

REFLECTIONS ON GAY AND LESBIAN (HOMOSEXUAL) RIGHTS: A COMPARATIVE APPROACH

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ABSTRACT

Background: The sexual is a vital aspect human rights and should be inherent in a democracy as equality, privacy, liberty and dignity are.

Aim: The aim of this study is to alert judicial officers, politicians and policy-makers to do away with discrimination of people on the basis of their sex and to afford homosexuals (gay and lesbians) the same constitutional rights of dignity and the expression of their sexuality. These aims or objectives are being achieved by basing the study mainly on a theoretical scope.

Methodology: The databases from which the author draws are books, case law, and internet sources. This study is a serious inquiry based on original data. The article demonstrates knowledge on the latest research-based literature on the topic and is universal in nature. The research covered the notions or perceptions of several jurisdictions, such as New Zealand, South Africa, United States of America and Muslim countries in the Middle and Far East. By coupling these different countries the study evokes a holistic picture of the rights to be afforded to homosexuals.

Result: An analysis of American case laws for example in *State of Oklahoma v Neil and Bernina Mata* and *Middle and Far Eastern judicature on homosexuality*, have established that the unjust and discriminatory treatment was meted out to certain people because they were homosexuals. South Africa, in case law *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, posed a rather positive approach to these marginalized group of people to such extent that gay and lesbian rights are being recognized in its constitutional framework.

Conclusion: The article pursues results where rights to liberty and respect for gay and lesbians and other minority groups to be established and these results been promulgated into law. In conclusion, it is worth note that the laws of South Africa paved the way for other countries to adopt a policy of tolerance towards homosexuals who also formed part of the community and deserved its protection like other heterosexual beings.

Keywords: Gay, lesbian, dignity, privacy, discrimination, equality.

1. Introduction

1.1 History of homosexuality

In ancient Greek and Rome there was no word that can describe homosexual conduct. It is because these societies did not have the same sexual categories that we do. Our categorization of the sexual or sexual expressions is or are based on the genders of the two partners involved: heterosexuality - when the partners are of the opposite sex, and homosexuality - when the partners are of the same sex [1].

In the homosexual relationship, sex pertains to the situation where one “do or did” something to someone. It was usually the man (or more precisely the penis) that did the doing. The Greeks had specific words to describe various sexual activities, often specifying a particular pairing of penis and orifice (such as *paedico*, which means “to penetrate anally”) [2]. The idealized sexual partnership involved an active older and a passive younger partner. The older took pleasure in the sexual act, while the younger partner was expected not to. There was never oral or anal contact, only intracural intercourse, as the older partner inserting his penis between the thighs of the younger as both are standing [3].

Female homosexuality or rather female homoeroticism was in the first century A.D. termed as “tribadism.” Both the Greeks and the Romans described the tribade as a woman who either sexually penetrated other women with an artificial phallus or was imagined to possess a clitoris large enough to do so. The term tribadism persisted well into the 20th century as a pejorative label for female homosexuality, although the more literary term lesbianism became common by the late 19th century [4].

Although ancient Romans more or less adopted some Greek attitudes, homosexuality seems not to be one of them [5]. With the proclamation of Christianity as state religion by Emperor Constantine, Canon law became civil law throughout Europe. Private sexual behavior now became subject to ecclesiastical and thus governmental regulation [6]. Condemnation of homosexuality developed as part of a shift on moral thinking. Any sexual activity that would not result in conception was considered illegitimate and “unnatural” [7].

Islam is much stricter than the West on homosexual conduct. Islamic law or Sharia explicates that homosexuality is a vile form of fornication and is punishable by death. In the study implied references to homosexual behavior that form part of the historical Arab and Muslim culture will be postulated.

The word homosexual was coined in 1869 by a German physician, who brought it into more popular usage in Germany around 1880 and introduced into English in 1892.

1.1.1 Modern day perceptions of homosexuals

Under Western Criminal law and Islamic Qur’anic law adult heterosexual sexuality and heterosexual intercourse have been theorized as the paradigm of normal sexual behavior. Sexual acts outside this norm are subject to criminalization and these sexual acts are subjected to intolerable behavior conduct. Apart from common law enactments, it is stipulated in the Qur’an (7: 8-84): “...For ye practice your lusts on men in preference to women; ye are indeed a people transgressing beyond bounds. And we rained down on them a shower (of brimstones).” This account seems to be borrowed from the Biblical story of Sodom. Muslim scholars through the centuries have interpreted the “rain of stones” as meaning that homosexuals should be stoned.

Homosexual conduct can be couched under homophobia and stigmatization, to mention but a few. Homophobia is the irrational hatred, intolerance, and fear of lesbian, gay, bisexual and transgender (LGBT)

people. These perceptions of gays and lesbians are expressed through homophobic behaviors such as jokes, physical attacks, discrimination in the workplace and irrational conduct by judicial officers (Mata) [8]. Gay discrimination is the act of treating people who identify as gay as lesser than those who identify in other ways (generally homosexuals) [9]. Currie & De Waal would rather call gay discrimination unfair discrimination. In their view mere discrimination on its own is not protected by the equality clause of the Constitution of South Africa, Act 108 of 1994. Currie & De Waal define unfair discrimination as treating people (in this context gay and lesbians) differently in a way which impairs their fundamental dignity as human beings. Unfair discrimination is thus differential treatment that is hurtful or demeaning. It occurs when law or conduct treats some people as inferior or incapable or less deserving of respect than others [10].

At the beginning of the HIV and AIDS epidemic, homosexuals (gay and lesbians) were frequently singled out for abuse as they were seen to be responsible for the transmission of HIV. In many countries, stigma and discrimination prevent homosexuals from accessing vital HIV prevention, testing, treatment and care services [11].

This paper emphasizes the tenor that the sexual is like, equality, liberty and dignity, a vital aspect of democracy. In terms of its constitutional recognition of homosexual relationships South Africa sets an enviable standard. This scenario has not been yet been achieved by Muslim countries.

1.1.1.1 Research methodology

The objectives of this study are achieved by data retrieved from literary sources such as books, court cases and internet sources. The paper has opted for a theoretical or desk top-based research. The data acquired about the treatment meted out to homosexuals spur this study to make a plea to the relevant stakeholders (governmental institutions and private set-ups) to make life bearable for homosexual minority groups. The paper evokes constitutional protection from the jurisdiction of South Africa to serve as blueprint for tolerance, accommodation and respect for gays and lesbians. These precepts can be couched under the concept of individualism. This research stresses the concept of individualism underpinned the notion of privacy and what individuals do in their home must be confined just to that. Privacy underpins dignity and these two concepts will form the legal substratum that underpinned or buttressed this study [12]. The objectives of this research are achieved by relying on a theoretical model. The data are complemented by documentary analysis and a complementation of an analysis by the author.

The research bases its findings on the treatment of South African and American case law coupled with sentiments from Muslim countries. The decision of the South African case law regarding the protection of homosexuals is to be followed by the judicature of other continents or countries.

The purpose of this article is to suggest a methodology for liberty and a respect to sexual minorities, such as homosexuals [13]. This research sets a platform whereby discrimination against anyone on grounds of sexual orientation be prohibited. In doing so, it nurtures a respect for the human dignity of all people, irrespective of their sexual orientation. That is, what the gist of democracy is and that is what this research actually is about

1.2 Research outcome/results

This study utilizes case law of different jurisdictions in order to find a solution to the ill-treatment that has been doled out to sexual minority groups such as gays and lesbians. Special mentioning was made of two court cases, one from South Africa and the other from the United States of America. Inferences from Muslim countries will also be accounted for. The verdict or decisions from the judges in American case law did not offered much protection to homosexuals. Neither did the decisions in Muslim judicature posted an

amiable solution for gays and lesbian in their community. The South African model proves to be congenial to the gist of this study and sets a normative standard for other jurisdictions to pay heed to.

2. Discussion

2.1 Language Usage and JUDICIAL Expression About Homosexuality

This study emphasizes that words may be simply regarded as neutral. The reason for this view is that words may have the same basic meaning, but come with different emotional and ideological loadings. This notion can be elaborated by means of an example: It is so that a very wealthy person could be described as a “successful businessman,” a “person who earns a lot of money,” or an “exploitative capitalist.” Edward Clark mentions that these three phrases denote the same person and bear the exact same meanings, but they convey a positive, neutral and negative emotional loading respectively [14]. Homosexuality is often describes and discusses by the using of negatively loaded language, and thus its construction as inferior to heterosexuality. Such language usage undermines the rights of homosexual persons, As per Thomas J in *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA), where homosexuals are regarded as persons being less worthy of concern [...] [15].

Adding insult to injury, the construction of judicial language also underrates homosexuality as inferior to heterosexuality. It is, because the law depicts sex between males as indecent and unnatural. The fact that homosexual sex is not capable of producing offspring also adds to its unfavourable reputation. Claims by homosexuals for practicing their rights are therefore viewed as problematic. It is on this basis that the language used by judges marks out the deviance of homosexual sex from the norm [16]. Clarke cites Bruce MacDougall who was saying: “[Judicial] expression influences the attitudes of the public, legislation, bureaucrats, and other judges” [17]. The words of judges carry particular weight in defining who belongs in society. Words pertaining to the inferiority of homosexuality perpetuate the imbalance in a homosexual/heterosexual binary. Judicial expression about homosexuality is mostly clouded by a lack of thought that is aired in the words used. The callousness of judicial expressions towards homosexuals bears a negative impact on homosexual people. The message that these expressions conveys is that heterosexuality is good and homosexuality is bad. In regard to homosexuality, words such as “indecent” and “unnatural” are being employed [18].

Judge’s reasoning usually assumes or valorizes heterosexuals and denounces homosexual relationships. In contrast to homosexual relationships, marriage is portrayed as the perfect union. It has been regarded over time that homosexuals undermine the concept of marriage. Clark echoes the judgment in *R v Cole* (1988) 4 CRNZ 49 (CA) in asserting that if such assumptions are accepted, then the case for the recognition of homosexual relationships would be seriously sapped [19].

The article wants to direct judges to couches their words or judgment in such a way that it did not affect homosexuals negatively in their dignity [20].

2.1.1 Muslim sentiments on Homosexuals

When Mehmed conquered Constantinople in 1453, the Muslim general demanded the 14-year old son of one of the city’s Christian leaders as his sexual concubine. The father and the son chose death instead. Subsequent Ottoman administrators also engaged in homosexuality, often with the boys of conquered populations who could not afford to satisfy the jizya (poll tax on non-Muslims).

In diametrically opposition to this historical account stands the Islamic abhorrence to homosexuality. Homosexuality is called the worst sin in Islam.

From the Hadith, Abu Dawud (4462) put the Messenger of Allah to the word: “Whoever you find doing the action of the people of Lot, execute the one who does it and the one to whom it is done.” In similar vein, al-Tirmidhi, Sunan 1: 152 divulge what Muhammad said: “Whoever is found conducting himself in the manner of the people of Lot, kill the doer and the receiver.”

These lines of thought or laws have been perpetuated until modern day times. Under Islam homosexuals have been beheaded, hung and stoned in modern Saudi Arabia and Iran. Five other Muslim countries also have the death penalty on their books for homosexual behavior.

Although the writings of scholars and the influences of political leaders in the West, there have never been any noticeable effort on Muslim leaders to achieve the plight of homosexuals in Islamic or Muslim countries.

2.1.1.1 Homosexuals as “Vulnerable Groups?”

Vulnerable groups include ethnic minorities, women, children, the elderly, the disabled and the economically disadvantaged. Homosexuals are excluded as vulnerable groups with the result that they remain unprotected. An article that was posted on the Chinese *Guangming Daily* Web site adumbrates that “vulnerable groups” refers to groups of people that have lower incomes, difficult lives, low social resources, weak competitive position within society and lack the potential to develop. Examples of these groups are mentioned above. It is being argued that homosexuals have food to eat, access to education, access to healthcare and employment.

The vulnerability debate illustrates the question, whether the government should protect those who are not necessarily economically disadvantaged but lack sufficient social resources to fight for themselves. It has been argued, for example, that homosexuals are minority groups with little protection from the law [21]. The rhetoric implies that homosexuals should therefore be categorized also under vulnerable groups.

As it is established that homosexuals reside under vulnerable groups, then the article vouched for their legal protection. The other side of the coin is that the protection may carry a stigma for homosexuals. The conception of gays as disadvantaged will help them as a group, but may also stereotype them [22]. This stereotyping emerged especially during the *Cultural Revolution* in the mid-1960’s where homosexuals were reduced to harsh treatment. In revealing their sexual orientation with a view that they will be guaranteed legal protection, they were under the impression that they were safe. This contention seems to be abandoned as harsh treatment were meted out to them. Certain authorities also harass gays and lesbians as if they were criminals. They are subjected to quasi-formal administrative punishments such as custody and education. In other cases, some authorities may choose to shame gay men or women by telling their close friends, parents, colleagues, or neighbors about their sexual orientation [23]. Sometimes gay men have their establishments closed by the authorities [24].

2.1.1.2 Discrimination

The Government of Hong Kong does not recognize same-sex marriages as a matter of law. The *Marriage Ordinance*, Cap 181 (Laws of Hong Kong) defines marriage as a union between one man and one woman to the exclusion of all others [25]. Sexual orientation is hereby established as a recognized ground of discrimination in terms of the Hong Kong *Marriage Ordinance* [26]. In the light of these fundamental principles of equality and non-discrimination, the *Marriage Ordinance* faces a challenge.

Courts found in the *Leung* decisions (*Leung v Secretary for Justice: Privacy, Equality and the Hypersexualised Homosexual Stereotype* (2005) 35 HKLJ 545) that incongruent treatment of homosexuals and heterosexuals and lesbians amount to discrimination [27]. This case thus harbinger that same-sex couples should be afforded equal treatment under Hong Kong's *Domestic Violence Ordinance* (DVO) (Cap. 189, Laws of Hong Kong). With regard to the *Marriage Ordinance's* enmity towards homosexuals, the issue of whether protection against domestic violence under the DVO ought to be extended to same-sex couples. This has become a subject of heated debate in Hong Kong. Given the conservative nature of Hong Kong society, talks of extending the DVO protection had generated uproar. Cardinal Joseph Zen Ze-Kiun, Bishop of the Catholic Church in Hong Kong, has issued a press statement saying that although the Church supported the notion that everyone was entitled to legal protection from violence, such an extension of the DVO to same-sex couples would result in a misunderstanding of the concepts of family and marriage and thereby undermining the very foundations of Hong Kong society [28]. On the other hand, groups fighting for the equal rights of all persons have claimed that any denial of such protection is tantamount to discrimination on the grounds of sexual orientation. These groups also aver that the denial of protection is also a violation of the Government's obligations under the *Basic Law of Hong Kong* (HKBL) and international law (*International Covenant on Civil and Political Rights*) (ICCPR) [29].

It has been argued that to extend the protection of the DVO to same-sex couples would be contrary to the spirit of the DVO, which aims to protect victims of family violence. Because homosexual couples are not legally recognized as family units in Hong Kong, it is obvious that this protection measure do not apply to them [30]. As a result, homosexual victims of violence have feared that seeking protection against violence will disadvantaged them. Homosexual victims of violence predicate that the prevalence of violence among homosexual couples can be used as a further argument against the sanctification of such unions and will only serve to validate negative stereotypes with respect to homosexual relationships. Many feel the costs of seeking such assistance are far too high [31].

As Hong Kong imports Article 39 into its laws, the ICCPR stipulates that Hong Kong should upholds the right to equal treatment under the law. Article 2(1) of the ICCPR also protecting the right to non-discrimination [32].

The right to equality before the law enshrined in the ICCPR and the HKBL demands that same-sex couples be equally protected from domestic violence and the *Leung* decision have already signaled the winds of change in this direction.

2.2.1 Mitigating or Aggravating Circumstances for Offender(s) of Homosexual Victims(s)

Judges take into account (mitigating factor) the fact that the offender committed the offence because of enmity towards homosexuals. If the offender can claims that he has lost the power of self-control as a result of being touched sexually by the victim, the former will be able to rely on the defense of provocation [33]. The gist of this research is that that provocation been regarded as unsuitable when the claim is based on an unwanted homosexual advance. It usually arises out of the homophobia of the killer, which cannot be treated as mitigating circumstances for a crime [34].

McDonald exerts that the killing (or assault) of homosexuals has been regarded as hate crimes and higher penalties must therefore be allocated as punishment. Hate crimes are those that are associated with the victim's "minority" status, such as those based on sexuality. It also involves a perpetrator and victim who are complete strangers to each other. Gay and lesbian communities are usually the recipients of harassment and abuse [35].

Homosexuals are also regarded as “an opposed group of social outsiders” by some governments [36]. On the basis hereof gay men are victims of violent assaults and murder. According to McDonald hate crimes are more harmful to society than comparable crimes without bias motive. Hate crimes therefore have the effect of silencing and render invisible members of the gay and lesbian communities. A letter furnished by McDonald reads as follows: “A schoolmate I’ve known for 44 years has only recently confided to me that he is gay: the homophobic hate-murder of Charles Aberhart in Hagley Park in 1964 has kept him in the closet from that day to this – as it was intended to do. Hate crimes have many victims other than the people physically hurt by them – whole communities. That is why they deserve special attention.” [37].

In the New Zealand case of *R V Poki* [38] Justice Nicholson asserted that an attack was premeditated and was undertaken because of the sexual orientation of the victim. It was a hate crime that was aimed at the sexuality of the victim. It must therefore be regarded as an aggravating factor when crimes are committed as a result of homophobia or hostility towards people on the basis of their sexual orientation [39].

Claims of unwanted homosexual advances forwarded by the perpetrator to exonerate him of a crime, has always been produced by him. These advances have become the reasons for most of the killings of gay men. In the *Poki*-case (supra) the accused alleged unwanted intimate action of the victim.

Criticisms against the permission of unwanted homosexual advances as a defense seem to benefit only straight men. It is obvious therefore that these defenses rendered gay men vulnerable for attack. The paper stresses that the Courts give men who proffer defense such as “homosexual advances” being meted out to them, a license to kill, if it is not convicting them of murder. The result is that Courts portray the notion that gay men are not entitled to human rights and protection under the law. This sentiment has a bearing on the justice system in the private as well as the public realm [40].

In the case, *State of Oklahoma v Neill*, [41] Neil was executed for murdering four people and being gay. According to Howarth, Neill’s identity as a homosexual was the reason for a death verdict. Neill’s case reveals the power of law to construct and condemn homosexual identity. Howarth exerts that sentencing a person to death because of moral distaste for homosexuality is itself morally reprehensible.

The research stresses that the gist of the argument in the *Neill*-case is that his execution would be unconstitutional, because it was based on the explicit exhortation by the prosecutor that Neill is to be executed because he was gay. The repeated description of Neil as homosexual during closing argument constituted prejudicial prosecutorial misconduct. Even Justice Lucero attested to this sentiment as can be seen in a citation of him: “[The] prosecutor’s blatant homophobic hatemongering at sentencing has no place in the courtrooms of a civilized society [...]” [42]. He proceeded, “[While] thinly disguising his intent by denying that a person’s ‘sexual preference’ is an ‘aggravating circumstance,’ the prosecutor deviously and despicably incited the jury with the statement” [43]. This paraphrase can be interpreted to read that Neill should be put to death because he is gay.

Judge Lucero also echoes a legal theory that was utilized in *Bowers v Hardwick* [44] and applied it on the *Neill* case. It reads as follows: “I cannot sanction-because I have no confidence in-a proceeding tainted by a prosecutor’s request that jurors impose a death sentence based [...] on who the defendant is rather than what he has done.” [45]. According to Lucero the prosecutor’s plea that the jury is to disregard Neil as a person and consider him instead a homosexual person, is blatant bias. Lucero concluded that the prosecutor’s words deprived Neill of a fair trial (*State of Oklahoma v Neil* 263 F.3d 1203. Lucero, J. dissenting).

In a case similar to that of Neill - the case of *Bernina Mata* (no citation of the case was given in the

literature) - Ruthann Robson believes the only real reason the jury could have convicted Mata of first-degree murder and her subsequent death sentencing was the prosecutorial misuse of her lesbianism. The prosecutor also labeled her a “hard core lesbian” [46]. In light of bias against lesbians and other sexual minorities, the American Enterprise Institute (AEI) has conducted empirical research on the matter. At completion of the research a report was released and it reveals that members of juries are composed from the population who disapprove of homosexuality. The *Chicago Times* reported incidents of bias by jurors towards gay and lesbian defendants. Given the statistics supporting jury bias, it is not surprising that discrimination against lesbians in the criminal justice system concludes that lesbians are more likely to be convicted than heterosexual women [47].

Robson concurs there are instances in which a defendant’s sexual relationships and identity are relevant to the circumstances of the crime, but she asserts that that the prosecution should introduce this evidence in the most factual and least biased manner as possible. She exerts that in the *Mata*-case, the latter’s sexual identity was irrelevant to the crime [48]. Mata’s lesbianism constituted the basis for the sole aggravating factor found by the jury. The prosecutor introduced and re-introduced evidence of Mara’s lesbianism for the purpose of inflaming and prejudicing the jury [49]. The negative stereotyping of lesbians as man-haters buttresses the notion that the murder in the case was committed in a cold, calculated and premeditated manner. Based on this negative stereotyping, the jury imposed the death penalty on Mata, because she was not a normal heterosexual person. This dehumanizing of Mata as a person not worthy of living may be an accepted strategy of prosecutors in seeking the death penalty [50].

2.2.1.1 Constitutional Protection Afforded to Same-Sex Partners: The South African Example

2.2.1.1.1 Dignity and Privacy

The ideal of human dignity implies that government should not execute their most marginalized citizens as punishment for a crime. In the context of same-sex couples, the question has been about the extent to which sexual practices such as sodomy should be entitled constitutional protection. All human beings innately have dignity [51].

Although sex is regarded as undignified and something which belongs to man’s baser animalistic aspect, courts, however, are more inclined to imagine sex as dignified and therefore try to protect the dignity of it [52]. Henceforth, sex is thus afforded constitutional protection.

The right to dignity (and privacy) has been emphasized in the *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* (1999) 1 SA 6 (CC). The South African Constitutional Court struck down the common law offense of sodomy on the basis of dignity and privacy afforded to homosexuals. The majority decision in the *Gay and Lesbian Coalition* case reads: “[privacy] recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy” [53].

It is obvious that the court’s emphasis on intimacy is the link between dignity and privacy.

2.2.1.1.2 Equality

The *South African Constitution*, Act 108 of 1996 states in section 9(1) that, “[everyone is equal before the law and has the right to equal protection and benefit of the law.” Section 3 of the constitution mentions further that, “[the] state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including [...] sexual orientation.” Subsection 4 of the Equality clause adumbrated that national legislation must be enacted to prevent or prohibit unfair discrimination.

The equality clause of the South African constitution’s philosophical idea is that people who are similarly situated should be treated similarly. It commits the state to the goal of achieving equality. This comprises a guarantee that the law will protect and benefit people equally and serves as a prohibition on unfair discrimination. Equality, as mentioned by section 9(2) of the South African Constitution includes the full and equal enjoyment of rights and freedoms [54].

Justice Ackermann also holds in the *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* case that respect for difference is at the heart of equality. He asserts that equality depends on the protection of political minorities. It implies that if we say any group is less deserving and unworthy of equal protection and benefit of the law, then society is demeaned. It is therefore injurious to say that those who are of a different sexual orientation are less worthy [55].

2.2.1.1.3 Practical Implications of Dignity and Equality with Regard to Sexual Orientation

The Constitutional Court held: “We need [...] to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not [...]” [56].

The South African Statute, The *Aliens Control Act* 96 of 1991 constitutes unfair discrimination on grounds of sexual orientation and marital status. This Act granted, for example only for heterosexual spouses of South African citizens a right to an immigration permit. By not extending this privilege to same-sex life partners, the Act differentiated between groups of people to the detriment of homosexual partners.

Discrimination based on sexual orientation is severe, because no concern is shown for the particular sexual orientation of gays and lesbians [57]. In a number of cases, sexual orientation has served as the basis for its invalidation. For example, in *Du Toit v Minister for Welfare and Population Development* (2003 (2) SA 198 (CC) provisions of the *Child Care Act* 74 of 1983 and section 1(2) of the *Guardianship Act* 192 of 1993, which provided for the joint adoption and guardianship of children by married persons, was declared unconstitutional, because the discrimination against gay and lesbians was unfair. In *Stachwell v President of the Republic of South Africa* (2002 (6) SA 1 (CC) the *Judges’ Remuneration and Conditions of Employment Act* 88 of 1989 was declared invalid in so far as it provided financial benefits only to the “surviving spouse” of a judge and not to a partner in a same-sex life partnership. In *J v Director-General, Department of Home Affairs* (2003 (5) SA 621 (CC) section 5 of the *Children’s Status Act* 82 of 1987 was declared unconstitutional, because it did not provide for registration of persons in permanent same-sex life-partnership as parents of children conceived by artificial insemination.

Common law confines the status of marriage to heterosexual relationships only. In the *Du Toit*-case, the

court lists a number of changes made to legislation and policy to include same-sex partnerships. With this impetus, Madala J challenges the common law definition of marriage as a union of a man and a woman. He asserts in *Fourie v Minister of Home Affairs* (2005 (3) BCLR 241 (SCA)) that only heterosexuals are given the choice to marry. In denying homosexuals such a choice, is to deny them the option of “entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations” [58]. This state (of unfair discrimination) could not be tolerated and the definition of marriage therefore had to be changed to accommodate the possibility of same-sex marriage.

The pressure mounted by abovementioned case law for the recognition of same-sex marriages by the community, served as a fulcrum for *Farr v Mutual & Federal Insurance Co Ltd*, (2000 (3) SA 684 (C)) where an insurance contract excluded liability of the insurer for injury to “a member of the policy holder’s family normally resident with him.” The insured’s long-term homosexual partner had been injured in a car accident while travelled with the insured. The court held, that family had to be interpreted to include same-sex life partners and that the insurer was accordingly excluded from liability.

In *Gory v Kolver*(2007 (4) SA 97 (CC85)), the Court declared a provision of the *Intestate Succession Act* 81 of 1987 unconstitutional in so far as the inheritance of intestate succession is concerned regarding same-sex life partners.

This paper includes implications for the development of laws and statutes in a myriad of jurisdictions to propose protection for the rights of homosexuals. It is aimed at policy-makers, politicians and governments to cast off the demeaning character that has been burdened this marginalized sector of the population or community. The research want to do away with law or conduct that differentiates between certain groups of people [59].

This paper tries to contrive a change in practice to the above challenges, by suggesting a platform for respect for sexual minorities. This can be achieved by rational dialogue and study of changes in other jurisdictions.

In fundamentalisms (such as Christians, Islamic, and Hindu) homosexuality is regarded as a violation of the rules of nature [60].

With the rise of individualism, people want to control their own lives. This includes decisions about sexuality and relationships and these relationships being subject to privacy [61].

With sexual diversity as norm (in modern day), sexuality are still shaped by complex relations of power. The most familiar of these forms are related to gender. Gender remains critical to the organization of sexualities and sexual cultures [62].

Sexuality is about interaction with others. As a result, sexuality is shaped and sexual knowledge adduced. Same-sex relationships have become the symbolic focus of political controversy. The sexual provides a focus for political and cultural confrontations in the twentieth century [63].

3. Conclusion

Gay discrimination is the act of treating people who identify as gay as lesser than those who identify in other ways, such as heterosexuals. When homosexuals are treated differently such treatment impairs their fundamental dignity as human beings. The study succeeds in bringing the message across in order for politicians and policy-makers and especially judges that homosexuals be treated with respect and dignity and that laws which infringe their rights be abrogated. These stakeholders must contrive new laws which protect these sexual minority groups' rights to freedom of expression, equality and all other dimensions of the civil and political life. A comparative model has been adopted by this study to fathomed which jurisdictions have laws in their panoply to protect homosexuals. South African judicature stands out to be the norm for the protection of sexual minority groups or homosexual peoples' rights. The ground-breaking case of National Coalition served as bedrock for the protection of gays and lesbians' rights. The other jurisdictions must pay heed to the example of South Africa and forged protection statutory laws in their legal framework, especially in their constitutions, which is the highest law of a country. The decisions or court procedures that have been followed in American case laws of State of Oklahoma and Bernina Mata and the judicature of Muslim or Islamic countries are deplored in this study. The research purports to denounce the ignoble conduct by the judiciary with regard to homosexual people. The prejudices homosexual people are suffering are reprehensible and have thus excited this study in order to make an appeal for their plight.

By demeaning one groups of society, because they are different from us, we in fact demean the whole of society.

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