

Homosexual Rights and the Law: A South African Constitutional Metamorphosis

Mr. Mwanawina Ilyayambwa

Junior Lecturer of Public Law and Legal Philosophy
North West University
Mafikeng Campus, Faculty Law
Private Bag X2046, Mmabatho
South Africa

Abstract

The jurisprudence of a nation or region has to accommodate the changes that are occurring in society, otherwise, the law would become irrelevant and redundant. The development of the South African Constitutional Jurisprudence is an example of this metamorphosis, from the creation of the Gay and Lesbians of the Witwatersrand (GLOW) in the 1980s, to the landmark case of National Coalition of Gay and Lesbian Equality and Others v Minister of Home Affairs and Others, trickling down to the 2010 decision of Hendrick Pieter Le Roux and others v Louis Dey. Underpinned by this background, this paper will give an analysis of the Constitutional status of homosexuality within South African law indicating the adequacy of the constitutional changes. It will also critique how the Louis Dey decision was an error in law. The paper will also highlight the international position on homosexuality.

Key words: Jurisprudence, Homosexuality, South Africa, Gay, Lesbian, Human Rights, Constitution,

1. Introduction

Human rights are afforded to all people, regardless of their status or whether they are in majority or minority. The jurisprudence of a nation or region has to accommodate the changes that are occurring in society, otherwise, the law would become irrelevant and redundant. The development of the South African Constitutional Jurisprudence is an example of this metamorphosis, from the creation of the Gay and Lesbians of the Witwatersrand (GLOW) in the 1980s, to the landmark case of National Coalition of Gay and Lesbian Equality and Others v Minister of Home Affairs and Others, trickling down to the 2010 decision of Hendrick Pieter Le Roux and others v Louis Dey. Underpinned by this background, this paper will give an analysis of the status of homosexuality within South African law and challenges thereof. The discussion will include the position in relation to international standards and give an examination of societal perceptions.

2. Defining Homosexuality

Homosexuality is defined as the orientation of sexual need, desire, or responsiveness towards other persons of the same gender.¹ It is submitted that in accordance to this definition, a broad context comes to light. A person need not have sexual relations in order to fit the definition, the mere longing to have a sexual association with a person of the same sex is sufficient to be established in this definition. The study of homosexuality has in the past been greatly curtailed by what some authors referred to as *academic amnesia* or *academic defiance* since there was a lot of stigma surrounding the issue. Some authors came to a conclusion that since virtually no work had appeared on the history of homosexuality anywhere in sub-Saharan Africa, let alone in South Africa, and some would claim that there is no story to be written on Homosexuality.² Homosexual conduct formed the basis of a variety of criminal offences. The early Roman criminal law expressly prohibited 'unnatural practices' between men. In the Roman-Dutch common law a large number of sexual acts between adults, whether between men or between a man and a woman, were criminal, if not directed towards procreation.³

¹ Masango, M. (2002). *Homosexuality: a challenge to African churches*. HTS : Theological Studies, Vol 58, Issue 3, Sep. p 958

² Du Plessis, A., (1997). *Searching in an "empty closet"? A history of homosexuality in South Africa*. Historia, May Vol 42, Issue 1., p 123

³ Jivan U., (2007). *From individual protection to recognition of relationships: same-sex couples and the South African experience of sexual orientation reform*. Law, Democracy & Development, November, Vol 11, Issue 2., p 21

3. *The South African Constitution and Homosexuality*

The apartheid social and legal system did not protect minority sexual inclinations, that is, sexual preferences of gays, lesbians and transsexuals. Because their sexual orientation differed from the norm, gays, lesbians and transsexuals were condemned, excluded and even punished by the law in the criminal, civil and family law spheres.⁴ With the advent of a Constitutional democracy beckoning, gays and lesbians, many of them from the mostly white middle and upper classes, had organized during apartheid and were well equipped to fight for protection under the new constitution. They had begun to organize openly in the mid-1980s, with the creation of Gays and Lesbians of the Witwatersrand (GLOW). Although GLOW's membership was predominantly wealthy gay whites, its founder was Simon Nkoli, a black South African and a well-known anti-apartheid activist.⁵

The preamble of the Constitution of the Republic of South Africa Act 200 of 1993⁶ provided that "WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".

In December 1996, thousands of people gathered at Sharpeville stadium to watch President Mandela assent to the final Constitution of South Africa. There were few banners displayed, a small section of the crowd was singing and the general mood was sober. About ten lesbians, gays and supporters held up the banner of the National Coalition for Gay and Lesbian Equality (NCGLE) inscribed with the slogan "Equality for All!"⁷ This same need for equality is affirmed in Constitution of the Republic of South Africa.⁸ The pursuit for equality is well captured in Chapter 1, the founding Provisions which are;

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.

Equality is a deeply controversial social idea. At its most basic abstract, the formal idea of equality is that people who are similarly situated in relevant ways should be treated similar. Its logical correlative is the idea that people who are not similarly situated should not be treated alike.⁹ In all the above mentioned provisions, the Constitution gives the reader a prima-facie view that persons cannot be discriminated against, regardless of their circumstances.

In 1996, the South African government approved a new constitution. In addition to ending de jure apartheid, it was the first in the world to protect the rights of homosexuals. Lawmakers made history by writing sexual orientation into the national non-discrimination clause, enshrining gay rights in the supreme law of the land. This progressive government and constitution, however, did not reflect the attitudes of most South Africans, who did not support gay rights. The government created a gap between its tolerant laws and the conservative social attitudes of its citizens.¹⁰

The Constitution, under Section 9, draws a clear principle that discrimination on grounds of sexual orientation is unconstitutional. It provides that;

Everyone is equal before the law and has the right to equal protection and benefit of the law.¹¹

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, **sexual orientation**, age, disability, religion, conscience, belief, culture, language and birth.¹² (emphasis added)

⁴ Jivan U, Ibid n.3 at page 21

⁵ Massoud M.F., (2003). *The Evolution of Gay Rights in South Africa*. Peace Review 15:3. p 302

⁶ Available from <http://www.info.gov.za/documents/constitution/93cons.htm>

⁷ Mazibuko J., (1998). *Gay and Lesbian Rights: Forcing Change in South Africa*. SAR, Vol 13 No 3, May. p 31.

⁸ Act 108 of 1996

⁹ Currie. I, and Waal. J., (2005). *The Bill of Rights Handbook*, p 230

¹⁰ Massoud M.F, *op cit* n.5 at page 301

¹¹ Section 9(1)

¹² Section 9(3)

The sentiments of *Massoud that*, laws do not necessarily reflect social attitude is further affirmed by *Duarte* when he spoke the following words;

Not only are there legal injustices to be done away with, but mindsets and cultures have to be done away with too. It's one thing for you to have your rights and equality in the law, it's quite another to have them each day in the street, at work, in the bar, in public places.¹³

It is correctly observed that the Interpretation of legal rules occurs not only in courtrooms but also in the court of public opinion. A nationally representative survey of people's attitudes conducted by the University of the Witwatersrand in 1995 found that only 38 percent of South Africans felt the constitution should give equal rights to gays and lesbians.¹⁴

4. Turning the Gears of Societal Change

The National Coalition for Gay and Lesbian Equality placed itself among the most successful Non Governmental Organisations to bridge the gap between legal and social change in South Africa. In sum, it brought the economic and civil rights concerns of South Africans to the courts, mainstreamed the gay rights struggle among the poor, and educated those most impoverished under apartheid about their constitutional rights.¹⁵ This was done through lobbying.

Links between gay and lesbian rights and the apartheid past were made early and often in the lobbying efforts. The Coalition's first official submission to the Constitutional Assembly argued that:

The Constitution enshrines the right to express differing views and to live varying lifestyles. It cannot enforce only the views of certain religions. This would endanger the fertile pluralism of our society, the rich diversity of our lives and experiences, and endanger our commitment to transcending our discriminatory past.¹⁶

Their efforts were always met with much stigma and opposition. *Meshoe* in his rebuke of such phenomenon once mentioned that nation-building cannot be possible while we try to legally destroy family values and the moral fibre of our society with clauses in the Constitution that promote a lifestyle that is an embarrassment even to our ancestors.¹⁷

In **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others**,¹⁸ the constitutionality of section 25(5) of the Aliens Control Act 96 of 1991 which omitted to give persons, who are partners in permanent same-sex life partnerships, the benefits it extended to "spouses" was brought under scrutiny.

The rights of equality and dignity were found to be closely related in the present case and it was held that section 25(5) reinforced harmful stereotypes of gays and lesbians. This conveyed the message that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected and constituted an invasion of their dignity. Section 25(5) was held to discriminate unfairly against gays and lesbians on the intersecting and overlapping grounds of sexual orientation and marital status and seriously limited their equality rights and their right to dignity. It did so in a way which was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Court accordingly held that the omission from section 25(5) of partners in permanent same-sex life partnerships was inconsistent with the Constitution. Having come to this conclusion it was unnecessary to consider whether any of the freedom of movement rights were in any way limited by section 25(5). The Court opined that;

¹³ Duarte J., South African Gay and Lesbian Film Festival, May 1994

¹⁴ Massoud M.F, *op cit* n.5 at 304

¹⁵ Massoud M.F, *op cit* n.5 at p 301

¹⁶ Oswin N., (2007) *The End of Queer (as we knew it): Globalization and the making of a gay-friendly South Africa*. Gender, Place and Culture. February Vol. 14, No. 1, p 99

¹⁷ Oswin N, *Ibid* n.15 at p 98

¹⁸ (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999)

In the first place, protecting the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership. In the second place there is no rational connection between the exclusion of same-sex life partners from the benefits under section 25(5) and the government interest sought to be achieved thereby, namely the protection of families and the family life of heterosexual spouses. No conceivable way was suggested, nor can I think of any, whereby the appropriate extension of the section 25(5) benefits to same-sex life partners could negatively effect such protection.¹⁹

In National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others,²⁰ the Constitutional Court was asked to confirm an order made by the Witwatersrand High Court that the law offence of sodomy, the inclusion of sodomy in schedules to certain Acts of Parliament, and a section of the Sexual Offences Act which prohibits sexual conduct between men in certain circumstances were unconstitutional and invalid. Although technically the Constitutional Court only had to decide on the constitutionality of the inclusion of sodomy in the schedules and of the section of the Sexual Offences Act, this could not be done without also considering the constitutionality of sodomy as a common law offence. Constitutional Court Justice Kate O'Regan in forecasting the Court's decision, explained how her view of jurisprudence ultimately included a broader definition of equality than in other Western democracies.

“Equality is substantive. It is about [remediating] particular types of discrimination that render groups vulnerable.”

The Court's opinion in the case echoed O'Regan's words: equality ought to be defined in terms of a history of disadvantage. O'Regan and the Court decided that, since the apartheid regime repressed gays and lesbians and made them a disadvantaged group, the rights of this group would be protected. The Constitutional Court's decision changed the landscape of South African law. It solidified in many respects what had been uncertain equality jurisprudence.²¹

The Court found that the above offences, all of which are aimed at prohibiting sexual intimacy between gay men, violate the right to equality in that they unfairly discriminate against gay men on the basis of sexual orientation. Such discrimination is presumed to be unfair since the Constitution expressly includes sexual orientation as a prohibited ground of discrimination. Gay people are a vulnerable minority group in our society. Sodomy laws criminalise their most intimate relationships. This devalues and degrades gay men and therefore constitutes a violation of their fundamental right to dignity. Furthermore, the offences criminalise private conduct between consenting adults which causes no harm to anyone else. This intrusion on the innermost sphere of human life violates the constitutional right to privacy.²² The Court resolved that;

The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.²³

In 2002, the South African Constitutional Court held in a remarkable decision that the provisions of the Child Care Act and of the Guardianship Act, which reserve adoptions to married couples or single persons, violate the Constitution and has thus made possible co-parent adoptions by a same-sex partner.²⁴

¹⁹ at para 55

²⁰ (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)

²¹ 305

²² Explanatory Note. Available from <http://www.saflii.org/za/cases/ZACC/1998/15media.pdf>

²³ at para 36

²⁴ Du Toit and Another v. Minister for Welfare and Population Development and Others, 2002 (10) BCLR 1006 (CC), 2002 SACLR LEXIS 23.

It is submitted that the efforts and determination of the Coalition together with the existence of a justiciable Bill of Rights and a judiciary underpinned by the supremacy of the South African Constitution all played a pivotal role in ushering in these changes.

4.1 The Louis Dey Case²⁵

On 8 March 2011, the Constitutional Court delivered judgment in a matter in which the applicants, Hendrick Pieter Le Roux, Burgert Christiaan Gildenhuys and Reinardt Janse van Rensburg, sought leave to appeal against a judgment and order of the Supreme Court of Appeal that upheld an award of damages made by the North Gauteng High Court, Pretoria (High Court) to the respondent, Dr Louis Dey.²⁶

4.2 The Picture at the Core of the Litigation

The first applicant, who then was fifteen and a half and in grade 9, one evening searched the internet for pictures of gay bodybuilders. He found one. It showed two of them, both naked and their legs astride, sitting next to each other in a rather compromising position – a leg of the one was over a leg of the other – and the position of their hands was indicative of sexual activity or stimulation. He manipulated the photograph by pasting a photo of the defendant's face on the face of the one bodybuilder and the face of the principal of the school onto the other. He also covered the genitals of each with pictures of the school's badge. He sent the manipulated photo to a friend who, in turn, sent it by cell phone to the second applicant, who was in grade 11 and 17 years old. The picture spread like fire amongst the scholars. A few days later the second applicant showed the picture to a female teacher during class and later decided to print the photo in colour and showed it around on the playground. At his behest and because he did not have the necessary 'guts' the third applicant, who was in the same grade and of the same age, placed the photograph prominently on the school's notice board. A teacher saw it quite soon and removed it.

4.3 Findings of the Constitutional Court

In a judgment by Brand AJ, (Ngcobo CJ, Moseneke DCJ, Khampepe J, Mogoeng J and Nkabinde J concurring) the majority of the Court affirmed the finding of the majority of the Supreme Court of Appeal that the image was defamatory of Dr Dey.. The following points from the Judgement are worth noting. The Court adapted the elements of defamation as established in the case of *In Khumalo and Others v Holomisa*²⁷ were the Court stated that the elements of defamation are:

- the wrongful
- intentional and
- publication of
- a defamatory statement
- concerning the plaintiff

The Court however would later opine at para 85 that the plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional.

In answering the question as to whether the picture was defamatory, Brand AJ opined as follows;

What I distil from all this is that in the present context, the question is not so much whether the attempt at a joke is objectively funny or not. Nor is it of any real consequence whether we regard the joke as unsavoury or whether we think that those who may laugh at it would be acting improperly. The real question is whether the reasonable observer – perhaps, while laughing – will understand the joke as belittling the plaintiff; as making the plaintiff look foolish and unworthy of respect; or as exposing the plaintiff to ridicule and contempt. Everyday experience tells us that jokes are often intended to and are frequently more effective in destroying the image of those at whom they are aimed. If the joke then achieves that purpose, it is defamatory, even when it is hilariously funny to everyone, apart from the victim.

²⁵ [2011] ZACC 4; CCT 45/10;2011 (3) SA 274 (CC) ; 2011 (6) BCLR 577 (CC) ; BCLR 446 (CC)

²⁶ Hendrick Pieter Le Roux and Others v Louis Dey. Media Summary. Available from <http://www.saflii.org/za/cases/ZACC/2011/4media.pdf>

²⁷ [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 18.

Reverting to the facts, this is precisely how the reasonable observer would, in my view, have evaluated the picture, namely, that it was aimed at challenging Dr Dey's authority through tarnishing his image and diminishing the respect that he enjoyed amongst the learners of the school. That renders the picture defamatory. I am prepared to accept that most of the learners at the school found the picture funny or even hilarious. But that does not detract from my conclusion. In fact, as I see it, the very reason why they would probably be laughing was that the two figures of authority were belittled and reduced to ridicule.²⁸

The Court stated that the line between a joke and defamation is crossed when the joke becomes hurtful; when it represents the teacher as foolish, ridiculous and unworthy of respect. In the end it comes down to a value judgment²⁹ and that in this instance Dr Dey had been hurt.³⁰

In balancing the rights of the Children as outlined in section 28 against the rights of the defamed, the court favoured the maintenance of discipline within the school system. This can be observed under paragraph 128 where the court opined that;

To facilitate this balancing act, there would have to be an investigation into what the effect of such free-reigning experimentation by schoolchildren with satire would be. Would it not result in a general destruction of respect for teachers? And, if so, what would be the effect on discipline in our schools? Apart from his own evidence, Dr Dey also presented the evidence of Dr Pieter Edwards at the trial. He is the principal of a well-known school in Pretoria. What we learn from his evidence, and that of Dr Dey himself, is that, in their experience, respect for teachers is an essential precondition for discipline; that discipline in turn is an essential requirement for the functioning of the school system; and that there is a growing tendency in our schools to challenge the status and authority of teachers with a concomitant breakdown in discipline. In this light it would, in my view, frankly be irresponsible to allow the extension of the reasonable publication defence contended for by the FXI without any proper investigation into the potential repercussions.

The Court also dismissed the applicants defence that they lacked animus iniuriandi by taking into consideration the fact that two of the applicants conceded in cross-examination that they would not paste the face of their dominee (church leader) on the same picture because one does not "mess" with the dominee. They also admitted that they would not like to see their own faces or the faces of their parents in that position. The only sensible inference that the court would draw from all this is that they knew that any person whose face was pasted on that picture would be humiliated and suffer harm through degradation. In short, they knew that they were "messing" with Dr Dey's image and carried on regardless of the consequences.³¹

In their judgment Cameron J and Froneman J held that the image was not defamatory, but that it infringed upon Dr Dey's personal dignity. They would have awarded the same relief for that infringement as the majority did for the defamation. In dismissing the defamation claim, they submitted that Dr Dey's personal understanding of this image is not decisive or even relevant³² since the required test is an objective test and in applying such a test the learned Justices concluded that the image does not, in their view, mean that the average reasonable person viewing the image in the school context, where it was published, would regard the picture as defamatory of Dr Dey by countenancing the indecent association or attempted ridicule. That contextually average reasonable school viewer, learner or teacher, knew better:

²⁸ at para 114-115

²⁹ at para 119

³⁰ This is also affirmed by the transcript at paragraph 144 where it is stated that; *As to the subjective element, Dr Dey testified that he was deeply hurt by the applicants' conduct; that he felt belittled and humiliated; that in his perception he had lost the image he had worked so hard to achieve as the upholder of values at the school; that in his mind, the majority of the children saw him as a laughing stock; and that he had therefore lost the respect of the schoolchildren which was vital for his continued functioning as a teacher at the school. No-one suggests that this evidence should not be believed or that his feelings were not genuine. In this light the subjective element of the dignity claim was clearly established.*

³¹ at para 133

³² at para 156

Dr Dey and the school principal were not promiscuous, they were respected teachers, and the offenders would get their just disciplinary deserts for their crude joke – as indeed they did.³³

Yacoob J held however that the image was neither defamatory nor an infringement of Dr Dey's injured feelings. He held that the average reasonable observer in a constitutional state would bear in mind the constitutional provisions relating to freedom of expression and the rights and interests of children. This reasonable observer, knowing that the image was created at school would have regarded it more as an immature attempt at an attack on the authority exercised by Dr Dey rather than an attack on Dr Dey's person. Skweyiya J agreed with Yacoob J but on a slightly different basis.

4.4 Questions raised by the Judgement

Apart from developing the South African law of defamation, the judgement raised a very crucial question that is litmus to the acceptance of homosexuality in our society.

At paragraph 183-184, the minority judgment went on to mention that;

The Bill of Rights, while respecting sexual orientation, and protecting gay and lesbian people against unfair discrimination, also protects autonomy of choice in relation to sexual orientation. Many of the Constitution's provisions protect the right to choose to live in a certain way – the rights to language, culture, religion and equality embody protection of autonomous choices, which should be constitutionally protected.

But it does not follow that Dr Dey's choice to lead a heterosexual lifestyle, and to be known as heterosexual, should be protected by legal action. An actionable injury cannot be based solely on a ground of differentiation that the Constitution has ruled does not provide a basis for offence. The Constitution does not condone individual prejudice against people who are different in terms of race, sex, sexual orientation, conscience, belief, culture, language or birth. These are unfair grounds for differentiation and the equality provision of the Bill of Rights protects against discrimination based on them.

In interpreting these paragraphs, one is led to ask themselves if the society, despite discrimination on grounds of sexual orientation being outlawed by the highest law of the land, has accepted homosexuality. If the society had accepted homosexuality and that homosexuality was a concept that has been engraved into the law as a normal human behaviour it is respectfully submitted that it would require no special protection by the law. In ideal circumstances, to be labelled a homosexual should not evoke defamatory sentiments but should be met with pride and affirmation. It is submitted that the defamatory claim in these instances should have been successful only on grounds of the image depicting him as being naked or indecent as properly observed in the minority judgement at paragraph 190 however the majority judgement seems to fail to disassociate completely and explicitly that the defamation claim would fail if it were based on grounds that the claimant was associated with being a homosexual.³⁴

Another critical aspect, which emanated from the majority judgement, was the tendency of the court to suffocate freedom of expression in favour of maintaining "school discipline". At paragraph 128 of the judgement, the court observed that;

What we learn from his evidence, and that of Dr Dey himself, is that, in their experience, respect for teachers is an essential precondition for discipline; that discipline in turn is an essential requirement for the functioning of the school system; and that there is a growing tendency in our schools to challenge the status and authority of teachers with a concomitant breakdown in discipline. In this light it would, in my view, frankly be irresponsible to allow the extension of the reasonable publication defence contended for by the FXI without any proper investigation into the potential repercussions.

³³ at para 167

³⁴ See also the usage of words such as immorality, embarrassing and disgraceful at para 98. It is submitted that there is too much grey area as to what aspect of the picture these words refer to.

This suffocation of expression is further compounded by the fact that the applicants were children, and under Section 28 of the Constitution, a measure of protection should have been afforded to them as a way of promoting their best interests, however this argument seems to have had very little weight in this instance. It is submitted that this may be a negative development in the constitutional jurisprudence of the country. There has been many instance in the world where the dignity and reputation of a public figure have not been paramount over freedom of expression however in this case it seemed the law was quick to favour the dignity of a public figure of the satirical expression and development of a child. It should be borne in mind as well that these children had already been punished at school level and had even offered an apology.

5. *The International Arena*

In other African countries, the acceptance of homosexuality has been hampered by societal attitudes that are near impossible to deal with since Africa generally faces rule of law challenges. In August 1995, upon learning that the organization GALZ (Gays and Lesbians of Zimbabwe) was to occupy a booth at the annual Zimbabwe International Book Fair, Mugabe stated:

I find it outrageous and repugnant to my human conscience that such immoral and repulsive organizations like those of homosexuals, who offend both the agents of the law of nature and the morals and religious beliefs espoused by our society, should have any advocates in our midst or even elsewhere in the world.³⁵

In the 60 years since the foundation of human rights law with the Universal Declaration of Human Rights (UDHR) in 1948, we have seen great progress in the reach of protection afforded by international human rights law and its core principles of equality, universality and non-discrimination. Yet attempts explicitly to extend human rights protection to address issues of sexual orientation have been met with reaction so strong that it threatened the founding concept of human rights – universality.³⁶ In June, the General Assembly of the Organization of American States adopted by consensus a resolution entitled ‘Human Rights, Sexual Orientation, and Gender Identity’ (AG/RES. 2435 (XXXVIII-0/08)) – the first resolution on LGBT rights at an inter-governmental forum. Then in December 66 states signed a statement on human rights, sexual orientation and gender identity (UN Doc. A/63/635) delivered at the UN General Assembly.³⁷

The document, *inter alia*, urged states to:

- ensure that human rights violations based on sexual orientation or gender identity are investigated and perpetrators held accountable and brought to justice
- ensure adequate protection of human rights defenders, and remove obstacles which prevent them from carrying out their work on issues of human rights and sexual orientation and gender identity.
- take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention.
- to commit to promote and protect the human rights of all persons, regardless of sexual orientation or gender identity

6. *Conclusion*

The South African legal system has transcended all major constitutional and legislative hurdles in an attempt to ensure the universality of human rights. This has however been met with challenges based on perceptions and religious backgrounds however the supremacy of the constitution and the rule of law has been allowed to prevail. Much work still remains at the grassroots. Perceptions still exist that being homosexual or being labelled one is degrading. These challenges cannot be resolved or tackled legislatively since they are within the conscience of an individual, however the manner in which the state and its institutions address challenges brought about by sexual orientation will ultimately determine the pace at which the complete integration of societal differences occurs in South Africa.

³⁵ Oswin N, *op cit* n.15 at p 101

³⁶ Sheill, K., (2009). *Losing out in the intersections: lesbians, human rights, law and activism. Contemporary Politics*. Vol. 15, No. 1, March 2009. p 56

³⁷ Sheill K, *Ibid* n 36 at p 59

7. References

Books

Currie, I, and Waal, J., *The Bill of Rights Handbook*, 2005.

Journal Articles

Du Plessis, A., (1997) *Searching in an "empty closet"? A history of homosexuality in South Africa*. *Historia*, Vol 42, Issue 1, May. p 116-129.

Jivan U., (2007). *From individual protection to recognition of relationships : same-sex couples and the South African experience of sexual orientation reform*. *Law, Democracy & Development*, Vol 11, Issue 2, Nov. p 19-46.

Masango, M., (2002) *Homosexuality : a challenge to African churches*. *HTS : Theological Studies*, Vol 58, Issue 3, Sep p. 956-972.

Massoud M.F., (2003) *The Evolution of Gay Rights in South Africa*. *Peace Review* 15:3 2003. p 301-307.

Oswin N., (2007) *The End of Queer (as we knew it): Globalization and the making of a gay-friendly South Africa*. *Gender, Place and Culture*. February Vol. 14, No. 1, p 93-110.

Sheill K., (2009) *Losing out in the intersections: lesbians, human rights, law and activism*. *Contemporary Politics*. Vol. 15, No. 1, March. p 55-71.

Case Law

Du Toit and Another v. Minister for Welfare and Population Development and Others, 2002 (10) BCLR 1006 (CC), 2002 SACLR LEXIS 23.

Hendrick Pieter Le Roux and Others v Louis Dey [2011] ZACC 4; CCT 45/10;2011 (3) SA 274 (CC) ; 2011 (6) BCLR 577 (CC) ; BCLR 446 (CC).

Khumalo and Others v Holomisa [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC).

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39.

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517.

Statutes

The Constitution of the Republic of South Africa Act 108 of 1996

The Constitution of the Republic of South Africa Act 200 of 1993