision supporting religious freedom in the 1999 Broadcasting Act since the absence of such a clause makes it easier for broadcasters not to include Christian programming on television and radio stations. The ACDP and its allies have also criticized the 1999 Education Laws Amendment Act because it permits the international reproductive health and rights organization Planned Parenthood to train the country’s life-skills teachers, teaches tolerance for homosexuality and promotes condom use. The Alteration of Sex Description and Sex Status Act (2003), which permits transgender people to alter their sex description in the National Population Register, is considered by ACDP loyalists to be an outgrowth of atheist and evolutionary concepts. They have also criticized the National Gambling Act (1996) and the Lotteries Act (1997) as immoral, and, like their conservative partners in the United States, have opposed the limits on firearm ownership set out in the Firearms Control Act (2000).

The Constitutional Court’s rulings on sexuality have usually further outraged conservative activists. In *Case v. Minister of Safety and Security* (1995), for example, the majority determined that anti-pornography statutes infringe on the right to personal privacy. A minority added that the prohibition also infringes on the right to freedom of expression. While the judgment was a defeat for the conservative lobby, it claimed victory nonetheless because the court affirmed the illegality of child pornography. But the greatest opposition has been to rulings concerning gay and lesbian rights.

The Court’s repeated assertions that gays and lesbians are entitled to all the rights and responsibilities of citizenship, have received considerable attention nationally and internationally. In *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998), the court struck down the criminal prohibition on sodomy between consenting adult men because “this intrusion on the innermost sphere of human life violates the constitutional right to privacy.” And in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* (1999), the court declared a section of the Alien Control Act of 1991 unconstitutional because it omits to give partners in same-sex life partnerships the benefits it extends to

spouses. This ruling effectively made it possible for South Africa's gay and lesbian citizens to sponsor applications for permanent residency made by their alien same-sex partners.

By drawing attention to the term "spouse" in this immigration case, the court alluded to problems with the definition of marriage in the country's common law, an issue it took up directly in the 2005 case, *Minister of Home Affairs and Another v. Fourie and Another (Doctors For Life International and Others, Amicus Curiae)*, which concerned the marriage rights of same-sex couples. The court found the common law definition of marriage inconsistent with the constitution and invalid because it does not permit same-sex couples to enjoy the status, benefits, and responsibilities it accords to heterosexual couples. Combined with a 2002 ruling that gay couples in "permanent same-sex" relationships could adopt children and a 2003 ruling in favor of a case brought by Judge Kathy Satchwell arguing that her lesbian partner should have the same benefits as the married partners of other judges, the court has extended an array of domestic rights to gays and lesbians. Before these judicial advances, some private sector businesses had allowed permanent unmarried partners (including same-sex partners) to be listed as beneficiaries on medical insurance and retirement plans. The court's rulings made these benefits a right of citizenship not just employment.

As observed by Isaack (2006, p. 55), "constitutional challenges on the basis of sexual orientation resulted in the development of an impressive equality jurisprudence" and are a remarkable departure from the way things were under apartheid. Gay and lesbian rights activists who lived through the apartheid years are still "struck with awe at the quantum leap from the antediluvian criminalization of homosexuality under apartheid, to the full citizenship of gays and lesbians under the government of the African National Congress," (Kraak, 2005, p. 119). The apparent lack of a "historically explicable discourse linking the past to the present" gives this shift the appearance of a "miracle" (ibid). Yet tracing such a genealogy is important — evidence of such links helps anchor rights in the country's historical fabric, enables activists to combat traditionalist arguments that non-heterosexual sexualities are "un-African," and contributes to a deeper global understanding of how sex rights may be advanced. Researchers and activists have examined a number of distinct as well as overlapping ideological, historical, and cultural precedents for the current blossoming of LGBT rights in South Africa.

Journalist Mark Gevisser (2000, p. 118) argues, “The ANC elite has a utopian social progressive ideology, influenced largely by the social-democratic movements in the countries that supported its struggle: Sweden, Holland, Britain, Canada, Australia . . . [and while in exile] South African leaders came to understand and accept — and in the case of women, benefit from — the sexual liberation movement.” This ideological base is evident in the histories of suffering of homosexuals under apartheid and the solidarity some gay and lesbian leaders demonstrated with the anti-apartheid struggle. Suffering and solidarity justify claims to the benefits of liberation, as Anglican Archbishop Desmond Tutu argues in a letter he sent to the Constitutional Assembly in June 1995 urging it to include the sexual-orientation clause in the final draft of the constitution. “The apartheid regime enacted laws upon the religious convictions of a minority of the country’s population,” he argues, and these “laws... denied gay and lesbian people their basic human rights and reduced them to social outcasts and criminals in their land of birth.” Tutu and his successor, Njongonkulu Ndungane, have reiterated this argument to the African Anglican church, which, in the words of Lagos Archbishop Peter Akinola, considers homosexuality “unnatural,” “unscriptural,” and “satanic” (Harrison & Seakamela, 2006).

Other attempts to claim the mantle of historical oppression include investigations of the colonial history of the country, which has brought to the fore evidence of the early persecution of “sodomites” by colonial administrators. These cases also confirm the existence of same-sex practices among the country’s indigenous populations. One such case is documented in the narrative film, *Proteus* (Lewis & Greyson, p. 2004), which portrays a long-term sexual and romantic relationship between a Dutch sailor and an indigenous man during their imprisonment on Robben Island in the eighteenth-century. The connection to imprisonment on Robben Island, centuries before it was used to house anti-apartheid political activists, has a symbolic resonance within the post-apartheid national narrative.

Evidence of same-sex behavior among indigenous groups both before and after the colonial period has been used by activists and scholars to rebut claims of a “foreign action imposed on Africa,” in the words of the Islamic leader Sheikh Sharif Ahmed following the passing of the gay marriage bill (Macanda, 2006). Such evidence also contradicts declarations by some activists that black culture is inherently homophobic. “I would argue that it is not homosexu-

ality that is un-African [but] homophobia and exclusion that contravenes African values and systems of belief,” says Isaacks (2006, p. 57). “In the pre-colonial African society, lesbian, gay, and inter-sexed people were culturally accommodated through various practices that were certainly more affirming than any contemporary European practices.”

One of the best examples of the rhetorical harnessing of sexual rights to the country’s core national narrative is found in Justice Sachs’ opinion in the 2005 case, *Minister of Home Affairs and Another v. Fourie and Another (Doctors For Life International and Others, Amicus Curiae)*. “The right [of same-sex couples] to get married represent[s] a major symbolic milestone in their long walk to equality and dignity,” Sachs writes. The phrasing echoes the title of Nelson Mandela’s autobiography, *Long Walk to Freedom*, a “sacred” metaphor in the country’s liberation story.

Equating homophobia with apartheid has had some noticeable international impacts. For example, when the Supreme Judicial Court in the U.S. state of Massachusetts affirmed the right of same-sex couples to marry rather than be satisfied with the “unconstitutional, inferior, and discriminatory status” of civil unions, the Court was presided over by Chief Justice Margaret H. Marshall, a former South African anti-apartheid activist. In her opinion, Justice Marshall referenced apartheid injustices as justification for her support of the rights of all minorities.

The posture of the justices in the Constitutional Court’s first decade has been, in the words of Gevisser (2004, p. 511), “activist and evangelical, they want to be of the people, with the people, and in the people.” Justice Sachs, whose opinions often touch on his understanding of the fundamental aspirations and responsibilities of the country, perhaps best fits this description. A champion of the “indivisibility” of rights, he notes in his opinion in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998) that “human rights are better approached and defended in an integrated rather than dislocated fashion,” and that “inequality is established not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage [and] leads to the scarring of the sense of dignity and self-worth associated with membership of the group...” In his opinion for *Minister of Home Affairs and Another v. Fourie and Another (Doctors For Life International and Others, Amicus Curiae)* (2005) he declares, “Our Constitution represents a radical rupture

with the past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all, for all.” The need, he continues, is “to affirm the character of our society as one based on tolerance and mutual respect. . . . [T]he test of this tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomforting.”

The justices’ personal experiences with the apartheid system may well have informed the direction and tone of their opinions. Chief Justice Pius Langa, for example, was an active ANC member during the years in which it was a banned organization. At age 15 Deputy Chief Justice Dikgang Moseneke was sent to Robben Island to serve a 10-year sentence. And when in exile in Mozambique, Justice Albie Sachs lost an arm and eye when a bomb planted in his car by South African agents exploded.

To some extent every South African is able to draw on his or her first-hand experience of apartheid, for regardless of political affiliation or beliefs one’s entire sense of selfhood, citizenship, and social position was governed by racial inequality. A few benefited from the system and the majority was harmed by it. Neither the beneficiaries nor the victims were unaware of the role racial inequality played in determining their fates — daily life provided numerous reminders of the official mechanisms designed to maintain the symbolic and material privileges of whites, such as riding segregated buses or trains, using different entrances to buildings, or drinking from different public water fountains. But widespread experience with intolerance and exclusion has not necessarily guaranteed the remedy Justice Sachs seeks. The “radical rupture” between past “intolerance and exclusion” and future “equality and respect” is overshadowed by the “radical rupture” between constitutional vision and the realities of South Africans’ daily lives.

The disjuncture between national idealism and everyday belief is documented in the Human Sciences Research Council’s (HSRC) survey, *South African Social Attitudes: Changing Times, Diverse Voices* (Pillay, Roberts, & Rule, 2006). Of the almost 5,000 adults aged 16 and older included in the survey, the majority support capital punishment, with 75 percent either “strongly agreeing” or “agreeing” that the death sentence is an appropriate punishment

for someone convicted of murder. Given this overwhelming support for capital punishment, it is not surprising that several minority political parties include the re-introduction of the death penalty in their platforms. Of the four sexuality-related moral issues included in the survey, premarital sex received the least “traditionalist” or “authoritarian” scores overall, with more than half of the respondents (51%) considering premarital sexual relations between a man and a woman “always wrong,” while only 22 percent consider it “not wrong at all.” It is uphill from there, however, with “traditionalist” rankings increasing for defect-related abortions, income-related abortions and, highest of all, same-sex sexual relations.

Only 21 percent of respondents considered birth defect-related abortions “not wrong at all,” with 56 percent considering them “always wrong.” Opposition is particularly high to “economic hardship” abortions, with 74 percent of black Africans viewing abortion for this reason as “always wrong,” an opinion held by 59 percent of Indians and 57 percent of whites. The ANC and the Democratic Alliance (DA), one of the stronger opposition parties in the South African parliament, both officially support the liberalization of abortion policies, but recent debates suggest deep divisions exist within the parties and could result in a shift in thinking. Representatives of the ACDP strongly oppose abortion and have claimed that many politicians are actually against abortion in principle but voted for the Termination of Pregnancy Act because it was the “politically correct” thing to do (Mkhize, 2004).

The opinion that same-sex adult sexual relationships are “always wrong” is highest among black Africans at 81 percent, while 64 percent of coloreds, 70 percent of whites and 76 percent of Indians hold this opinion. Politicians are polarized on the issue. In response to the Civil Union Bill extending marriage rights to same-sex couples, Jo-Anne Downs, deputy president of the ACDP, said, “South Africa is out of step with the world.” ANC spokesman, Smuts Ngonyama, acknowledged that the proposed law may be “too progressive” for the country and the region but “someone has to show the way and shape the thinking of the continent. We have to keep up globally; we just need to educate our people” (*Afrol News*, 2006, November 16).

The ANC’s members were known to be deeply divided on the bill but were pressured by party whips to vote for it (ibid). The internal schism emerged in comments made by ANC

member, former deputy president, and potential presidential candidate, Jacob Zuma. In a public speech at Heritage Day celebrations in KwaDukuza, historic capitol of the Zulu Kingdom, Zuma said, “When I was growing up an *ungquingili* [sodomite] would not have stood in front of me. I would have knocked him down.” He went on to declare, just weeks before the final vote on the marriage bill, that same-sex marriages are “a disgrace to the nation and to God,” (*Mail and Guardian*, 2006, September 26). Zuma later apologized for his statements but was probably well aware that he had already strengthened his bonds with the cultural traditionalist constituencies that will be among his strongest supporters should he run for the presidency.

The HSRC report dealing with moral issues describes public opinion in South Africa as largely “traditionalist,” adhering to conservative or conventional moral values and beliefs regarding sex, reproduction, and punishment. These positions are derived in large part from religious beliefs, with close to 80 percent of the population claiming affiliation with one Christian sect or another and four to six percent identifying as either Hindu or Muslim (Statistics South Africa, 2007). Religious institutions wield considerable political influence and the ANC government has attempted to maintain the ties it established with churches during the liberation struggle by collaborating on various health and social welfare programs (Rule & Mncwango, 2004). The strain placed on this alliance by the ANC’s decision to initiate an armed struggle against the apartheid regime was tempered by the formation of coalition groups that provided grounds for the struggle beyond the ANC’s. It remains to be seen how the party’s current progressive social policies will be mediated so that moral disagreements do not come to dominate the relationship between church and state. Such disputes will likely register strongly with many of the country’s citizens and would significantly impact sexuality politics.<sup>4</sup>

Once considered President Mbeki’s clear successor, Zuma is now largely excluded from the ANC’s inner circle. He has been implicated in corruption scandals and accused of rape. He was acquitted of the rape charge and the corruption cases were dismissed because of legal technicalities. While these travails have cost him support among some political elit-

<sup>4</sup> For more on the advocacy activities and positions of the Catholic Church and other conservative religious forces in global and local sexuality politics and rights, see also in this publication: Girard, F. Negotiating sexual rights and sexual orientation at the UN; Bahgat, H., & Afifi, W., Sexuality politics in Egypt; Cáceres, C., Cueto, M., & Palomino, N., Sexual and reproductive rights policies in Peru: Unveiling false paradoxes; Nowicka, W., The struggle for abortion rights in Poland.

es, they have provided a platform from which he espouses his particular interweaving of populist liberation rhetoric and traditionalist moral principles held by many in the ANC's lower ranks. His avuncular and leftist-sounding declarations have also increased his support among members of the Committee of South African Trade Unions (COSATU), one of the country's strongest civil society groups whose members have justifiably felt abandoned by the ANC's neoliberal policies.

When still deputy president, Zuma led the country's Moral Regeneration Movement, an initiative of Nelson Mandela in response to requests from some of the country's religious leaders for a greater role in the construction of a post-apartheid society. According to the president's official website (<http://www.thepresidency.gov.za>), the Moral Regeneration Movement is designed to promote "human rights, ethical behavior, and the values enshrined in the constitution." But as its name suggests, the movement proved vulnerable to reactionary conceptions of rights, ethics, and values. Zuma exploited this in speeches that called for disciplinary and punitive remedies for the country's moral degeneration. His appeal to personal responsibility and harsh discipline tapped into a widespread hunger for familiar formulas that favored normative behaviors and traditional values to combat social crises. Zuma's own moral crises appear to have enhanced his stature and he is welcomed with rapturous applause and praise by traditionalists, including conservative Christian Zulus. South Africa is home to a number of nativistic and millenarian Christian sects that emerged in the late nineteenth and early twentieth centuries as part of the "African Reformation" and Zuma is very familiar with their beliefs and conventions (Vilakazi et al., 1986). In his speeches he echoes the "Africanist" churches' combination of indigenous and Christian theologies, which rekindle dreams of an African cultural renaissance while affirming anti-modernist commitments to essential, timeless, and stable moral beliefs and practices.

Appeals to "African-ness" are not new and certainly are not exclusive to conservative religious groups. As an adjective, "African" is applied to tourist experiences, architectural styles, and systems of justice, and although impossible to reconcile, it helps to legitimize the idea of a specifically "African" way of being, believing, and behaving. The cultivation of "African-ness" is very much a part of the country's current nationalist discourse and is used to provide the state with a rationale for its leadership role in Africa as a whole, a project President Mbeki

refers to as “the African Renaissance” (Mbeki, 2002), which suggests a confusing reformation of an African spirit damaged by colonialism and imperialism as well as the construction of a new African future. The ability to claim the “Africanist” mantle is a reward potentially as powerful as claiming victory against apartheid. And many have staked their “Africanist” claims, including the Constitutional Court, which selected as its logo a tree sheltering people to honor the African “tradition of justice under a tree.” According to Justice Sachs (in *Doctors for Life International v. The Speaker of the National Assembly and Others*, 2006), this image has “ancient origins” that pass through the country’s “rich culture of *imbizo*, *lekgotla*, *bosberaad*, and *indaba*,” each a form of community gathering and collective deliberation practiced by one or more of the country’s ethnic, cultural, or tribal groups. A fine line exists between views of culture as products of history, place, politics and the actions of individuals to “form and change their cultural environments through accepting or resisting the norms with which they live,” (Jolly in Manjoo, 2005), and attempts to cultivate nationalist projects in the ideological soils of “traditionalism” and “naturalism,” in short, “essentialism.” Symbols like those used by the court walk this fine line.

According to the HSRC survey, moral traditionalism is most intense among “black South Africans, married people, people with low incomes, people who have not completed high school, and regular attendees of religious meetings” (Rule & Mncwango, 2004, p. 272). The distribution of support for the death contradicts this trend, however, and suggests a situation more complex than is possible to capture even in disaggregated survey data. South Africa’s youth, who are as vibrant and potentially unorthodox as any in the world, are not represented in the survey. It is yet to be seen what the “democracy generation” (children born after 1992) will do in this era of rights.

Notions of “traditionalism” are further complicated by the fact that, despite their conservative opinions, the majority of the population votes for the “liberal” ANC, which has captured 60 to 70 percent of the votes in all three national elections. This suggests a number of possibilities: other incentives are holding voters’ moral concerns in check; voters are more tolerant of diversity than their moral beliefs suggest; or moral debates have yet to assume the political center stage. The Gender Commission’s study of how rural women approached the 1999 elections provides some support for the first of these three options. Respondents

emphasized jobs, education, running water, housing, and the belief that “by voting my family will see change . . . my vote will bring food at home” (Vincent, 1999, p. 34). Whether this will remain the case, as disillusionment with economic progress deepens and politicians begin to appreciate the power of moral debates to mobilize the population, is a significant concern. As Rule and Mncwango (2006, p. 273) caution, there is clearly deep tension between the South African government’s conspicuous attempts “to lead rather than follow public opinion in relation to moral values . . . [and citizens’] dilemmas about whether to follow their beliefs and consciences or whether to abandon these in favor of the state’s enshrined constitutional values.”

There is also a caution in this for those among the “progressive elite” who pursue policy and jurisprudence while neglecting the material needs and desires of the majority of voters. The impact of the government’s neoliberal response to globalization can only underscore this caution. Mbeki in particular has favored neoliberal policies in exchange for capital’s acceptance of black economic empowerment and some affirmative action. As Ballard et al. (2006) note, the primary beneficiaries of these policies are black entrepreneurs as indicated by the increase in the black African proportion of the country’s richest income bracket from nine percent in 1991 to 22 percent in 1996. On the other hand, the country’s Gini coefficient (a measure of inequality) continues to rise. The consequences of this increasing inequality are severe. Unemployment is 36 percent for the overall population and 52 percent for black African women. Poverty is between 45 and 55 percent and about 10 percent of Black Africans are malnourished. Twenty-five percent of black African children are developmentally stunted. Given these conditions, it is not surprising that public trust in the government is eroding — a recent poll indicated that 63 percent of South Africans think their leaders are dishonest (McGreal, 2007).

Many South Africans have distanced themselves from the political and labor organizations they formerly supported and are turning to the rapidly growing number of evangelical and Pentecostal churches established with spiritual, intellectual, and financial help from the evangelical right in the United States. As Gevisser (1997, p. 26) observed just a few years after the first democratic elections: “The further away from the moment of liberation we get, the easier it will be for religious conservatives to mobilize South Africans around their

agendas — agendas that are America’s most noxious export.” Economic hardship and crime-induced fear provide fertile ground for such shifts in allegiance.

The Constitutional Court justices are clearly cognizant of the fact that “citizens are confronted with a set of human rights entitling them and their fellow countrymen and women to engage in practices that are contrary to their upbringing, socialization, and religious beliefs,” (Gevisser, 1997, p. 273). In his opinion for *Minister of Home Affairs and Another v. Fourie and Another (Doctors For Life International and Others, Amicus Curiae)* in 2005, Justice Sachs acknowledges the volatile relationship between secular and sacred: “Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues that have caused deep schisms within religious bodies . . . The function of the Court is to recognize the sphere which each [secular and sacred] inhabits, not to force the one into the sphere of the other.”

In the same opinion he admits that, by itself, the law can do little to eliminate stereotyping and prejudice; the law, he said, “serves as a great teacher, establishes public norms that become assimilated into daily life, and protects vulnerable people from unjust marginalization and abuse.” In other words, from its perch on Constitution Hill, the Constitutional Court may witness the struggle for justice but finds that it can do little more than suggest remedies to redress the lack of food, housing, health, and security.

A useful place to test Sachs’ optimism is at the point where “cultural rights,” such as those governing marriage and property, confront other rights. This is a realm of deep concern in South Africa where many citizens identify as members of distinct religious/cultural communities whose “customs” were codified into law by colonial, and later white governments. The Constitutional Court has attempted to treat customs in a manner sensitive to both individual and collective rights. However, in the 2004 cases *Bhe and Others v. The Magistrate, Khayelitsha and Others*, *Shibi v. Sithole and Others*, and *South African Human Rights Commission and Another v. President of the Republic of South Africa*, the Court seems inclined to nudge “traditions” in the direction of liberal and individualist conceptions of equality. If this were successful, social and legal conventions would be significantly altered.

These cases concerned the rule of male inheritance in the African customary law of succession. Writing for the majority, District Court Judge Langa argues that the customary rule of male primogeniture unfairly discriminates against women and illegitimate children because it prevents them from inheriting their fathers' estates. He further notes that the section of the Black Administrative Act of 1927 applied in such inheritance cases is an "anachronistic piece of legislation which ossified 'official' customary law and caused egregious violations of the rights of black African persons ... [since under the law] the estates of black people are treated differently from the estates of white people." The "unconstitutionality" of the law does not undo the custom, however, so going forward the judge expresses the desire "for courts to develop new rules of African customary law to reflect the living customary law and bring customary law in line with the constitution." In other words, customary law is unjust because it does not provide the same relief as "white" law. The way to resolve this problem is to rewrite customary law so that it is in line with the constitution or, put another way, to make the constitution the new custom.

Opinions vary widely on the implications of these judgments and the overall relationship between "traditional culture" and the constitution. Feminist constitutionalists, such as Sibongile Ndashe (2005) of the Women's Legal Center, are firm in their position that group rights cannot be exercised in a manner inconsistent with the constitution, and that the right to culture, although provided for in the constitution, is subordinate to other rights. Others have deliberately critiqued traditional marriage practices in order to underscore the need to "change mindset and behavior." Lungiswa Memela (2005) of the Western Cape Network on Violence Against Women, lists her concerns with Xhosa marriage conventions: "*Lobola* (bride price) confirms that women are the property of men; the term *umakoti* (newlywed woman) has no counterpart for men, and the newly married woman is forced to become 'a totally new person.'"

Some scholars champion efforts to harmonize the relationship between the constitutional protection of equality and marriage customs. Likhapa Mbatha (2005), head of the Gender Research Program at the University of Witwatersrand's Center for Applied Legal Studies, argues that the Recognition of Customary Marriage Act respects the differences in South African society while improving African women's legal status within customary marriages and permitting women the right to choose between marriage conventions. A final group ad-

vocates plural marriage laws as the only way to fulfill the state's cultural rights obligations. As Bafana Khumalo, theologian and Deputy Chairperson of the Commission on Gender Equality, notes, this is not to condone the existing manner in which (colonially corrupted) customary law with regard to women is enacted, nor is it a refusal to change and adapt custom. Rather, it is to honor the questions African scholars have raised concerning the very definitions and parameters of Eurocentric epistemologies responsible for devaluing indigenous knowledge and foreclosing any possibility of alternate systems of agency for women. Nkosi SP Holomisa, ANC member of parliament and president of the Congress of Traditional Leaders of South Africa, echoes this point with his rejection of the tendency among human-rights activists to regard African culture and customs as inherently undemocratic, oppressive, and discriminatory against women and children. As evidence to the contrary he points to the "armory of penalties" in customary law to which women and children can appeal in order to redress wrongs.

Returning to the issue of gender-based violence, which fuels much of the debate regarding gender "traditions," Bennett (2005, p. 25) deftly reframes the focus on "tradition" in order to move beyond the polarizing claims that dismissing cultural change as "Westernization" is a way of legitimizing the ongoing oppression of women, and that "traditional culture" will free African identities, societies, and futures from Northern dominance. She responds to observations by University of Western Cape Psychology Professor Kopano Ratele that the violent history of South Africa and its institutions requires that we stop talking about men who are "mad" and start talking instead about the "madness" of the society. Discussion of gender-based violence should begin therefore "not with the fiction that life is by and large 'normal' . . . but with the notion that . . . there is a mad something (with a long and complex history) pervasive in our gendered homes, streets, institutions, and communities." In other words, discussions of gender-based violence that are purportedly about culture are actually about "South African 'normals' . . . [and] efforts to move beyond 'normality,'" (Bennett, 2005, p. 33).

### **The newly enfranchised? Second-generation rights for mothers and children**

Some social critics view the contradictory politics of everyday life in South Africa as confirmation that human-rights approaches cannot alone deliver social justice (Bond, 2004;

Neocosmos, 2004; Terreblanche, 2002; Hart, 2002). In particular, human rights provide little leverage against the ANC's neoliberal policies because they can be used to justify individual and group self-interest. Neocosmos (2004) argues that within liberal political systems rights are manifest as "special interests" each of which aims to be incorporated into the management structures of the state. In South Africa social debate is so conditioned by state fetishism and "the apparently evident 'common sense' notion that the post-apartheid state can 'deliver' everything from jobs to empowerment, from development to human rights, from peace in Africa to a cure for HIV/AIDS," that instead of engaging with fundamental social questions "the focus is on management rather than on politics," (Neocosmos, 2004, p. 161). The state becomes the source of rights for the formerly "rights-less" rather than viewing rights as imminent in the practices of its citizens.

The quintessential example of this administration of rights is how national and transnational groups respond to the images they generate of oppressed African women. By virtue of their suffering, African women are considered virtually unable to act politically, requiring that some external body — the judiciary, health system, NGOs, or states — act on their behalf. For Neocosmos (2005, p. 168), "the simple fact that the state (or other) power is expected to decide on one's behalf, and that this is systematically internalized in the process of identity formation, is arguably what lies at the root of issues of powerlessness as disparate as those of HIV/AIDS, the alienation of youth from society, and the absence of people-centered development." Thus, using human rights to remove citizens from oppressive "traditions," norms, conventions, and histories eliminates their ability to act politically within such "traditions" to provoke the fundamental changes that would truly ensure that the "rights-less" attain their rights. Without placing rights in such a dialectic, citizenship is "simply reduced to the possession of state documents which entitle the majority to engage in politics at most once every five years or so," (Neocosmos, 2005, p. 168).

"Democracy did not go into a deep sleep after elections, only to be kissed back to short spells of life every five years," said Justice Sachs in his concurring judgment in *Doctors for Life International v. The Speaker of the National Assembly and Others* (2006). This case dealt with the government's constitutional obligation to facilitate public involvement in the making of laws. *Doctors for Life International* claimed that parliament failed to fulfill this obligation

when it passed four health-related bills: The Sterilization Amendment Bill, which would permit a legal guardian to consent to the sterilization of persons under the age of 18 years who are considered incompetent to give such consent on their own by virtue of their mental disability; The Traditional Health Practitioners Bill, which formally recognizes and regulates the country's traditional healers; The Choice on Termination of Pregnancy Amendment Bill, which clarified where, and by whom, abortions could be performed; and The Dental Technicians Amendment Bill, which recognizes and regulates informally-trained dental health workers.

In support of Doctors for Life International, the Court found unanimously that in the case of the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment, certain provincial governments had indeed failed to provide adequate accommodations for comment given the high level of public interest in the issues. As a result of this failure, the Court invalidated the bills but suspended the order for 18 months so that parliament has time to enact the bills afresh and in accordance with the constitution. Since the other two bills had not generated great public interest, the Court considered the government to have met its obligations in those instances.

Although it is confined to addressing only the few elements of the 2004 Amendment Act no. 38 and not the 1996 act that legalized abortion, this case was a clear challenge by conservative groups to the legalizing of abortion. The ruling makes it possible for abortion foes to use a technicality to re-open debate on the issue and possibly exploit dissent within the ANC and among other parliamentarians (Ndashe, 2006). A less obvious aspect of the case is the implied connection between traditional health practices and reproductive rights. The link, as expressed in Doctors for Life International's literature,<sup>5</sup> is a complex amalgam of religious and scientific thinking.

The organization is committed to three principles — sanctity of life, sound science, and a basic Christian ethic in the medical profession — which it applies to all issues on its agenda, including pornography, homosexuality, prostitution, cloning, abortion, egg and sperm donation, euthanasia, sexual addiction, and traditional healers. Thus, in the case of abortion: “The termination of people who the government considers less than human, ‘unwanted,’ and

<sup>5</sup> [www.doctorsforlifeinternational.com](http://www.doctorsforlifeinternational.com).

a 'burden to society' is egregiously wrong and against God's holy commandments;" "Scientific research clearly defines the beginning of life at conception [since] each cell . . . has sufficient information in its DNA structure to produce a complete human being;" and, the government "forces doctors to, against their conscience and beliefs, take part in performing abortions." It should be noted that the Choice on Termination of Pregnancy Bill does accommodate "conscientious objectors" as long as women requesting abortion are referred to a practitioner who will accommodate their request.

In the case of traditional healers, the literature states that: "Traditional healers (at least African traditional healers) are priests of the religious system of African Traditional Religion (ATR), and function as such;" "...any form of medicine that is not based on empiric truth is potentially (and ultimately) harmful to patients in need;" and, "Doctors for Life (South Africa) would like to affirm our commitment to promoting holistic health . . . in a morally accountable way," implying, of course, that this would not occur with traditional healers.

As one digs deeper into the arguments made by this and similar right-wing organizations, the distinctions that generally hold between morality, science, politics, culture, and ethics become increasingly unclear and discordant, and the debate more fundamentalist in tone. The situation is further complicated by the fact that political expediency can make allies of groups that have bitterly opposed each other. So while they disagree on medical treatment, Doctors for Life International and some "African traditionalists" find common ground in their positions on sexuality and reproductive-health issues. Both consider abortion to be murder, criticize the government for not consulting them when developing the Choice on Termination of Pregnancy Act and its amendments, and believe they should be able to counsel women wishing to have abortions (Rakhudu et al., 2006). Anti-abortion groups have attempted to strengthen connections with conservative black African organizations by describing the abortion laws as "an attempt to eliminate black people" and likely to have consequences that would "eclipse the horrors of apartheid," (Gevisser, 1997, p. 26). U.S. anti-abortion groups, such as the Center for Bio-Ethical Reform in Lake Forest, California, have introduced the concept of "pre-natal justice" into these debates, enabling South African anti-abortion groups to develop a unifying justice framework for the many elements on their agendas.

These fundamentalist debates are especially harsh with respect to HIV/AIDS, with each side making claims about the absolute success of their approach compared to the failure of those of their opponents. A prime example is the claim by the Minister of Health, Manto Tshabalala-Msimang, that anti-retroviral medicines are poisonous for Africans and a diet of African potatoes, garlic, olive oil and so forth will more effectively control the disease.

A second point to underscore in *Doctors for Life International v. The Speaker of the National Assembly and Others* (2006) is the fact that Doctors for Life International decided to work within the judicial system. In doing so, it took advantage of a constitutional technicality to reopen debate on abortion and traditional medicine. Although the ruling cannot be said to undermine the constitutional protection of abortion (which was determined by the legislature and has not been challenged yet in a manner that would bring it before the court), it does demonstrate that the Court and, by extension, constitutionally enshrined rights, cannot substitute for social action in settling dissent. Justice Ngcobo touches on this point in the majority opinion in the case: “The representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters . . . [Participation] acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like South Africa where great disparities of wealth and influence exist.

Neocosmos (2004) notes that “equality of rights is simply impossible in an unequal society,” and that the reality in South Africa, as in all liberal democracies, is that no matter the mechanisms for participation, because of the costs, lack of knowledge, and access to the full range of resources of bourgeois society, the struggle for rights has been taken out of popular control and moved to the technical realm of the judicial system. Rights are “guaranteed” by the state and its beneficiaries are the already privileged class. Abortion, same-sex practices, sexual health, the rights and responsibilities of desire, sexuality, and knowledge are simply not available to all.

In her discussion of the South African women's movement, Hassim (2006, pp. 355-356) reminds us that by collaborating with the state women have realized a number of crucial legislative and policy gains, one of the most important being the legalizing of abortion. Like feminists elsewhere, South African feminists employed the more acceptable terms of health rather than bodily integrity in their campaign for a termination of pregnancy law. "Even so, it was only the ANC's strong support for the Termination of Pregnancy Act and its refusal to allow its members of parliament a free vote that made possible the passage of the legislation in 1996." This emphasis on women's health helps explain the strategic use of health arguments by anti-abortion groups and does indeed point to a weakness in the current status of the law.

The introduction of legislation to legalize abortion in South Africa was the culmination of a two-year policy process, and an even longer period of lobbying and political maneuvering by activists. In 1994 the Ad Hoc Committee on Abortion and Sterilization was convened to examine the existing abortion law, the Abortion and Sterilization Act of 1975. After almost a year of work, which included oral and written testimony from interested parties, the committee recommended that the 1975 Act be repealed, and that abortion and sterilization be regarded as separate issues.

Initially the committee recommended that the Choice on Termination of Pregnancy Act should allow abortion on demand for women up to 12 weeks of pregnancy and under restricted conditions between 14 and 24 weeks. In the final bill, the upper limit of 24 weeks was cut to 20 — termination after this is allowed only if the woman's life is in danger or if there is severe malformation of the fetus. Grounds for abortion in the second trimester are: risk to the mental or physical health of the women; substantial risk of serious mental or physical fetal abnormalities; pregnancy resulting from rape, incest, or sexual abuse, and where the social and economic status of the woman would be severely affected if the pregnancy continues.

All information on terminations is confidential, but medical facilities or practitioners are required to report the procedure to the South African Department of Health. Abortion services are supposedly available in the public sector at designated facilities and privately either through gynecologists or agencies, such as Marie Stopes International, which now has 15 centers in six of the country's nine provinces. The state is obligated to provide or facili-

tate pre- and post-abortion counseling for women seeking or having an abortion, and while women and girls are not required to obtain the consent of either their husbands, partners, or parents, minors are advised (but not required) to discuss their choice with their next of kin. Despite such clear legal rights and guidelines, abortion is extremely contentious and there is a large gap between legislation and practice. This is especially true for poorer women seeking to terminate a pregnancy through public health-care facilities, which are hampered by inadequate resources and poor infrastructure.

While procedures such as dilation and curettage (D and C) are a compulsory part of medical training for doctors, and RU-486 (mifepristone or “the abortion pill”) was approved by the South African Medicines Control Council in 2001, access is curtailed by lack of resources and the opposition of many health-care workers to the procedure. A 1999 survey of all 292 facilities designated to provide these services revealed that only 32 percent were functioning and 27 percent of those were in the private sector. Half of the induced abortions in that year took place in Gauteng province, home to only 19 percent of women of reproductive age (Dickson et al., 2003). Plans to expand access by permitting midwives to perform first trimester abortions did not prove very effective; by 2000, only 31 of 90 midwives trained to perform the procedure were providing the service (Potgieter, 2004).

The right to refuse to perform abortions because of religious or other beliefs is permitted unless it is necessary to save the life of the pregnant woman, although women’s rights activists report that in some such cases, “conscientious objector” providers simply botch the termination. The law requires that health-care workers who refuse to perform a termination refer women to another medical worker who will. Medical workers convicted of hindering access in ways that contravene the law are liable to be fined or sentenced to up to 10 years in jail, a sentence that is equivalent to those applied to people who perform abortions outside the limits set by the act.

In 2000 researchers in South Africa’s most populous province, KwaZulu Natal, found only 11 percent of community members and primary nurses supported the Choice on Termination of Pregnancy Act, which had come into force three years earlier. Only six percent of the nurses supported abortion on demand, although 56 percent supported abortion for pregnan-

cies resulting from rape or incest. A clear majority (61%) supported abortion if continuing the pregnancy would endanger the woman's health. In their report the researchers observed that an effective way of improving access to abortions would be to locate the facilities within reproductive-health services rather than as an isolated service (Harrison et al., 2000).

A 2002 study by the Global Health Council estimates that between 1995 and 2000, approximately 200,000 abortions were performed annually in South Africa yet data collected by the Department of Health in 2000 indicates that public facilities performed only about 50,000 abortions each year. The government itself has admitted that there is a need to facilitate access to abortion for women within the state sector. In its Report on the Implementation of the Choice on Termination of Pregnancy Act 1997–2004, the Department of Health acknowledges that the incidence of spontaneous miscarriages and illegally induced abortions has not changed since 1994, something it attributes to lack of public education and inadequate services in some areas. These figures confirm that access to official abortion services is extremely limited for the majority of the female population.

The anti-choice lobby is active in South Africa. Women's rights activists have reported incidents where anti-choice proponents, complete with graphic photographs and exhibits, gave talks to medical students. Similar presentations have been made to parliamentarians. Members of Pro-Life South Africa have also threatened to use violence to shut down abortion clinics, stating that the government has forced "people to become accessories to murder — by paying for abortions through their taxes" (Ruaridh, 1997). Such groups have mounted legal challenges to the legislation and have held demonstrations in cities and towns across the country. In response to challenges by the Christian Lawyers Association, however, the High Court found in 1998 that a fetus did not have a constitutional right to life in South Africa, and in May 2004, the Pretoria High Court dismissed an attempt to restrict provision of abortion services to minor girls.<sup>6</sup>

Lack of respect for sexual and reproductive health extends to state services. Contraception is problematic for many women. The most widely used form of contraception is the injection

<sup>6</sup> For further examples of fetal politics, see also in this publication: Vianna, A. R. B. & Carrara, S., Sexual politics and sexual rights in Brazil: A case study, p. 33; Cáceres, C., Cueto, M., & Palomino, N., Sexual and reproductive-rights policies in Peru: Unveiling false paradoxes, pp. 136-137; Nowicka, W., The struggle for abortion rights in Poland, pp. 179-181.

(depo provera), which has the advantage of being long lasting and so reducing the number of visits to a family-planning clinic. The use of intrauterine devices (IUDs) has been curtailed for fear of infection and also because of perceived difficulties in providing a safe and effective service. Diaphragms are not available through the public sector medical facilities, and for many women regular visits to a family-planning clinic may be difficult in terms of geography, financial or time resources, or the need to avoid stigma. All of these issues are compounded for HIV-positive women who must confront multiple stigmas that make it difficult for them to seek abortion and pregnancy-related care. There is very little support for HIV-positive women who wish to become pregnant (Nawaal, 2004).

In response to critiques of the failure of rights-based approaches to produce fundamental transformations, social activists in the country have pursued “second generation” socio-economic rights, like the right to housing, health care, and social security, as a means of extending “first generation” political rights — that is, freedom of speech, assembly, information and opinion (Mbali, 2005). Given the inextricable link between poverty and powerlessness, particularly for women and marginalized groups like gay men, lesbians, bisexuals, and transgendered persons, this approach has direct implications for gender and sexual rights. It is an approach where civil society may well lead the law, as has occurred with the struggle for access to HIV/AIDS treatment.

The AIDS epidemic has disturbed the order of things in South Africa and is an unavoidable issue for anyone working on sexual politics in the country. Although not explicitly addressed in the *Doctors for Life International v. The Speaker of the National Assembly and Others* (2006) case, Doctors for Life International uses the HIV/AIDS crisis as justification for its particular blend of religion, science, and ethics. The Traditional Health Practitioners Bill has provoked repeated conflicts over how best to address HIV/AIDS prevention and treatment within the country’s constitutional framework. Politicians and civil-society groups have also used the crisis to argue in favor of their radically different approaches to women’s sexualities. (Paradoxically, the unrelenting discussion of women’s vulnerabilities only underscores the silence that defines the experiences of the majority of South African women.)

The ANC faltered in its response to AIDS from the very beginning despite the development of a well-reasoned and affordable plan as early as 1992 and the formation of the National AIDS

Committee of South Africa (NACOSA), which, following the 1994 elections, was declared a “Presidential Lead Project.” The plan was not adequately implemented for reasons that included poor infrastructure, redundancy at the provincial level, the decision to locate NACOSA within the Department of Health rather than at an inter-sector level as recommended, and President Nelson Mandela’s failure to provide the aggressive political leadership required.

The failure of the president’s office to provide adequate leadership only intensified when Mbeki was elected and expounded the “denialist” position. In a letter circulated to international political leaders and organizations defending his decision to question the basic science of AIDS, he said, “We are now being asked to do precisely the same thing that the racist apartheid tyranny we opposed did, because, it is said, there exists a scientific view that is supported by the majority, against which dissent is prohibited,” (in Shisana & Zungu-Dirwayi, 2003, p. 182). This evocation of apartheid’s injustices combined with an appeal to basic rights — in this case the right to freedom of speech and thought — is one Mbeki has embraced repeatedly in order to construct arguments that fold progressive and reactionary discourses and positions into one.

In his arguments Mbeki focused on a particular understanding of the relationship between the epidemic and historical and economic antecedents. He claimed that poverty is a critical health risk for millions around the globe and is rooted in the vestiges of the imperial and colonial eras. He also suggested that global responsibility for the epidemic begins with an acknowledgement of “unacceptable disparities in wealth” within and between nations, a point he quoted from a World Health Organization (WHO) report in the speech he gave at the 2000 International AIDS Conference (Mbeki, 2000) in Durban. Certainly, the South African epidemic does follow social contours of inequity, political and economic disenfranchisement, gender oppression, and cultural and racial difference (Whiteside, 2001). Mbeki combined this analysis, however, with the “dissident” position that environmental factors, rather than HIV, are the cause of AIDS. Consequently, AIDS is not remedied by medicine but by political and social change, even perhaps, historical redemption. He also identified in the dominant AIDS discourse the same racist claims he felt underlay debates about rape in South Africa, namely that Africans are diseased, sexually depraved, and without moral sense.

When viewed from Mbeki's position, providing access to antiretroviral medications (ARVs) represents a turning away from the imperatives to address global inequities and oppressive racist histories in favor of the narrow and apolitical paradigms and institutions of Western biomedicine. Treatment activists have countered, however, that the struggle for access to ARVs may actually prove crucial to the transformation in the global systems of inequality. This position has been most vociferously argued by the Treatment Action Campaign (TAC), which was formed in late 1998 by Zackie Achmat, who was at the time head of the National Coalition for Gay and Lesbian Equality.

TAC has campaigned for access to free or affordable ARV treatment through the public-health system. Initially, TAC and the ANC government worked in partnership against the efforts of multinational drug companies to prevent access to cheap medications, but this partnership soon dissolved into a national struggle that left little room for activism on global trade policies. Indeed, the greatest disappointment of the South African AIDS movement has been the relinquishing of those initial confrontations with pharmaceutical companies and of participation in the activism that others in the global South, such as Brazil, India, and Thailand, had initiated. In the first years of the new ANC government, it appeared from legislative initiatives and diplomatic efforts, that South Africa would be in the vanguard of challenges by the 100 or so developing countries in the World Trade Organization (WTO) against TRIPS (Trade Related Aspects of Intellectual Property Rights, a WTO-administered treaty) and GATT (General Agreement on Tariffs and Trade), first through the exercise of compulsory licensing and parallel import mechanisms and then head-on in negotiations to re-think intellectual property agreements within the organization. With the largest national epidemic and the highest pharmaceutical prices in the world (South Africa comprises two percent of the global profits but only one percent of the global market) South Africa was perfectly positioned to challenge these regulations and agreements on humanitarian, ethical, and economic grounds (Bombach, 2001).

The Constitutional Court has engaged in some of its most important discussions of socio-economic rights in cases concerning AIDS. *Minister of Health v. Treatment Action Campaign* (2002) is the most prominent of these. Two years prior to hearing this case, however, the Court issued its judgment in *Government of the RSA v. Grootboom* (2000), which concerned the right to housing for the poor Western Cape community represented by Irene Grootboom.

The majority concluded, “Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive.” (Incidentally, the Afrikaans name “Grootboom” means “large tree,” a reminder of the court’s logo.)

In *Minister of Health v. Treatment Action Campaign* (2002), the court considered whether or not the state was required to make the AIDS drug Nevirapine available through all its clinics and hospitals. Nevirapine is a simple, cheap, and effective prophylactic against the transmission of HIV from mother to child. In its unanimous judgment the Court required government “to devise and implement within its available resources a comprehensive and co-ordinated program to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.”

Both cases arrived at the court following sustained community mobilization and grassroots activism that had not produced the desired results despite commitments from government officials. And even though the judgments were significant victories for the petitioners, the government’s response was still inadequate. Grootboom and her neighbors have received some of the housing they require but not all. The government appealed the Court’s decision in the TAC case and although the appeal was denied, it further delayed implementation of treatment. In 2003 the Department of Health threatened to revoke its approval of Nevirapine unless the manufacturer, Boehringer Ingelheim, provided additional data on its safety. Nevirapine is apparently readily available now; the government estimates that in 2004, 78.7 percent of pregnant HIV-positive women received the drug. These figures are contradicted, however, by a 2006 UNAIDS global report stating that only 14.6 percent of pregnant women in South Africa who need the drug are receiving it.

Over the past seven years, the government has initiated a number of programs to address the epidemic but the results have always been disappointing. In January 2000 it launched the South African National AIDS Council (SANAC) with then Deputy President Jacob Zuma as chair. This initiative was overshadowed, however, by the creation that same year of an advisory panel to review the scientific evidence on the cause of AIDS. In parallel with this review, the government initiated work on a comprehensive overall policy framework. The policy document, *HIV/AIDS and STD: Strategic Plan for South Africa 2000-2005*, was launched in

early 2000 and received lavish praise from many world leaders for being one of the best in the developing world. Not only did it elevate the fight against AIDS institutionally in government and state structures through SANAC, but it also sought to include civil society in partnerships to pool resources in the fight against AIDS. The implementation of the policy was woefully inadequate, however. Despite placing its overall policy within the paradigm of mainstream research, it continually undermined its own statements by communicating, intentionally or not, perceptions and convictions that contradicted its elaborate policy intentions.

This confusion has made South Africa ripe for the absorption of conservative initiatives and programs, primarily from the U.S. The Bush administration named South Africa as a PEPFAR (President's Emergency Plan For AIDS Relief) recipient. The PEPFAR funding has supported six media campaigns with abstain-and-be-faithful messaging as well as two school and community-based life-skills education programs. These campaigns and programs emphasize abstinence and faithfulness and include projects designed by NGOs and faith-based organizations to promote the delay of sexual activity, abstinence, faithfulness, and "responsible" decision-making. In concert with the explicit and implicit reactionary pressure in the PEPFAR programs, several U.S.-based abstinence-promotion organizations worked in South Africa; Focus on the Family established an in-country office in 1992 and is selling its "No Apologies" curriculum nationwide, and The Silver Ring Thing, a Christian, abstinence-only-until-marriage program, has also made inroads. In the U.S., The Silver Ring Thing has faced multiple legal challenges to its misuse of federal funds to promote religion, and as a result, the U.S. Department of Health and Human Services has suspended funding to the organization.

In November 2003 the government declared that it would launch a large-scale rollout of free ARV treatment through the public-health system. The primary impetus for this plan was most likely political and diplomatic as it followed a declaration by provincial administrations controlled by opposition parties that they would disregard the directives of the Department of Health and start providing treatment through their own public-health systems. These statements were favorably received nationally and globally, suggesting that treatment access would be a key factor in the next round of national elections. In its subsequent election platform, the ANC asserted, "Every person has the right to achieve optimal health, and it is the responsibility of the state to provide the conditions to achieve this." In a less than veiled

reference to the nevirapine debates discussed earlier, the ANC platform prioritized “promotion of the survival, protection, and development of children and their mothers through a system of appropriate health-care delivery, health-personnel training and support, research, and a range of related programs.”

The implementation of this plan was not smooth. Following the landslide victory of the ANC in late 2004, the plan stalled prompting a new court case by TAC seeking access to the implementation timetable. Awareness of the government’s failures to address its poorer constituents is growing and there are indications that the grassroots movement now associates the unsuccessful approaches to AIDS with failures to deliver employment, adequate education services, and various other social needs. No doubt aware of this growing discontent, provincial governments have, for the most part, pushed ahead aggressively with the roll-out of ARV treatment. As of August 2006, close to 140,000 South Africans were receiving ARV treatments through the public sector, with an additional 110,000 accessing treatment through non-governmental programs (Abdullah, 2006). This is still less than half of the number projected to be on treatment by this point. Frustrated with the slow pace of progress, TAC members and supporters held protests in a number of cities across the country in late 2006 calling for the Minister of Health, Manto Tshabalala-Msimang, to resign.

Following these protests, TAC and the government entered into a period of rapprochement with Zuma’s replacement, Deputy President Phumzile Mlambo-Ngcuka, playing a leading role. The Health Minister, Tshabalala-Msimang, is on long-term medical leave. TAC is currently focusing its activism internationally in support of efforts to prevent the drug company Novartis from shutting down or significantly limiting the production of low-cost generic drugs in India. Should Novartis succeed there will be a severe shortage of affordable AIDS medications, which would mean that millions would lose access to treatment.

The impact of the South African treatment rollout on public health could be substantial both within South Africa and globally. What this might mean for the health economy of the country and even globally or the impact it may have on the epidemiology of the region is not yet known. If successful, this program could also shift our understanding of the relationship between the state and the health of nations, particularly within middle-income countries.

These are the more obvious issues and they are already the focus of investigation by political scientists, sociologists and others.

The impacts that are less investigated because they have not been a major focus of attention in the research in South Africa up to this point (probably because they are viewed as tangential to the primary goal of providing medical treatment) are those that will affect the many and fast-changing local contexts of risk, infection and care. Epidemiologists are concerned with some aspects of the behavioral dimensions of risk but since they emphasize South Africa's experience as a "generalized" epidemic, they have sidelined many of the most interesting questions concerning the heterogeneity of sexual cultures, and how social dynamics of infection and treatment and the related concerns of violence and stigma are influenced by collective empowerment and community mobilization. The political critique of the epidemic in South Africa has been strong, particularly regarding the government's actions, but there are fewer of these studies than those that are conventionally biomedical and epidemiological in nature.

The AIDS epidemic in South Africa illustrates both the authority as well as the limitations of the constitutional process. The discourse on rights and citizenship legitimized by the constitution has proved effective in mobilizing individuals and groups around sexuality issues, brought many of the most disenfranchised of the citizens into the political process, and proved successful in some claims for political and normative rights. But rights in themselves are not a panacea for the complex historical and contemporary inequalities that shape South African society. The AIDS epidemic is sustained by entrenched material and ideological inequalities, and has been the lightning rod for debates that exceed the realm of rights. These debates have focused on how globalization has politicized "science" and "culture" (Potgieter, 2005). The Constitutional Court, and the entire judiciary for that matter, is as reluctant to rule in these matters, as it is to address issues of theology. Its positive rhetoric is of little value unless carried into action by the legislature or civil society, which it rarely is. And in their interpretation of the constitution, the judiciary and the legislature sometimes frustrate progressive forces seeking sexual rights. Underlying all of this is the inertia of social forces conditioned by the racist, sexist, and patriarchal regimes of religion, morality, traditionalism, and neoliberalism.

## References

- Abdullah, F. (2006). Lessons from the field: ART scale-up in South Africa. Powerpoint presentation at the XVI International AIDS Conference, Toronto, Canada. Retrieved September 8, 2006, from <http://www.aids2006.org/PAG/PSession.aspx?s=123>.
- Afrol News/IRIN (2006, November 16). Same-sex marriage bill divides the nation. *Afrol News*. Retrieved January 24, 2007, from <http://www.afrol.com/articles/22708>.
- Amnesty International. (1989). *When the state kills: The death penalty v. human rights*. London: Amnesty International Publications.
- Arnott, J., & Macquene, A. (2006). *Submission to the South African Law Commission Project 107 — Sexual Offences Act Issue Paper 19*. Sex Workers Education and Advocacy Taskforce. [www.sweat.org.za](http://www.sweat.org.za)
- Ballard, R., Habib, A., Valodia, I., & Zuern, E. (2006). Introduction: From anti-apartheid to post-apartheid social movements. In R. Ballard, A. Habib, & I. Valodia, (Eds.) *Voices of protest: Social movements in post-apartheid South Africa*, pp. 1-22. Scottsville: University of KwaZulu-Natal Press.
- BBC News (2004). Mbeki slammed in rape race row. Retrieved January 30, 2007, from <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3716004.stm>.
- Bennett, J. (2005). "An old rag:" South African research on GBV and debates on "cultures" and "rights", pp. 24-35 *Agenda — Special Focus (Gender, Culture and Rights)*.
- Bentley, K., & Brookes, H. (2005). The great leap sideways: Gender, culture and rights after 10 years of democracy in South Africa, pp. 2-13. *Agenda — Special Focus (Gender, Culture and Rights)*, pp. 2-13.
- Bombach, K.M. (2001) Can South Africa fight aids?: reconciling the South African Medicines and Related Substances Act with the TRIPS Agreement, *Boston University International Law Journal* 19, pp. 273-306
- Bond, P. (2004). *Talk left, walk right: South Africa's frustrated global reforms*. Scottsville: University of KwaZulu-Natal Press.

- Cooper, D., Morroni, C., & Orner, P. et al. (2004). Ten years of democracy in South Africa: Documenting transformation in reproductive health policy and status. *Reproductive Health Matters*, 12(24), pp. 70-85.
- Dawes, A. (2004). Partner violence high in South Africa, says new study. *HSRC Review*, 2(3), p. 3.
- Devenish, G. E. (1990). *The Application of the Death Penalty in South Africa*. Pietermaritzburg: University of Natal Press.
- Dickson, K. E., Jewkes, R. K., Brown, H., Levin, J., Rees, H., & Mavuya, L. (2003). Abortion service provision in South Africa three years after liberalization of the law. *Studies in Family Planning*, 34(4), pp. 277-284.
- Dirsuweit, T. (2006). The problem of identities: The lesbian, gay, bisexual, transgender, and intersex social movement in South Africa. In R. Ballard, A., Habib, & I. Valodia, (Eds.) *Voices of protest: Social movements in post-apartheid South Africa*, pp. 325-347. Scottsville: University of KwaZulu-Natal Press.
- Gevisser, M. (2004). From the ruins: The Constitution Hill project. *Public Culture*, 16(3), pp. 507-519.
- Gevisser, M. (2000). Mandela's stepchildren: Homosexual identity in post-apartheid South Africa. In P. Drucker, (Ed.) *Different rainbows*. London: Gay Men's Press.
- Gevisser, M. (1997, February 17). The ANC's great divide. *The Nation*, pp. 25-26.
- Harrison, A., Montgomery, E.T., Lurie, M., & Wilkinson, D. (2000). Barriers to implementing South Africa's Termination of Pregnancy Act in rural KwaZulu-Natal. *Health Policy and Planning*, 15(4), pp. 424-431.
- Harrison, R., & Seakamela, I. (2006). Jesus supports gay rights, say South African Anglicans. *Behind the Mask* (Source: Reuters). Retrieved January 24, 2007, from [www.mask.org.za](http://www.mask.org.za).
- Hart, G. (2002). *Disabling globalization: Places of power in post-apartheid South Africa*. Berkeley: University of California Press.

Hassim, S. (2006a). *Women's organizations and democracy in South Africa: Contesting authority*. Scottsville, South Africa: University of KwaZulu-Natal Press.

Hassim, S. (2006b) "The challenges of inclusion and transformation: The women's movement in democratic South Africa." In R. Ballard, A., Habib, & I. Valodia, (Eds.) *Voices of protest: Social movements in post-apartheid South Africa*, pp. 349-370. Scottsville: University of KwaZulu-Natal Press.

Holomisa, N. S. P. (2005). A traditional leadership perspective of gender, rights, culture, and the law. *Agenda — Special Focus (Gender, Culture and Rights)*, pp. 48-49.

Isaack, W. (2005). "LGBTI mainstreaming: Inculcating a culture of human rights. *Agenda — Special Focus (Gender, Culture and Rights)*, pp. 50-57.

Jacobs, S., & Calland, R. (Eds.) (2002). *Thabo Mbeki's world: The politics and ideology of the South African President*. Pietermaritzburg: University of Natal Press.

Khumalo, B. (2005). The role of men in the struggle for gender equality: Possibilities for positive engagement. *Agenda — Special Focus (Gender, Culture and Rights)*, pp. 88-95.

Kraak, G. (2005). Homosexuality and the South African left: The ambiguities of exile. In N. Hoad, et al. (Eds.) *Sex and politics in South Africa*, pp. 118-135. Cape Town, South Africa: Double Storey Books.

Lewis, J., & Greyson, J. (2004). *Proteus* DVD, 97 mins., Strand Releasing.

LoveLife. (2000). *The impending catastrophe: A resource book on the emerging HIV/AIDS epidemic in South Africa*. South Africa: Colorpress.

Macanda, P. (2006, November 15). Africans cheer and condemn South Africa gay marriage bill. *Scotsman*. Retrieved January 25, 2007, from [www.news.scotsman.com](http://www.news.scotsman.com).

Mail and Guardian (2006, September 26). Zuma earns wrath of gays and lesbians. *Mail and Guardian*. Retrieved January 25, 2007, from [www.mg.co.za](http://www.mg.co.za).

Manjoo, R. (2005). Gender rights within the framework of traditional or cultural norms and rights. *Agenda — Special Focus (Gender, Culture and Rights)*, pp. 80-83.

Matthews, S., Abrahams, N., & Martin, L.J. (2004). Every six hours a woman is killed by her intimate partner: A national study of female homicide in South Africa. *MRC Policy Brief*, 5, pp. 1-4.

Mbali, M. (2005). The Treatment Action Campaign and the history of rights-based, patient-driven HIV/AIDS activism in South Africa. *Centre for Civil Society Research Reports*, 1, pp. 63-85.

Mbatha, L. (2005). Reflection on the rights created by the recognition of customary marriages act. *Agenda — Special Focus (Gender, Culture and Rights)*, pp. 42-47.

Mbeki, T. (2001, July 9). Speech at the Opening Session of the 13th International Aids Conference. Retrieved December 5, 2004, from <http://www.anc.org.za/ancdocs/history/mbeki/2000/tm0709.html>.

Mbeki, T. (2002) The African Renaissance: Africans defining themselves. In *Africa — Define Yourself*, pp. 72-81 Cape Town: Tafelberg Publishers.

McGreal, C. (2007, January 29). Report attacks South African crime and corruption. *Guardian*. Retrieved January 1, 2007, from [www.guardian.co.uk](http://www.guardian.co.uk).

Memela, L. (2005). The role of society and culture in shaping gender inequalities. *Agenda — Special Focus (Gender, Culture and Rights)*, pp. 96-99.

Mkhize, T. (2004, February 8). ACDP to campaign on anti-abortion ticket. *Sunday Times*.

Nawaal, D. (2004, March 9). South Africa: Reproductive care off to a slow start. *Global Information Network*, p. 1.

Ndashe, S. (2005). Human rights, gender and culture — a deliberate confusion? *Agenda — Special Focus (Gender, Culture and Rights)*, pp. 36-41.

Ndashe, S. (2006, August 28). The right to abortion has not been implicated. Women's Legal Centre Press Statement. Retrieved January 16, 2007, from [www.hst.org.za](http://www.hst.org.za).

Neocosmos, M. (2005). Re-thinking politics today: Elements of a critique of political liberalism in Southern Africa. *Centre for Civil Society Research Reports*, 1, pp. 157-190.

Pillay, U., Roberts, B., & Rule, S. (2006). *South African social attitudes: Changing times, diverse voices*. Cape Town: HSRC Press.

Posel, D. (2004). Getting the nation talking about sex: Reflections on the discursive constitution of sexuality in South Africa since 1994. *Agenda — Empowering Women for Gender Equity*, 62, pp. 53-63.

Potgieter, C-A. (2005). Gender, culture, and rights: Challenges and approaches of three chapter 9 institutions. *Agenda — Special Focus (Gender, Culture and Rights)*, pp. 154-160.

Potgieter, C-A. (2004). Stigmatisation of termination-of-pregnancy providers in state hospitals. *HSRC Review*, 2(3), p. 8.

Quinn, A. (2007, January 30). Aids rises among SA's rich, say researchers. *Mail and Guardian*. Retrieved January 30, 2007, from [www.mg.co.za](http://www.mg.co.za).

Rakhudu, M. A., Mmelesi, A. M., Myburgh, C. P., & Poggenpoel, M. (2006). Exploration of the views of traditional healers regarding the termination of pregnancy law. *Curationis*, 29(3), pp. 56-60.

Ruaridh, N. (1997, February 2). Threat to new abortion clinics." *The Guardian*, p. 12.

Rule, S., & Mncwango, B. (2006). Rights or wrongs? An exploration of moral values. In U. Pillay, B. Roberts, & S. Rule, (Eds.) *South African social attitudes: Changing times, diverse voices*, pp. 252-276. Cape Town: HSRC Press.

Smith, C. (2004, September 26). Rape has become a sickening way of life in our land. *Sunday Independent*. Retrieved January 30, 2007, from [www.sundayindependent.co.za](http://www.sundayindependent.co.za).

Statistics South Africa (2007) *Census 2001*. Retrieved January 13, 2007, from <http://www.statssa.gov.za/Publications/>.

Swart, S. (2006). Religious freedoms at risk in South Africa. Retrieved January 24, 2007, from [www.frontline.org.za/articles/religious\\_freedoms\\_at\\_risk.htm](http://www.frontline.org.za/articles/religious_freedoms_at_risk.htm).

- Terreblanche, S. (2002). *A History of Inequality in South Africa, 1652-2002*. Scottsville, South Africa: University of KwaZulu-Natal Press.
- Tutu, D. (2005). Letter to the members of the Constitutional Assembly Cape Town, June 2, 1995. In N. Hoad, et al. (Eds.) *Sex and politics in South Africa*, p. 222. Cape Town, South Africa: Double Storey Books.
- Vetten, L. (1996) "Man Shoot Wife:" Intimate femicide in Gauteng, South Africa. *Crime and Conflict*, 6, pp. 1-4.
- Vilakazi, A., Mthethwa, B., & Mpanza, M. (1986). *Shembe: The revitalization of African society*. Braamfontein: Scotaville Press.
- Vincent, L. (1999). Polls apart: South African women and the 1999 general election. *Issue: A Journal of Opinion*, 27(2), pp. 31-36.
- Whiteside, A. (2001). AIDS and poverty: The links. *AIDS Analysis Africa*, Aug/Sept. 2001, 12 (2), pp. 1, 5.
- Wojcicki, J. M. (2003). The movement to decriminalize sex work in Gauteng Province, South Africa, 1994-2002. *African Studies Review*, 46(3), pp. 83-109.
- Zegeye, A. (2001). Conclusion: Depoliticising ethnicity in South Africa. In *Social identities in the New South Africa: After apartheid — Volume One*, pp. 333-346. Roggebaai, South Africa: Kwela Books.