

Same-sex relationships in Botswana: Current perspectives and future prospects

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Summary

In this article, the author examines constitutional challenges to statutes criminalising same-sex behaviour in three Southern African countries. On the one hand, in Botswana and Zimbabwe, the highest courts found (in the Kanane and Banana cases, respectively) that such statutes are not unconstitutional. On the other hand, the South African Constitutional Court invalidated statutes criminalising consensual sexual conduct between men in private. The main explanation for the difference is the fact that the South African Constitution outlaws unfair discrimination on the basis of sexual orientation, while the constitutions of the other two countries do not. However, the author argues that the courts in Botswana and Zimbabwe could have reached a different conclusion, had they creatively applied a broad and generous interpretative approach. Changes to the status quo depends more on the actions of those affected by these laws than on judicial interpretation.

1 Introduction

Sexual behaviour in society is generally predicated on heterosexuality and as a result, any exhibition of homosexual tendencies is regarded as deviant behaviour and an affront to morals and decency.¹ In regulating

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¹ See AB Tafa 'Right to sexual orientation: The line of the Botswana government' in Ditshwanelo Conference on Human Rights and Democracy, 17–19 November 1998, Gaborone, Ditshwanelo, (2000) 127.

sexual behaviour between consenting adult males and females, the law performs the function of prohibition through the criminalisation of homosexual activity and attempts to organise relationships in the public and private sphere through legal engineering.² This is manifested in the regulation of heterosexuality and its concomitant demands for conformity and its relegation of homosexuals into the criminal realm. In recent years there has been a wave of agitation for reform in many countries for the decriminalisation of homosexual activity, with some measure of success.³ The agitation has taken the form of attack on the criminalisation of homosexual activity as a denial of the civil rights of those who exhibit that tendency.

In Botswana there has not been any noticeable agitation for such reform, but the recent decision of the Court of Appeal in *Utjiwa Kanane v The State*⁴ has brought into the public domain same-sex relationships which had hitherto been discussed, if at all, by whispers and innuendos in private. This decision comes in the wake of a number of similar decisions in neighbouring countries such as South Africa and Zimbabwe. This paper examines the issues raised in the case, comparing them with those raised in South African and Zimbabwean cases and ascertaining whether same-sex relationships have a future in the law of Botswana.

2 The *Utjiwa Kanane* case

In March 1995, the appellant was brought before the Magistrate's Court and charged with the commission of two offences, namely committing an 'unnatural offence, contrary to section 164(c) of the Penal Code', and committing 'indecent practices between males, contrary to section 167 as read with section 33 of the Penal Code'.⁵ Section 164(c) provides as follows:⁶

Any person who . . . permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

² See D Cooper & D Herman 'Getting 'the family right': Legislating heterosexuality in Britain, 1986–1991' (1991) 10 *Canadian Journal of Family Law* 41, cited by SSM Edwards *Sex and gender in the legal process* (1996) 52.

³ See (2003) 116 *Harvard Law Review* 2007–2012 and E Steyn 'On the international recognition of gay love' (2003) 2 *Journal of South African Law* 340.

⁴ Criminal Appeal No 9 of 2003 (30 July 2003) unreported.

⁵ The section provides that where the Code does not specifically provide for punishment for an offence, a punishment of a maximum term of two years' imprisonment or a fine or both shall be imposed.

⁶ The section was amended by sec 21 of the Penal Code (Amendment) Act 1998, by substituting the words 'any other' for the word 'male' contained in the section. One of the objectives of the Bill, which eventually became the 1998 Act, was to enable sexual offences to be applicable to both sexes. See Bill No 1 of 1998, *Government Gazette* of 23 January 1998.

Section 167 provides as follows:⁷

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit an act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of an offence.

In relation to the first offence, it was alleged that on 26 December 1994, at Maun Village, the appellant 'permitted Graham Norrie, being male, to have carnal knowledge of him (Utjiwa Kanane) against the order of nature'. The particulars of the second offence were that the appellant, a male person, on 26 December 1994, at Maun Village, 'committed an act of gross indecency with Graham Norrie, a male person'. The appellant pleaded not guilty to both charges and averred that the sections of the Penal Code under which he was charged were *ultra vires* section 3 of the Botswana Constitution. It was common cause that this averment raised a constitutional issue, which ought to be determined by the High Court before the trial could proceed. Accordingly, in terms of section 18(3) of the Constitution, the case was referred to the High Court for determination. Section 18(3) provides:

If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of sections 3 to 16 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

The essence of the appellant's contentions in the High Court was that the stated sections of the Penal Code, (a) discriminate against male persons on the ground of gender and offend against their right of freedom of conscience, of expression and of privacy, assembly and association entrenched in section 3 of the Constitution,⁸ and thus contravened that section; and, (b) hinder male persons as contained in sections 13⁹ and 15¹⁰ of the Constitution by discriminating against males on the basis of their gender and thus contravened those sections.

⁷ The section was amended by sec 22 of the Penal Code (Amendment) Act 1998 by deleting the word 'male' wherever it appears and inserting the words 'or her' immediately after the word 'him' and 'or herself' immediately after the word 'himself'. For a discussion of the amendments, see Tafa (n 1 above) 128 and DG Boko 'The case for the decriminalisation of voluntary homosexual conduct in Botswana' in Ditshwanelo (n 1 above) 129.

⁸ The section grants every person in Botswana, irrespective of his or her race, place of origin, political opinions, colour, creed or sex, fundamental rights and freedoms of the individual, namely life, liberty, security of the person, protection of the law; freedom of conscience, of expression, assembly, association and protection for privacy of his or her home and other property and from deprivation of property without compensation.

⁹ The section provides for the protection of freedom of assembly and association.

¹⁰ The section provides for, *inter alia*, protection from discrimination on the grounds of race, tribe, place of origin, political opinions, colour or creed.

Furthermore, the alleged offences, it was contended, were committed in private between two consenting male adults. It was submitted on behalf of the defendant that the traditional legal attitudes to sex were founded on a procreation fetish, and therefore under such an approach, all non-procreative sex was deemed aberrational, deviant and unnatural, thus making the ambit of the so-called 'unnatural offences' being far from clear, so that it was impossible for any charge under section 164(c) of the Penal Code to satisfy the requirements of section 10(2)(b) of the Botswana Constitution.¹¹

Mwaikasu J, in a lengthy and detailed judgment,¹² held that the sections of the Penal Code complained of did not violate any of the provisions of the Constitution and were in accordance with them. The learned judge was of the view that the application essentially concerns the place and extent of public morality or moral values in the criminal law of a given society. In his view, the criminal law has as its basis the public morality or moral values or norms as cherished by members of the society concerned, and is influenced by the culture of the moment of such society. Such moral values regulate the conduct of individual members of society for the good of society and provide a conducive environment for the exercise and enjoyment of the individual rights and freedoms of members of such society. He added that the conduct of any person that is seen to threaten the fabric of a given society is what falls to be proscribed under the criminal law of the society concerned. In this regard, the identification of any such moral values or norms as being of importance to the welfare of society as a whole and for the promotion of the dignity, rights and freedoms of its members is the preserve of the society concerned.

It follows, therefore, that with offences of the type the appellant was charged with, great care must be taken by the courts in interpreting the relevant provisions of the Penal Code, lest they be trapped in unconsciously importing alien notions of moral values or norms into Botswana. Great reliance was placed on the Wolfenden Report¹³ and the

¹¹ The said section provides that '[e]very person who is charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands and in detail of the nature of the offence charged'.

¹² See Crim Trial No F94/1995 (22 March 2002) unreported.

¹³ A report by a committee set up in England, Committee on Homosexual Offences and Prostitution, in 1957, chaired by Sir John Wolfenden. The report asserted that '[i]t is not the duty of the law to concern itself with morality as such . . . [I]t should confine itself to those activities which offend against the public order and decency or expose the ordinary citizen to what is offensive or injurious.'

response to it by Lord Devlin in a series of lectures.¹⁴ Mwaikasu J approved the latter's view:¹⁵

The true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.

Mwaikasu J expressed the view that offences like 'unnatural offence', 'sodomy' and 'bestiality', though found in the Penal Codes of many African countries, are generally uncommon among indigenous African societies.¹⁶ They are the type of offences that have had their origin and predominant practices among white societies, particularly in the West and migratory white communities from there. Consequently, he asserted that these offences are more pronounced in countries like South Africa and Zimbabwe, where white settlers have imparted their influence in planting such practices, than in Botswana.

Tebbutt JP, who gave the lead judgment of the Court of Appeal, with which the other four Justices of Appeal consented, disassociated himself from the view that the offences in issue are uncommon among indigenous African societies as no evidence or authority was cited in support of it.¹⁷ On the question whether sections 164 and 167 violated the Constitution, Tebbutt JP opined that Mwaikasu J failed to appreciate that the appellant had been charged with contravening the sections as they existed prior to their amendment in 1998, and dealt with the appellant as if he had been charged with those sections in their amended form. Furthermore, it was his view that the Court should adopt a broad and generous approach to the construction of the Constitution, an approach which had earlier been adopted by a majority of the Court in

¹⁴ See *The enforcement of morals* (1965), a reprint of lectures delivered by him between 1959 and 1964. Lord Devlin was a leading figure in Britain during the years 1948–1964 and a proponent of the legalistic view of enforcement of morals. It was his view that 'the whole basis of criminal law is that there are certain standards of behaviour or moral principles which society requires to be observed and a breach of them is an offence against society as a whole'. He added that conduct that arouses 'intolerance, indignation and disgust' in society needs to be suppressed by legal order. Devlin's view was criticised by Prof Hart (*Law, liberty and morality* (1963)), who asserted, *inter alia*, that Devlin's proposition that homosexuality is a threat to society is as meaningless as Justinian's view that homosexuality causes earthquakes and that his assumption that there is a shared solidarity of morality is naïve.

¹⁵ See 21 of the transcript.

¹⁶ See AJGM Sanders 'Homosexuality and the law: A gay revolution in South Africa?' (1997) 41 *Journal of African Law* 101, where a view is expressed to the effect that whereas, culturally, a gay (homosexual) lifestyle is un-African, situational same-sex activity, at least among males, is not. See also K Botha 'A regional perspective of the right to sexual orientation' in Ditshwanelo (n 1 above) 124.

¹⁷ See 20–21 of the transcript.

Attorney General v Dow.¹⁸ Relying on *dicta* from this case,¹⁹ he held that discriminatory legislation on the basis of gender, though not expressly mentioned in section 15(3) of the Constitution, would violate section 3 of the Constitution.

Consequently, section 167 of the Penal Code, with which the appellant was charged, was clearly discriminatory on the basis of gender, either in itself or in its effect. The section was aimed entirely at male persons who committed acts of gross indecency with one another, be it in public or in private. However, he could not strike down the section in light of the 1998 amendment. With regard to section 164(c) as it stood before the 1998 amendment, it was his view that it did not discriminate on the basis of gender. As the person who commits the stipulated offence may be either male or female, the allegation that it is discriminative in nature failed. The appellant's appeal therefore succeeded in part, as the Court held that section 167, as it stood at the time when the appellant was charged, violated the Constitution but that section 164 did not.

The possible impact of the case on the law on same-sex relationships in Botswana may be seen from some of the reasons advanced by the court for not decriminalising homosexual behaviour. The pertinent questions which the court thought arose from the case were whether, at the present time and circumstances, homosexual practices between consenting adult males should be decriminalised in Botswana. Was there a class or group of gay men who require protection under section 3 of the Constitution? Should the word 'sex' in section 3 of the Constitution be broadened by interpretation to include 'sexual orientation'? These questions will be looked at below.

3 Should homosexual practices between consenting adults be decriminalised?

In trying to answer this question, Tebbutt JP noted the conclusion reached in the High Court by Mwaikasu J that Botswana society did not at the present time require the decriminalisation of homosexual practices between consenting adults because such practices were generally uncommon among indigenous African societies. As indicated above, Tebbutt JP disassociated himself and the Court from this and other reasons advanced by the learned judge for this conclusion. He nevertheless affirmed that the time had not yet arrived to decriminalise

¹⁸ [1992] BLR 119 at 129–132 *per* Amissah JP. For a commentary on the case, see EK Quansah 'Unity Dow v Attorney General of Botswana — One more relic of a woman's servitude removed?' (1992) 4 *African Journal of International and Comparative Law* 195; (1993) 5 *African Journal of International and Comparative Law* 189.

¹⁹ [1992] BLR 119 122.

homosexual practices even between consenting adults in private.²⁰ Gay men and women, in his view, did not presently represent a group or class which had been shown to require protection under the Constitution. Although no evidence was before the Court as to the extent of public opinion in favour of the decriminalisation of homosexual practices, he was supported by the legislature's passing of the Penal Code (Amendment) Act of 1998, which amended sections 164 and 167 and broadened other aspects of the Code.²¹ Tebbutt JP also took judicial notice of the incidence of HIV/AIDS,²² both worldwide and in Botswana,²³ and concluded that the amendments made by the legislature showed public concern for the spread of HIV/AIDS, and far from moving towards the liberalisation of sexual conduct by regarding homosexual practices as acceptable conduct, such indications as there are show a hardening of a contrary attitude. He cited with approval a *dictum* from the majority judgment in the Zimbabwean case of *Banana v The State*²⁴ to the following effect:

From the point of view of law reform, it cannot be said that public opinion has so changed and developed in Zimbabwe that the courts must yield to that new perception and declare the old law obsolete.

However, he added that, although the courts may not be dictated to by public opinion, the courts would be loathe to fly in the face of public opinion,²⁵ especially if expressed through legislation passed by those elected by the public to represent them in the legislature.²⁶ As Lord Bingham put it in *Reyes v R*:²⁷

[I]n a liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences.

²⁰ See 26 of the transcript. See Boko (n 7 above) for arguments in favour of decriminalisation of voluntary homosexual conduct.

²¹ See eg secs 2 & 3 of the 1998 Act, which broadened the definition of rape and increased the punishment for the offence by imposing a minimum term of 10 years' imprisonment and a maximum term of life imprisonment. The latter section introduced compulsory HIV tests for convicted rapists and, depending on the outcome of the test, the minimum sentence may be either 15 or 20 years.

²² UNAIDS estimates that the global HIV/AIDS epidemic killed about 3 million people in 2003 and that an estimated 5 million people acquired HIV, bringing to 40 million the number of people living with the virus around the world. See AIDS Epidemic Update 2003 at <http://www.unaids.org> (accessed 30 September 2004).

²³ In 2003 an estimated 39% of the Botswana's population was infected with HIV. See source cited in n 22 above.

²⁴ (2000) 4 LRC 621 (ZSC) 670–671 *per* McNally JA.

²⁵ On the effect of public opinion on constitutional interpretation, see the English case of *Reyes v R* [2002] 2 LRC 606 607, approving a *dictum* from the South African case of *S v Makwanyane* [1995] 1 LRC 269 311; 1995 3 SA 391 (CC) *per* Chaskalson P.

²⁶ See 23 of the transcript.

²⁷ *Reyes v R* (n 25 above) 620. The *dictum* was approved by the Court of Appeal in *Badisa Moatshe & Others v The State* Cr App No 26/2001, unreported and reiterated in the present case.

Whilst the court will jealously guard the rights of citizens against violations of those rights by the legislature, Tebbutt JA was of the view that the protection of such rights was subject to the limitation that enjoyment of such rights does not prejudice the rights and freedoms of others, or the public interest, as provided for in section 3 of the Constitution. Consequently, public interest must always be a factor in the court's consideration of legislation, particularly where such legislation reflects a public concern.

4 Is there a class of gay men requiring constitutional protection?

In answering this question, the Court of Appeal was of the view that 'gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution'.²⁸ The Court reasoned that, whilst there must be a need for the courts to be alive to the fact that the constitutional rights of citizens of Botswana must, where circumstances demand, keep abreast of similar rights in other kindred democracies,²⁹ the time had not yet arrived for the adoption of progressive trends taking place elsewhere. This conclusion was borne out by the fact that legislative enactments in recent years have tended to take a sterner view of sexual offences. Particular reliance was placed on the Penal Code (Amendment) Act 1998, which in a number of sections broadened the scope and ambit of offences relating to sexual acts. The Court acknowledged that it was for the legislature to decide, subject to the confines of the Constitution, what conduct should be regarded as criminal and in doing so, the legislature must inevitably take a moral position in tune with what it perceives to be the public mood.

5 Should the word 'sex' used in the discriminatory provisions of the Constitution be broadened to include 'sexual orientation'?

'Sexual orientation' is said to be:³⁰

defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of

²⁸ See 25 of the transcript.

²⁹ The court surveyed changing trends in attitudes to sexual orientation in South Africa, England, USA and in Europe. See 12–16 of the transcript.

³⁰ See E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450–452. The definition was adopted by Ackermann J in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 1 SA 6 (CC) 21. See also 'Sexual orientation and the law' by the editors of the *Harvard Law Review* in 1989 *Harvard Law Review* 1511 n 1.

the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.

The Botswana Constitution does not make any reference to a right to or protection from discrimination on the ground of sexual orientation. A possible way to accommodate sexual orientation within the Constitution would be to extend the definition of 'discriminatory' in section 15(3) to cover it. There is precedent for the extension of the provisions of the said subsection. In *Attorney General v Dow*, the Court held that the classes of discrimination contained in section 15(3) of the Constitution were not meant to be closed. The classes mentioned therein were mere highlights of some vulnerable groups or classes that might be affected by discriminatory treatment. Consequently, the Court extended the ambit of the subsection to include 'sex' in the sense of male or female or gender. In the present case, while acknowledging this precedent, the Court did not think it appropriate to further extend the ambit of the subsection to include sexual orientation.

Why, one may ask, are gays and lesbians not classified as a new category of persons needing protection? If 'sex' in the sense of male or female or 'gender' was found worthy of inclusion in section 15(3), why not 'sexual orientation'? The answer, it would seem, is that the legislature is not ready for such an extension. It needs to be pointed out that the fact that the legislature was not ready to accept 'sex' as a basis for discrimination, however, did not deter the Court in *Dow's* case from including 'sex' in the subsection, albeit by a majority of three to two.³¹

In light of these views, expressed by the highest court in Botswana, the current perspective seems therefore to be that same-sex relationships will remain relationships prohibited by law. This is due to the fact that public opinion shaped through a democratically elected legislature is not supportive of legalising them. Present trends, judged from legislative enactments, point to a hardening of attitudes towards such relationships. It will be instructive to compare the emerging trends in South Africa and Zimbabwe, countries with which Botswana shares a legal tradition.

³¹ It took the legislature some three years to enact the Citizenship (Amendment) Act 1995 (now consolidated and re-enacted as the Citizenship Act 1998) to reflect the decision of the court that the then sec 4(1) of the Citizenship Act was unconstitutional.

6 Judicial attitudes to same-sex relationships in South Africa

The constitutional provisions relevant to the issue at hand are found in sections 9 and 10 of the South African Constitution Act 108 of 1996. Section 9 provides as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) 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.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 10 provides: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

A number of cases have been brought before the Constitutional Court to determine various aspects of the concept of sexual orientation as envisaged under subsection (3) and its relationship with other subsections of section 9. A brief look will be taken at some of these cases.

In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*³² the South African Constitutional Court was faced with the question whether the following laws were unconstitutional and invalid: the common-law offence of sodomy, the inclusion of sodomy in schedules to the Criminal Procedure Act 51 of 1977, the Security Officers Act 92 of 1987, and section 20A of the Sexual Offences Act 23 of 1957, which prohibits sexual conduct between men in certain circumstances. The Court unanimously held³³ that the offences, all of which were aimed at prohibiting sexual intimacy between gay men, violated the right to equality in that they unfairly discriminated 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. The Court expressed the view that gay people were a vulnerable minority

³² n 30 above.

³³ Ackermann J delivered the judgment with which the other judges concurred (Sachs J wrote a separate concurring judgment).

group in society. Sodomy laws criminalised their most intimate relationships and the Court felt that this devalued and degraded them and therefore constituted a violation of their fundamental right to dignity. Furthermore, the offences criminalised private conduct between consenting adults, which caused no harm to anyone else. This intrusion on the innermost sphere of human life violated the constitutional right to privacy. The fact that these offences, which lie at the heart of the discrimination, also violated the rights to privacy and dignity, strengthened the conclusion that discrimination against gay men was unfair.

Finally, the Court found no legitimate reason why the rights of gay men should be limited in the way set out in the schedules to the statutes referred to above. The Court added that open and democratic societies around the world were increasingly turning their backs on discrimination on the basis of sexual orientation, even though South Africa was the first to do so in its Constitution.³⁴ The Court therefore concluded that the common-law offence of sodomy, its inclusion in certain statutory schedules, and the relevant section of the Sexual Offences Act, were not reasonable or justifiable limitations on the rights of gay men to equality, dignity and privacy, and accordingly were unconstitutional and invalid.

In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*³⁵ the Constitutional Court was again asked to determine the constitutionality of a statute, namely section 25(5) of the Aliens Control Act 96 of 1991, and if it was found to be unconstitutional, whether the Court may insert words into the statute to remedy the unconstitutionality. This subsection was alleged to fail to give persons, who are partners in permanent same-sex life partnerships, the benefits it extends to 'spouses' under that subsection. The Court therefore found it necessary to determine the constitutional validity of the subsection. The constitutional rights of equality and dignity were found to be germane in determining the constitutionality of the subsection. It was felt that this subsection reinforced harmful stereotypes of gays and lesbians. This conveyed the message that such people 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. The section 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 that was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

³⁴ See Cameron (n 30 above) 450.

³⁵ 2000 2 SA 1 (CC).

The Court accordingly held that the omission from the section of partners in permanent same-sex life partnerships was inconsistent with the Constitution. The Court therefore concluded that there were only two ways to remedy the defects in the provision before it, that is, by declaring the whole subsection invalid, or by reading words into it to cure the defects. The Court adopted the latter option and decided that the words 'or partner in a permanent same-sex life partnership' should be added to the section. Permanent life partners were said to be those who had an established intention to cohabit with one another permanently.

In *Satchwell v President of South Africa*,³⁶ the Constitutional Court expressed the view that, depending on the circumstances of a particular case, a duty of support may be inferred as a matter of fact in cases of persons involved in permanent same-sex life partnerships.³⁷ This was so as a result of the range of family formations having widened in South African society. In *Du Plessis v Road Accident Fund*,³⁸ the Supreme Court of Appeal extended the common-law dependant's action to cover a partner in a same-sex permanent life relationship, similar in other respects to marriage, where the deceased owed that partner a contractual duty of support.

In *J & B v Director General, Department of Home Affairs and Others*,³⁹ the Constitutional Court held that section 5 of the Children Status Act 82 of 1987 was unconstitutional in that it unfairly discriminated on the basis of sexual orientation, in violation of the equality provisions in the Constitution; and ordered that it should be read to provide the same status to children born from artificial insemination to same-sex permanent life partners as it currently provides for children born to heterosexual married couples.⁴⁰

In all these cases, the constitutional argument that the rights of gays and lesbians to equality, dignity and privacy have been violated, has prevailed. This outcome is based on the fact that the South African Constitution expressly prohibits discrimination on the basis of one's sexual orientation. This prohibition is further strengthened by section 9(4), which provides that no person may unfairly discriminate against anyone on one or more of the grounds stated in subsection (3), and section 9(5), which presumes that such discrimination is unfair unless it is established that the discrimination is fair. The immediate political past of the country

³⁶ 2002 6 SA 1 (CC).

³⁷ Para 25.

³⁸ 2004 1 SA 359 (SCA) 362 para 1.

³⁹ 2003 5 BCLR 463 (CC).

⁴⁰ See also *Satchwell v President of the Republic of South Africa & Another* 2003 4 SA 266 (CC), where the court ruled that sec 9 of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 discriminated against same-sex partners on the ground of sexual orientation.

may inform the rationale behind these prohibitions. As Ackermann J observed in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*:⁴¹

In a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.

With this background, gays and lesbians were recognised as a vulnerable minority group who had no chance of influencing legislation to better their lot, except by relying on the Bill of Rights provisions in the Constitution. Consequently, the courts have taken a vigorous stand in protecting their rights.

7 Judicial attitudes to same-sex relationships in Zimbabwe

One of the most notable judicial decisions on same-sex relationships in Zimbabwe is the case of *Banana v The State*.⁴² The appellant was a former non-executive president of Zimbabwe. In 1997, his aide-de-camp, D, was convicted by the High Court of having murdered a police constable. The Court held that it could not reject as false the uncontradicted claim that D had been traumatised as a result of being the victim of repeated homosexual abuse by the appellant. Subsequently, after police investigation into the allegations of the common-law crime of sodomy, unlawful intentional sexual relations *per anum* between two human males, the appellant was indicted for trial by the High Court. He was convicted, *inter alia*, on two counts of sodomy. He appealed against the conviction to the Supreme Court. The Court had to decide whether, amongst others, the common-law crime of sodomy was in conformity with section 23 of the Zimbabwean Constitution, which guaranteed protection against discrimination on the ground of gender.

By a majority of three to two, the Court held that section 23 of the Constitution did not include an express prohibition against discrimination on the ground of sexual orientation. That provision prohibited discrimination between men and women, not between heterosexual men and homosexual men. The latter discrimination was

⁴¹ 1999 1 SA 6 (CC) para 60.

⁴² (2000) 4 LRC 621 (ZSC).

prohibited only by a constitution which proscribed discrimination on the grounds of sexual orientation. The real complaint by homosexual men, in the majority's view, was that they were not allowed to give expression to their sexual desires, whereas heterosexual men were. In so far as that was discrimination, the majority thought it was not the sort of discrimination which was prohibited by section 23 of the Constitution. The majority further expressed the opinion that the argument that the discrimination arose from the fact that men who performed that act with women were not penalised, although technically correct, lacked common sense and real substance. It added that the law had properly decided that it was unrealistic to try to penalise such conduct between a man and a woman. This did not lead to a conclusion that the law was discriminating when such conduct took place between men. The real discrimination was against homosexual men in favour of heterosexual men, which was not discrimination on grounds of gender. Consequently, the majority concluded that the criminalisation of consensual sodomy was not discrimination under the Constitution and even if that was the case, the law in question would stand the constitutional test of whether it was 'not shown to be reasonably justifiable in a democratic society'. The appellant's conviction was therefore upheld. The following *dictum* from McNally JA succinctly expressed the reasoning behind the majority's decision:⁴³

In the particular circumstances of this case, I do not believe that the 'social norms and values' of Zimbabwe are pushing us to decriminalise consensual sodomy. Zimbabwe is, broadly speaking, a conservative society in matters of sexual behaviour. More conservative, say, than France or Sweden; less conservative than, say, Saudi Arabia. But, generally, more conservative than liberal. I take that to be a relevant consideration in interpreting the Constitution in relation to matters of sexual freedom. Put differently, I do not believe that this Court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal interpretation on the constitution of a country whose social norms and values in such matters tend to be conservative.

Of the three jurisdictions, it is not surprising that the vigour with which the South African Constitutional Court has tackled the issue of gay and lesbian protection under its Constitution, is not evident in the other two jurisdictions. This is attributable to the fact that it is only in the South African Constitution that there is an expressed prohibition against discrimination on the grounds of sexual orientation. This notwithstanding, the Botswana Court of Appeal and Zimbabwean Supreme Court both have a history of adopting a broad and generous approach to constitutional interpretation, and one would have thought that such an approach should have been adopted in the same-sex cases that have come before them.

⁴³ 671.

In the Botswana case of *Utjiwa Kanane v The State*, Tebbutt JP reiterated the generous approach to constitutional interpretation when he restated the position adopted by the Court in the landmark case of *Attorney General v Dow*.⁴⁴ He reiterated that, in construing the Constitution, a broad and generous approach should be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together in order to effect the objective of the Constitution, and where such rights and freedoms were conferred on persons by the Constitution, derogation from such rights and freedoms should be narrowly or strictly construed.⁴⁵

Similar sentiments were expressed by the Zimbabwean Supreme Court in *Banana v The State*. McNally JA⁴⁶ approved the generous and purposive approach to constitutional interpretation put forward by Gubbay CJ in *Smyth v Ushewokunze*.⁴⁷ Despite the adherence to this approach to constitutional interpretation, the two courts took a seemingly conservative stand in interpreting their respective constitutions with regard to same-sex relationships. *Kanane's* case presented the Botswana Court of Appeal with an opportunity for some creative interpretation of the discriminatory provisions of the Constitution, an opportunity which was unfortunately missed.

8 Future prospects of law reform on same-sex relationships

As set out above, the attitude of the Botswana Court of Appeal to same-sex relationships is conservative in nature when compared to the South African Constitutional Court. This admittedly is due to the fact that, whilst the South African Constitution expressly prohibits such discrimination, the Botswana Constitution does not. Although there is a precedent in the Botswana Court of Appeal for extending the ambit of the definition of 'discriminatory' in section 15(3) of the Constitution, the Court did not think the time was ripe for the extension of that subsection to include sexual orientation. Judging from the views expressed in *Kanane's* case, the future prospects for law reform concerning same-sex relationships in Botswana look bleak. The judiciary does not have an enviable record of activism,⁴⁸ and as such no prospect of help will be

⁴⁴ [1992] BLR 119 (CA) 130–132 *per* Amisshah P.

⁴⁵ 8–9 of the transcript.

⁴⁶ 671.

⁴⁷ (1997) 4 BHRC 262 269. A similar approach is also adopted by the South African Constitutional Court. See *S v Makwanyane* (n 25 above) 282–283 *per* Chaskalson P.

⁴⁸ See AJGM Sanders 'Constitutionalism in Botswana: A valiant attempt at judicial activism' (1984) XVI *Comparative and International Law Journal of Southern Africa* 350 and (1984) XVII *Comparative and International Law Journal of Southern Africa* 49.

forthcoming from there. The executive's attitude to same-sex relationship is, at best, one waiting to be shaped by majority sentiments of the people of Botswana and, at worst, one of denial — such relationships do not exist in Botswana.⁴⁹

The executive position was articulated as follows by a Deputy Attorney General:⁵⁰

Constitutional orders and/or legal regimes (including their amendment) have, particularly in this Republic, by and large been grounded in the changing and/or evolving mores and attitudes of our people. It is for this reason that, throughout our history as a nation, the Parliamentary Law Reform Committee⁵¹ has touched base with our people with respect to major and/or far-reaching proposed constitutional or other legal amendments. I have no doubt that even with regard to the question of the recognition of rights to sexual orientations (other than the conventional), the same consultative machinery and processes shall be invoked and the government be guided by majority sentiment on the issue. What government would, however, want to guard against — as indeed has been the case with other matters — is the substitution of the views of a small (but vocal) minority for those of the majority.

Furthermore, there is no known pressure group currently championing the cause of gay and lesbian rights in order to keep the issue constantly in the public domain.⁵²

The sum total of the prevailing circumstances, therefore, can be said to be that parties to same-sex relationships will have to conform either to established norms of heterosexuality, or become 'unapprehended felons'⁵³ by persisting in their homosexual practices. Whether there are a significant number of persons within Botswana's society practising homosexuality or exhibiting homosexual tendencies is a moot point because no empirical evidence exists on this. *Kanane's* case demonstrates that until the numbers significantly increase, and the yardstick for this is unclear, gays and lesbians will remain beyond the pale of constitutional protection.

⁴⁹ See M Olivier 'The reality of being gay in Botswana' in Ditshwanelo (n 1 above) 135.

⁵⁰ See Tafa (n 1 above) 128.

⁵¹ The track record of this Committee is dismal. See AJGM Sanders 'Ten years of the Botswana Matrimonial Causes Act — Future proposals for divorce reform' (1982) 26 *Journal of African Law* 163 167.

⁵² A representative of an organisation called Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo) presented a paper at a Human Rights Conference in 1998. See Ditshwanelo (n 1 above) 135. Hitherto and subsequent to the said conference nothing much has been heard of the organisation.

⁵³ See Cameron (n 30 above) 455.

9 Conclusion

The wind of change blowing through kindred liberal democracies for the decriminalisation of homosexual practices will take some time to reach Botswana. The country is doggedly holding on to established heterosexual norms and is not in any hurry to effect changes. One may ask for how long the country can stem the tide of change and who will determine the time for change, if that time comes. On the present evidence, it would seem that the Court of Appeal has deferred to the legislature to determine the time frame within which a change, if any, should take place. Judging from the track record of the legislature on matters of gender equality in particular,⁵⁴ and law reform in general,⁵⁵ gays and lesbians have a long walk from the closet to the living room, not to talk about coming out onto the front porch.

The future recognition of same-sex relationships, one may conclude, lies mainly in the hands of those who wish to engage in this type of relationship. Despite the many obstacles faced by and prejudices shown against them by society, they must stand up and be counted in order to influence a shift in public opinion, leading to legislative and constitutional changes in the *status quo*. Their heterosexual compatriots are not likely to do it for them.

⁵⁴ n 31 above.

⁵⁵ Machinery for law reform is woefully inadequate and this has severely hampered systematic reforms of many of the archaic laws still scattered around in the statute books. The Law Reform Committee of parliament is presently the only body charged with law reform and its activities, if any, have failed to make the desired effect on law reform; n 50 above.