**NOTE: the prior version had some formatting errors so we are resubmitting.**

**A comparison of Lesbian, Gay, Bisexual, Transgender and Queer rights in South Africa and the USA**

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**A comparison of Lesbian, Gay, Bisexual, Transgender and Queer rights in South Africa and the USA**

Lize Booysen and Heather Wishik

**Introduction**

This paper offers comparisons between the progress toward Lesbian, Gay, Bisexual Transgender and Queer (LGBTQ) equality and workplace inclusion in the Republic of South Africa (SA) and in the United States of America (USA) with an emphasis on legal equality and workplace policy. The 20 years between 1993 and 2013 have been remarkable ones for the LGBTQ movements for equality for both SA and the USA. The word movements here is deliberately plural, since gay men, lesbians, bisexual people, transgender people and those who adopt the term queer [[1]](#footnote-1)have not always worked inclusively with each other, and their respective efforts and progress toward equality and inclusion have at times been aligned and at times divergent. While between SA and the USA there are numerous and striking parallels and similarities regarding the progress both inside and outside the workplace toward LGBTQ equality and social inclusion, , there are also unique peculiarities and distinct differences, just as there are between the two countries’ progress on racial equality (Booysen & Nomo, 2010; Lillivik, Combs & Wyrick, 2010; MAP 2009, 2011).

The rationale for comparing LGBTQ rights in these two particular countries is based on the following:

1. Both countries share a similar early historical context of colonization, independence wars, displacement of, and discrimination towards indigenous peoples, racial segregation and eventually a strong civil rights movement (albeit at different times) towards racial (and gender) equality that paved the way for LGBTQ rights.
2. While both countries currently have nationally prescribed outcome-based affirmative action workplace legislation and regulatory schemes in regards to race and to a lesser extent in regards to gender, South Africa’s national legislation pertaining to LGBTQ rights can be categorized as Encouraged Voluntarism (Hyman, Klarsfeld, NG and Hag, 2012) where employers are encouraged, but not required, to take action to ensure progress by LGTBQ individuals. The USA lacks any federal legislation related to sexual orientation based discrimination, except for the US military where such employment discrimination ended effective 2011 (10 USC §654, repealed 2010\_). This leaves this arena up to state governments, only a minority of whom prohibit such discrimination. Even in SA, were there is formal constitutionally based equality of rights based on sexual orientation, and sexual orientation discrimination is formally prohibited, there are no measures to monitor compliance and/or sanctions for breach of LGBTQ rights or equality.
3. LGBTQ rights have been in the spotlight in both countries in the recent past, eliciting active debate in the legislative and societal arenas, and possible changes in national LGBTQ legislation and constitutional rights are imminent in both countries (Rouseau, 2012; Booysen and Nkomo, forthcoming; Lee, 2012).

**Aim of this paper**

This paper explores both the similarities and differences in the outcomes and implementation of legislation and constitutional civil rights pertaining to equal opportunity and workplace inclusion of the LBGTQ community as a specific set of target groups. This is discussed in the context of the larger equal opportunity and workplace inclusion landscapes of SA and the USA, based on their respective historical backgrounds, societal and cultural and workplace contexts. We highlight relevant current issues and debates in the two countries, distill a number of key themes for comparison, and identify a number of future trends. The paper also attempts to characterize the types of regulation recently involved and the trends as the regulatory schemes have been changing, using the frameworks suggested by Reynaud’s theory of social regulation (1979) and categories further developed by Hyman, Klarsfeld, NG and Hag (2012). Reynaud’s theory is concerned with the processes of creation, maintenance, displacement and abolishment (decline) of formal and informal rules in a society. This theory offers a useful analytical frame to identify the different kinds of regulation operating in regard to LGTBQ rights in the two countries. The next to last section (titled Social regulation– analyzing the patterns related to LGBTQ rights) in particular focuses on this issue of categorization.

At the outset, the authors want to make their own positionality clear, in order to make their own social location and inter-subjective standpoint more explicit. Both authors are white lesbian women from the baby boomer generation. One author is a South African citizen residing in the USA under legal alien resident status. The other author is a US citizen doing part time doctoral studies in South Africa. Both authors work in the areas of social justice, identity and diversity work as scholar-practitioners in both SA and the USA.

The authors also acknowledge, and indeed advocate for, the intersectional nature and simultaneity of race, gender and sexual orientation, among other critical social identities. These intertwined social identities often converge and create constellations of relative privilege and disadvantage. For instance, the social location at the intersection of black + female + lesbian carries more levels of disadvantage than does that of white + male + homosexual. Nonetheless, this paper will put in the foreground sexual orientation, and second gender identity and expression, with a focus specifically on LGBTQ legal equality, rights and workplace inclusion.

**Historical Background: A Convergent History**

The contexts within which LGBTQ issues arise and have been addressed in the two countries involve important similar aspects of national history. These include initial exploration in the 1400s by Portuguese (SA) or Spanish (USA) seafarers. The two countries also share later colonisation and systematic displacement and/or genocide of indigenous peoples by European settlers, including by the Dutch, English, French, Portuguese and Spanish from the 1400s on into the middle 1600’s and through the mid 1800s. The European settler colonies in both countries also rebelled against colonial rule and won independence through war (Zinn, 1980; Leonard, 2001).

During colonial rule and after independence, both countries relegated indigenous and/or imported people of colour to non-citizen status through slavery, and/or second-class citizen status via numerous social and political norms, laws, regulations, and forced removals. Both countries also later incorporated racial segregation into law, such as in the USA with the post Civil-War 19th century Jim Crow laws enforcing black-white segregation and the US Naturalization Act of 1870, which effectively segregated and ghettoized the many thousands of Chinese men working to build the USA’s railroads and mine for gold (Zinn, 1980; Takaki, 1989). In South Africa the mid 20th century Apartheid legislation provided a comprehensive racially based segregation framework (Leonard, 2001).

While some of the current issues may still be rooted in the historical contexts of the two countries, this paper will not focus extensively on the history of the gay/lesbian/bisexual or transgender rights movements in the two countries. Suffice it to say that in both countries (male) homosexual acts were illegal and criminalized, based on the Roman-Dutch sodomy laws (1872) in SA and the English Common Law in the USA. Female same-sex conduct was not illegal under these initial laws, but eventually was criminalized in some subsequent laws in both countries. Cross- dressing was criminalized in the USA until recently (Sears, 2008).

**Coalition and Marginalization: A Contrasting History**

One core contextual area of contrast between SA and the USA is the trajectory of coalition politics between the LGBTQ movement and the racial and gender equality movements. For example, in the USA, the movement to abolish slavery and the movement for women’s rights first emerged almost simultaneously in the pre-civil war period of the early 1800s, and then again as civil rights movements in the mid 20th century. Both of these mid 20th century civil rights movements were explicitly hostile to the participation of LGBTQ people despite the fact that gay men and lesbians played crucial roles in each (Faderman, 2000; Katz, 1992). Leaders, including Betty Friedan of the National Organization for Women (NOW), who purged lesbians from NOW, and Martin Luther King, Jr. who kept in the background Bayard Rustin, the man who helped persuade King to adopt non-violence and who organized the 1993 March on Washington, provide prominent examples of the refusal to operate through coalition politics with LGBTQ people (Alexander, 2006; D’Emilio, 2004).

The 20th century USA LGBTQ movements followed these other two civil rights movements, and modelled goals, legal and social strategies on them. This meant a central focus on the acquisition of formal civil rights, law reform through both the courts and legislatures, and the use of large public demonstrations (Katz, 1992; Hunter, 2000). With the exception of sporadic small efforts, serious coalition building between LGBTQ activists and African Americans did not take place. Only in the 2012 Presidential election season, after President Obama publicly came out in support of same sex marriage (Lee, 2012), did coalition politics between African Americans and LGBTQ people have a national impact. Coalitions between the women’s movement and LGBTQ movement have also been fragile and sporadic. For example, many heterosexual feminists continue to be critical of marriage as a legal and social institution oppressive to women while the LGBTQ movement has focused a great deal of energy on gaining access to civil marriage (Kim, 2011). In the last decade and a half, issues such as hate crimes, domestic violence, and women’s access to health care have formed the basis of some coalition politics between LGBTQ and women’s groups, or between lesbians and women’s groups, but such coalition politics are still issue driven rather than comprehensive.

By contrast, in South Africa, the anti-apartheid movement, both within and outside South Africa, and in the exile communities outside the country, included, among other groups, substantial numbers of LGBTQ people who were known to ANC party leaders and were very active. When it came time to garner political support for the end of apartheid, elections for the transition to the Mandela government and adoption of an interim constitution, the ANC embraced coalition politics inclusive of LGBTQ equality, explicitly incorporating equality on the basis of sexual orientation into the draft constitution, in addition to gender and race equality, among other dimensions of equality. Thus, early in the transition to majority rule LGBTQ citizenship, full equality rights, and activists themselves were included by the ANC in the broad coalition that led national transformation. As the years have passed, however, LGBTQ people and their concerns have moved to the margin, and ANC support has weakened (Rouseau, 2012).

In a sequence opposite to the US story, coalition politics were strong and effective at the beginning but are eroding over time, even as the lives of many Black LGBTQ South Africans in particular become more endangered and their equality looks more and more like a chimera (Booysen and Nkomo, forthcoming). This is occurring despite continued progress in formal legal equality and in more inclusive workplace climates in South Africa for LGBTQ people. These similarities and differences are further explored below.

**The legal landscape of LGBTQ rights in SA and the USA: Key Themes**

Simplicity versus complexity

The legal landscape of LGBTQ rights in South Africa involves a single national jurisdiction with rights deriving both from the South African Constitution, as interpreted by the Constitutional Court, and from national legislation adopted by Parliament. In the USA the situation is a complex multilayered mosaic of regulatory authority. Each of the 50 states, and each American Indian tribal council administering Indian land, has its own laws, with each state also having its own constitution. In addition, there are laws of national scope adopted by the US Congress, federal regulations adopted by the agencies of the executive branch serving under the President, and applicable sections of the US Constitution. Municipal ordinances may also address LGBTQ rights, as do laws in the US territories and the District of Columbia.

In general, a right held to originate from the US Constitution is of the highest status, which the US Congress, states, municipalities and territories cannot violate. Federal laws usually bind the states to provide at the minimum the level of protection or rights granted federally, but states are free to add additional rights or levels of protection. Similarly municipalities must comply with state law, but can usually extend additional rights or protections further. State constitutional rights are superior to state legislation. In the absence of federal law, states are relatively free to act, and in the absence of state law, municipalities are relatively free to act.

Table 1 depicts a summary timeline of the key legislation that has addressed LBGTQ equality in SA. Table 2 depicts major categories of LGBTQ related rights or porohibitions by state in the USA plus a few related federal level rights or prohibitions .

-- INSERT TABLES 1 AND 2 HERE --

The next section scrutinizes the development, implications and outcomes of the above legal reforms in more depth, by country and subject of regulation.

**South Africa**

Statutorily based discrimination against LBGTQ’s has systematically been abolished in South Africa beginning in 1980. A number of significant law reform efforts have been initiated over the last 19 years of democracy. These reforms are part of the march toward equality for all in South African society and workplaces, in line with the 1993 interim Constitution and the 1996 Constitution (Booysen, 2007; Booysen and Nkomo, 2010). Since legislation happens on a national level in South Africa, no additional provincial or municipal legislation is in place or proposed.

Sexual Conduct

In the Apartheid era homosexuality was punishable by up to seven years in prison based on the Sodomy laws of 1872. The government was hostile to the human rights of homosexuals and there were conservative social attitudes among both white and black populations towards homosexuality. Homosexuals were prohibited from service in the permanent military and reparative therapy was practiced in the South African Defense force, since homosexuality was seen as a “behavioral disorder” (Canaday, 2002).

In 1969, the Immorality Act of 1957, which prohibited sex between whites and non whites, was amended to also prohibit men from engaging in any erotic conduct when there were more than two men present. Male to male sexual conduct was also a statutory crime if a male was under the age of 19. The1988 amendment to the Immorality Act changed the name of the Immorality Act of 1957 to the Sexual Offences Act of 1957, and for the first time criminalized a female having sex with a person under the age of consent. For boys the age was set at 16 and for girls at 19.

In the case of *the National Coalition for Gay and Lesbian Equality vs Minister of Justice,* in 1998 the sodomy laws were ruled to be unconstitutional by the High Court, and the ruling was applied retrospectively to the adoption of the interim Constitution on 27 April, 1994 (Reber, 1998). In 2007, *The Sexual Offenses Act* was amended by setting 16 as the uniform age of consent and rewriting the law in gender and sexual orientation neutral terms. In 2008 a ruling [[2]](#footnote-2)declared the age of consent of 16 to apply retroactively from the date of the adoption of the interim Constitution on 27 April 1994. As of 1 January 2008, all provisions that discriminate based on sexual conduct have been formally repealed.

Post Apartheid Civil Rights and Constitution

Due to the lobbying of black and white gay and human rights activists, and the African National Congress’ emphasis on human rights, the 1993 post apartheid interim constitution explicitly prohibited discrimination based on sexual orientation. In 1994, male same-sex conduct was decriminalized, while the consenting age for all same sex sexual acts remained at 19 regardless of gender, as opposed to the age of consent for heterosexual sex acts, which was 16.

In May 1996, South Africa, with its heavy focus on civil rights, became the first country in the world to outlaw any discrimination based on sexual orientation in a national constitution. Consequently, post apartheid South Africa has instituted progressive laws on issues of sex and sexuality, based on the non-discrimination clause of the Section 9 Equality statement in the South African Constitution. It reads:

*(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[[3]](#footnote-3), 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)* (SA Constitution, 1996, p. 1247)

This has set the equality of the SA LGBTQ community on a solid legal footing and affirmed such equality as a basic human right.

Nondiscrimination Laws

Many pieces of formal legislation have evolved based on the Section 9 Equality statement of the Constitution. This section will discuss the most salient legislation pertaining to LGBTQ rights, using the focus of the specific law and chronology as organizing principles.

Employment Rights

*The Basic Conditions of Employment Act* (1997) and the *Employment Equity Act*, (EEA)(1998), protect all South Africans from unfair labour practices and discrimination on the basis of sexual orientation, and the other categories as stated above in (3). With the adoption of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (PEPUDA) in 2000, similar protections were extended to public accommodations, and services. These acts prohibit unfair discrimination by individuals, and private and government organisations, for instance withholding partner benefits. PEPUDA also forbids hate speech and harassment in public and private spaces. In line with the EEA, the Department of Defense as of 1996 officially ceased taking any interest in the lawful sexual behavior of its members , and in line with PEPUDA in 2000 extended spousal medical and pension benefits to partners in a permanent life-partnership.[[4]](#footnote-4)

Parental Rights

In 2002 the Constitutional Court ruled that the existing Adoption Law was unconstitutional, and allowed same-sex partners the same adoption rights as married spouses. *The Children’s Act* (2005, p. 112) replaced the Adoption Law and allows adoption by spouses and by "partners in a permanent domestic life-partnership" regardless of sexual orientation. Artificial insemination was made legal for single women including lesbians in 1997, and in 2003 in the case of *J v Director General, Department of Home Affairs* the Constitutional Court ruled that same-sex partners should be recognized as legitimate parents. This means that children born by artificial insemination to a lesbian couple are regarded as legitimate and the partner who is not the biological parent is regarded a natural parent as recorded on the child's birth certificate (De Vos, 2003).

Gender Transition

Arguably, the most progressive piece of legislation for LBGTQ rights is *The Alteration of Sex Description and Sex Status Act of 2003*, pertaining to transgendered citizens. This Act allows anyone whose “sexual characteristics” have been altered by surgical or other medical means (or anyone who is intersexed) to apply for a change of their sex status with the Department of Home Affairs. De Vos (2010, para. 13) argued that the definition of

“sexual characteristics” ‘ … is extremely broad and one needs not have concluded the surgical process of altering one’s body completely … to qualify in terms of the Act to have one’s sex status changed. As long as one has started the process of transitioning from a man to a woman or from a woman to a man (and as long as the technical requirements prescribed in the Act are met), the Department of Home Affairs must issue you with a new ID book and passport recording your newly acquired sex … By passing this law our Parliament did a great and progressive thing – not waiting for our Courts to force them to do the right thing.”

Same-sex marriage

Same-sex marriage was legalized on 30 November 2006 through the promulgation of the *Civil Union Act, (Act no. 17 of 2006)*. This act affords equal social and legal status for two people regardless of gender, to form either a marriage or a civil partnership. This act followed the judgment of the Constitutional Court based on the groundbreaking case of *Minister of Home Affairs v Fourie,* on 1 December, 2005which ruled that under the equality clause of the South African constitution it was unconstitutional for the state to provide the benefits of marriage to opposite-sex couples while denying them to same-sex couples. This made South Africa the fifth country in the world, and the first in Africa, to legalize same-sex marriage.

Further LBGTQ Recognition in SA society

In October 2012, South Africa became the first country in the world to officially recognize the Rainbow Gay Flag of South Africa, which incorporates elements of the South African flag, as the national symbol of the LGBTQ community. As described above, in less than 20 years the SA legislative landscape pertaining to the human rights of the LGBTQ community has changed dramatically and positively.

**The USA**

Introduction

As was noted above, the legal landscape for LGBTQ people in the United States is complicated by the fact that the 50 states have their own laws and constitutions, in addition to federal law and the federal constitution, and municipal laws. Also, most criminal and family law has historically been a matter of state law, while civil rights laws operate at both levels. The following subject matter sections include examples of differences between state and federal law when relevant. By way of introductory explanation, a mini-case example follows first.

AB is a citizen of South Africa legally residing and working in the USA as a resident alien with permanent resident status. She and XY, a woman who is also a South African citizen, were legally married in South Africa many years before AB moved to the USA. During those years in South Africa they co-habited, shared economic resources, and co-parented AB’s biological child. If AB were heterosexual, she could apply for legal entry into the USA and permanent residence for her legal male spouse under USA family reunification policies. The US federal government does not recognize her same-sex marriage and she cannot obtain permission for her spouse to immigrate to the US. If the USA decides to change this policy, she may be able to obtain entry for her spouse. Nonetheless, in the state in which AB resides, her same-sex marriage will not be recognized because that state has a state constitutional amendment limiting marriage to a man and a woman. The state will not be required to recognize their marriage for state law purposes such as tax and inheritance rights, but the state also cannot interfere with their legal immigrant status granted by the federal government. The city in which AB resides cannot adopt a local law recognizing same-sex marriage because this is prohibited by the state’s constitution. The state’s power to refuse recognition of AB’s same sex marriage could be ended if the US Supreme Court were to rule that equal access to marriage for same sex couples is a federal constitutional right.

Sexual Conduct

Same sex sexual conduct between men was an offense under the English Common Law that formed the early basis for all laws in the American colonies and early United States (except in the state of Louisiana which traces its origins to France’s Napoleonic Code). In 1961 every state and territory in the USA, and the US military, criminalized sodomy. In some states these laws dated to the colonial era when sodomy was a capital offense (Crompton, 1976). Some state laws included same sex and heterosexual behavior while others only addressed same sex conduct. Definitions of sodomy varied and sometimes applied only to men, or were gender inclusive (Crompton, 1976).

Reform began in the early 1960s as the states, starting with Illinois, began adopting The Model Penal Code. The Model Penal Code decriminalized private consensual sexual conduct between consenting adults. (Model Penal Code §213.2, 1962). This section of the Code was based in part on the 1957 Wolfenden Report, the report that formed the basis for the eventual decriminalization of sodomy in the United Kingdom via the Sexual Offenses Act of 1967 (Wolfenden, 1957) Despite a trend of decriminalization among the states, the US Supreme Court upheld Georgia’s sodomy law as applied to a gay male couple in the privacy of their home in 1986 (Bowers v. Hardwick, 478 U.S. 186). In 2003 the court reversed itself and overturned all state sodomy laws (Lawrence v. Texas, 539 U.S. 558). It was not until 2011, when in accord with federal legislation (The Don’t Ask Don’t Tell Repeal Act of 2010, Public Law 111-321, 2010) the US military stopped discharging soldiers known to be gay or lesbian, that it effectively ended its disparate treatment of same sex conduct, even though same sex and opposite sex consensual sodomy is still prohibited to a limited extent under the Uniform Code of Military Justice (UCMJ §125.

Civil Rights/Nondiscrimination Laws

In the 1960s, as the movement for equal civil rights for African Americans forced reform of federal and state laws and public and private practices related to racial discrimination, Congress included a ban on gender discrimination at the same time (see for example the Civil Rights Act of 1964 barring sex and race discrimination in employment and public accommodations, and subsequent laws extending bans on such discrimination to education, federal contractors, etc). Sexual orientation was not included in any of these federal civil rights laws. In the 1980’s, the adoption of state laws prohibiting sexual orientation discrimination in employment and/or public accommodations began, with Wisconsin leading the way in 1982 (NGLTF, 2012). These reforms followed city ordinances banning sexual orientation discrimination in hiring, starting with East Lansing, Michigan in 1972 (The State News, 3/11/12). Since these beginnings, 21 states have adopted laws barring sexual orientation discrimination in employment and other arenas of living, and 16 of these also bar discrimination based on gender identity or expression (NGLTF, 2012).

As of 2013 there are still no federal laws in the USA prohibiting sexual orientation or gender identity discrimination except in the US military, where as mentioned above sexual orientation discrimination in military employment was effectively ended by Act of Congress, effective September, 2011 (Public Law 111-321). Under the Obama administration, protections against sexual orientation discrimination related to specific areas of living are being extended by federal regulation in the absence of federal laws. For example, the Housing and Urban Development Agency (HUD) now prohibits sexual orientation and gender identity discrimination in federally subsidized housing (24 CFR Parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982, February2012). The Pentagon is about to extend military ID cards to same sex partners, allowing them access to military bases and commissaries, among other privileges (New York Times, Feb. 5. 2013). Also a recent administrative order required a military spouses’ on-base organization to admit a same sex spouse.

US federal law, through operation of the Defense of Marriage Act (DOMA) (Public Law 104-199, 1996) also explicitly authorizes discrimination based on sexual orientation and marriage in the administration of all federal benefits otherwise available to legally married spouses, such as social security, taxes, inheritance, retirement and immigration. DOMA is discussed below in the Same Sex Marriage section.

At the federal level, there have been ongoing attempts to pass protections from sexual orientation and gender identity discrimination in the last 20 years, in employment law, since 1994, and regarding immigration since 2000. The Uniting American Families Act, the immigration bill that would recognize same sex partners for purposes of immigration, died in committee at the end of 2012. The issue of equal treatment for bi-national same sex couples has been dropped from the current proposed immigration reform legislation although there are proposed amendments to re-insert it (Kiene, 2013; Preston, 2013). Meanwhile, current Obama administration policy is to focus deportation on non-citizens in the US illegally who have broken other laws and not to pursue deportation orders against non-citizens who have not broken any other laws, providing some small comfort for same sex couples with a foreign spouse who has remained in the USA beyond the expiration of their visa or is otherwise present illegally.

Employment

While a minority of states provides protection in the employment arena (see Table 2), the federal government in the USA does not yet require employers, government or private, to do so. As noted above, the Employment Nondiscrimination Act (ENDA) – a nondiscrimination act to prohibit discrimination in employment based on sexual orientation and/or gender identity –has been introduced in Congress since 1994 but has not passed, and it died in committee in 2012. Covering only sexual orientation discrimination in early years, gender identity was added in recent years in the midst of much controversy among Congressional supporters of ENDA (Hunt, 2011). ENDA, now known as HR 1755, was reintroduced in the 2013 session of Congress in April, 2013.

In the USA, many private employers have, through policy, supported workplace equality with regard to sexual orientation and gender identity, even when not required to do so by law. For example, access to health insurance is primarily through employment in the USA and Levi Strauss, the blue jeans manufacturer, in 1991 was the first Fortune 500 Corporation to extend domestic partner health benefits to same sex partners of employees (Levi-Strauss, 2010). In 2012 88% of the Fortune 500 had nondiscrimination in employment policies covering sexual orientation, and most of these policies were global; 57% also covered gender identity, the first time a majority covered the latter. 62% of these companies offer domestic partner health benefits and 25% offer equitable access to health benefits for transgender employees (Human Rights Campaign, 2013). In addition to nondiscrimination policy and benefits, many US employers have supported LGBTQ inclusion through strategies such as LGBTQ employee resource groups, training for managers and Human Resources, gender transition guidelines and other diversity management techniques (Kaplan, M, 2010). In the US, the employment arena’s progress toward full inclusion in the last 20 years has been truly remarkable.

Relationship recognition and Marriage

Same sex relationships were first explicitly prohibited by law in the state of Maryland in 1973, although attempts by same sex couples to get marriage licenses had been denied throughout the USA prior to that, with a few exceptions that were never fully tested in the courts. For example, in 1971 one male couple obtained a marriage license from a town clerk after being denied in another town, and were married by a minister in Minnesota; that marriage was never invalidated (Baker and McConnell, NYTimes, 2013).

Globally, progress toward same-sex relationship recognition moved quickly in Europe after Denmark, in 1989, became the first nation to recognize same sex registered partnerships. In the USA, progress toward same sex relationship recognition began in earnest in the 1990s. The Hawaii Supreme Court in 1993 signaled that it was likely to find denial of access to marriage for same sex couples unconstitutional unless the state could show a compelling state interest for the denial (Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, 1993). This set off a firestorm of political reaction in the USA, culminating in the federal government’s adoption of the Defense of Marriage Act (DOMA) in 1996 under the Clinton administration. DOMA prohibits federal government recognition of same sex relationships and frees the states to choose whether or not to recognize such marriages legally performed in another state. This is unusual because under the US Constitution, ordinarily both the federal government and states recognize the legal acts and court orders of other states under the “full faith and credit clause” (Article IV, §1). In 1998, Hawaii adopted a constitutional amendment barring same sex marriages, as did Alaska, making them the first states to do so.

Same sex marital rights were not again recognized in the USA at the state level until 1999, when Vermont’s Supreme Court found denial of access to marriage for same sex couples violated the state’s constitutional guarantee of equal protection under law and ordered that the state offer marriage or a marriage equivalent status (Baker v. Vermont, 744 A.2d 864 ,Vt. 1999). Vermont adopted a civil unions law in 2000, offering marital equivalent status. The first state to legalize full marriage for same sex couples was Massachusetts in 2004, after its high court found denial of access to marriage unconstitutional under the constitution of the Commonwealth (Goodrich v. Department of Public Health, 798 N.E.2d 941, Mass. 2003).

The first legal same sex marriages performed in the USA took place in Massachusetts in May of 2004. Prior to that, American same sex couples had legally married in The Netherlands in 2001, and in Canada as of 2003, but recognition of those marriages in the USA had not been tested legally (Wockner, 2001). Once Massachusetts recognized same sex marriage in 2004, same sex marriage became an even more hotly contested political issue in the USA. In reaction, 28 states who had not already done so passed constitutional amendments or legislation barring same sex marriages in the years following (See Table 2 for a complete list of states that bar same sex marriage).

The momentum against same sex marriage shifted after 2008. In the interim, civil unions or domestic partnerships were legally recognized in various states and localities (California and Delaware, for example). In recent years, several more state supreme courts ordered access to marriage for same sex couples (Iowa and Connecticut, for example) and a few legislatures also allowed it (New Hampshire and the District of Columbia, for example). By means of a referendum known as Proposition 8, voters rejected California’s Supreme Court court decision ordering equal marital access. Negative reaction to the hate-filled campaign on the California referendum, largely funded by Christian groups including the Morman Church, and the contemporaneous election of Barack Obama, helped shift the public dialogue.

The New York legislature legalized same sex marriage in mid 2011. Maryland, Maine and Washington legalized same sex marriage in November 2011 and Minnesota voters that month rejected a referendum that would have banned it. Same sex marriage legislation became law in Rhode Island, Delaware and Minnesota in 2013,making a total of 12 states with marriage equality, and is pending in the Illinois legislature, while Colorado approved civil unions the same year. Interestingly, Rhode Island’s governor explained his support of same sex marriage in economic terms, suggesting that his state’s competition with surrounding states to attract and grow the high tech industry sector requires “the 3 T’s – talent, technology and tolerance,” with same sex marriage equality a cornerstone of the tolerance a young educated workforce expects (Chafee, 2013). Despite this progress, a majority of states still ban it, either by constitutional amendment or legislation.

Meanwhile, the US Supreme Court is considering a case about California same sex marriage and its Proposition 8 equal marriage ban (Hollingsworth v. Perry). This case gives the US Supreme Court a chance to hold that same sex marital access is constitutionally required at the federal level, or to just rule on the issue at the level of California’s state constitution and referendum process. A second pending case, challenging the Defense of Marriage Act (DOMA), also provides the court an opportunity to make a broad access to marriage ruling, or just decide whether denial of federal benefits to legally married same sex couples is or is not permissible (United States v. Windsor). There is additional pressure on Congress to repeal DOMA, in part coming from The Business Coalition for DOMA Repeal, a group of major corporate employers such as the Morman-founded and owned Marriott Corporation (Colker, 2013). This coalition is an example of how conscious collective action is influencing regulation toward further equality in the USA at this time.

Parental Rights

For LGBTQ people, the ability to adopt, access to artificial insemination, and to be recognized as the parent of a same sex spouse/partner’s biological child have all been legal challenges in the USA. 18 state courts and laws grant joint adoption rights for same sex couples and seven prohibit it either by statute or court decision (HRC, 2012). Parental rights have been more rapidly extended with the advent of same sex marriage, civil unions and domestic partnership recognition in the states where such status exists. However, parental rights are fragile in states where same sex relationships do not have legal status. For example, in Virginia, a biological mother who was in a legal civil union in Vermont when the child was born, left her partner and moved out of state with the child to Virginia. She contested the second mother’s parental rights and initially won because Virginia did not recognize the second mother as a legal parent. Although the Virginia court eventually reversed the decision, it did so only because obligated to recognize the prior existing Vermont court order under a uniform child custody agreement between states (Miller v. Jenkins, S.E. 330, 2006).

USA Gender Identity and Transition

Gender identity and expression rights have lagged behind gay and lesbian rights in the USA. Cross-dressing was criminalized in many parts of the USA into the 20th century (Sears, 2008). The right to change one’s birth certificate to reflect one’s chosen gender during or after gender transition is a matter of state law and still unavailable in some states (Lambda Legal, 2012). Access to health insurance coverage for medical treatments associated with gender transition is rare (HRC, 2013) and the costs of such treatments prohibitive for most people until well into their careers, meaning many transgender people wait much longer than they wish to for some steps in their transitions.

The USA psychological and psychiatric community has reformed its approach to transgender people. The new manual for diagnosis of psychological disorders (DSM V) eliminated the category “gender identity disorder” and instead now describes “gender dysphoria”. Some states are beginning to require access to health insurance for medically necessary treatments associated with gender dysphoria. In 2012, California and Oregon began enforcing their new requirement that employers offer health insurance coverage for medically necessary treatments to transgender people, even if the employer is headquartered outside California and the insurance plan is an out-of-state plan (Morgenstern, 2013).

Discrimination in employment, housing, services and other areas of daily life continue for transgender people in the USA. No federal protections address gender identity and expression and only 16 states prohibit such discrimination. Hate crimes continue to be a serious and escalating problem, including murders (NCAVP, 2011, 2012).

Religion, Psychology and Reparative Therapy

In 2012 California banned so-called reparative therapy to try to change a person’s sexual orientation from LGB to heterosexual. Such alleged therapy became a visible campaign issue during 2011 when a candidate for the Republican party’s Presidential nomination, Michelle Bachman, spoke about the center she and her husband own which practices a religiously motivated form of such therapy. Despite being disavowed by reputable mental health professionals, some conservative communities in the USA, including evangelical church communities, continue to encourage young people and adults to seek to change their sexual orientations through combinations of prayer and therapy. Legislation banning the practice has been proposed in New York and several other states in 2013.

**Trends and Current Issues: Key Themes**

From the Tables and the discussion above it is evident that both countries have made huge strides towards equality and LBGTQ rights over the past 20 years. While SA has the most progressive legislation in place, and the USA is still progressing towards legislative equality, the lived experiences of the LBGTQ community in both countries show differing and somewhat contradictory levels of substantive equality.

Our focus will now turn to the current issues and debates pertaining to LBGTQ rights, equal opportunity and workplace inclusion.

**Social realities and pressure on the legal framework**

Despite South Africa’s progressive Constitution and subsequent anti-discrimination legislation and provisions, there is cause for grave concern, since this progressive stance has come under attack as of late.

In 2012 the Congress of Traditional Leaders of South Africa (CONTRALESA), a non-government pressure group, filed a draft document calling for the removal of LGBTQ rights from the Constitution of South Africa and The House of Traditional Leaders has submitted a proposal to the Constitutional Review Committee, suggesting an amendment to this effect to section 9(3) of the Constitution (Rouseau, 2012). The parliamentary caucus of the ruling African National Congress rejected the proposal and South African president Jacob Zuma, despite his vocal homophobia, has given his cautious support of gay rights and marriage equality (Morgan, 2012).

While it seems as if equality trumped opposition for the moment, and that the Constitution was upheld in this case, the mere fact that the proposed Constitutional amendment removing sexual orientation from protection against discrimination has made it through the Constitutional Review Committee into the ANC’s National Assembly for parliamentary caucus, is a concern in itself. This does not bode well for the equal rights of the South African LGBTQ community, and we might see increasing marginalization and stigmatizing of lesbian and gays in South Africa. One example of such social prejudice already evident is so called “corrective rape” – another first for South Africa.

Corrective rape, or curative rape is when a person is raped because of the perceived sexual or gender orientation. The common intended consequence of the rape, as seen by the perpetrator, is to "correct" or “cure” the victim’s orientation, to turn them heterosexual, or to make them "act" more in conformity with gender stereotypes (Wesley, 2012). The term was coined in South Africa after well-known cases of corrective rapes of lesbians like Zoliswa Nkonyana (4 February, 2006), and Eudy Simelane became public, and has since been labeled as an epidemic by Human Rights Watch in 2011 (Martin, Kelly, Turquet & Ross, 2009; Dipika Nath, 2011; McKaizer, 2011). Corrective rape tends to be more prevalent in economically marginalized black communities, and while it is more prevalent toward black lesbians it also affects transgender black men. Gay rights activists are currently pushing for 'corrective rape' to legally be seen as a hate crime (Martin, et al. 2009; Wesley, 2012).

It needs to be noted that there are currently unprecedented high levels of violent crime and violence against women in South Africa. Corrective rape is just a sub-category of a larger pandemic of rape in a society where the rape of infants (baby rape), the rape of elderly women (granny rape) and brutal gang rapes and mutilation are unfortunately common practice. The High Commissioner for Human Rights, Navi Pillay said in this regard - “There is a need for very strong signals to be sent to all rapists that sexual violence is absolutely unacceptable and that they will have to face the consequences of their terrible acts. The entrenched culture of sexual violence which prevails in South Africa must end,” (8 Feb, 2013). Dr Saths Cooper, president of the International Union of Psychological Science, argue in this regard “… when social and economic conditions are unstable, and there is a high level of uncertainty and anxiety, there are concomitant levels of rape and other aberrations. We don’t know to what extent the frustration of young and old males, at their wits end in a society that has discarded them, where they have no jobs and women tend to get things quicker exacerbates the situation. That is not a cause, but could be an underlying issue behind incidence of sexual violence (in South Africa).”

The everyday reality of poverty, unemployment and violence especially in the township and informal settlements has become a driver for violent crime. Abdi (2011, p. 695) argued “Unsurprisingly then, some in this group continue to use violence – the tool of social relations and conflict resolution that was normalised under apartheid – because they remain culturally, residentially and economically segregated from current institutions of power.” In this regard Cooper (2013, p. 2) concluded “… in South Africa there are lots of people who are the walking wounded, who feel frustrated and oppressed, and who don’t have ability to discriminate right and wrong”.

The normalization of violence as conflict resolution method of choice, the disintegration of family structures due to migrant work patterns and detentions during the struggle against apartheid, HIV AIDS casualties, poor education, the joblessness, the class divides and extreme poverty, have all also given rise to the so called Lost Generation, (roughly 1980 – 2000) and the upsurge of violent crime in South Africa (Sparks, 1992, Herskovitz and Laventure, 2012).

Meanwhile, in the USA, social equality in daily living continues to progress rapidly for lesbian and gay people, but more slowly for bisexual and transgender people. The US Congress in 2013 has seven out gay, lesbian and bisexual members, including the first ever out Senator, lesbian Tammy Baldwin of Wisconsin and the first ever out bisexual member, Representative Krysten Sinema of Arizona. A majority of people in the USA say they know someone who is gay, a majority support employment and marital equality, and more than a third say their views have changed over time (Page, 2012). While hate crimes against LGBTQ people continue to be a serious issue, general social attitudes are improving, with the younger generation above 73% in approval of full equality (Page, 2012).

**Organizational context, employment relations, and lived experience**

While SA affords formal equality of rights to LGBTQ individuals through its Constitution, it is weak on anti-discrimination measures to monitor compliance and/or sanctions for breach of LGBTQ rights or equality in the workplace. For instance, LGBTQ status is not listed as one of the [[5]](#footnote-5)designated groups under the Employment Equity Act (EE Act, 1998) to benefit from Affirmative Action policies.

Research on sexual orientation and the experiences of LGBTQ employees in South African workplaces is limited. However, a recent study by Els and Nkomo (forthcoming) found that gays and lesbians perceived their workplace cultures as heterosexual and this influenced their willingness to disclose their sexual orientation. Despite legislative equality, there are also numerous examples of negative social sanctions and marginalization of the LGBTQ community in the South African society at large that detract from substantive equality. These include, for instance, the practice of reparative therapy, and refusal to serve LGBTQ individuals. As recent as 4 May, 2013 a complaint was lodged with the Human Rights Commission against the owners of a wedding events center at a Cape winery for refusing to host a gay wedding reception. The owners of the farm, who are a prominent celebrity couple, claimed they “could not find it in their hearts” to allow a gay couple to get married on their property (The Saturday Star, 4 May).

Despite widespread US workplace equality as discussed earlier in terms of business policies and diversity management regarding gays and lesbians, the issue of coming out continues to be a personal one, easier for the younger generations than for the older. Certain employment arenas continue to be relatively hostile, including professional sports, despite recent leader claims of readiness to support out gay or lesbian team members, and the coming out of a few female and male basketball players (Collins & Lidz, 2013). Without federal legislation banning employment discrimination, workers in a majority of states continue to be vulnerable to such discrimination. Meanwhile, equity and inclusion for bisexual people and transgendered people at work, in society and in law is still a work in progress.

* **Africa’s Influence on South Africa**

Homosexuality is illegal in most African countries based on remnants of sodomy laws introduced during the British colonial era and perpetuated by cultural and religious beliefs. Punishments across the continent range from fines to years in prison, and even the death penalty (Pearlman, 2012). Uganda and Nigeria are in the process of passing draconian laws criminalizing public display of affection and even the witnessing of same-sex “marriage” ceremony.

Ugandan Speaker Rebecca Kadaga told the Associated Press that the country is clamoring for the bill's passage, and some Christian clerics at the meeting in the Ugandan capital, Kampala, asked the speaker to pass the law as "a Christmas gift” last year (Pearlman, 2012, p. 1).

During debate Nigerian House majority leader Mulikat Adeola-Akande, referring to same-sex marriage, said "It is alien to our society and culture and it must not be imported. Religion abhors it and our culture has no place for it" Nigeria's senate already approved in November 2011 a bill that would make same-sex marriages punishable by up to 14 years for the couple and 10 for anyone abetting such unions (Abuja, 2012).

Robert Mugabe, Zimbabwe's president, claims that homosexuality doesn't belong in Zimbabwe and it violates women's rights by denying the union of men and women needed to bear children. When the Anglican Church condoned gay marriage in July, 2010, Mugabe said: “The Archbishop of Canterbury is blessing such marriages – that is similar to dog behavior”. Mugabe fortunately, currently faces a challenge from Prime Minister Morgan Tsvangirayi, who recently adopted a pro-LGBT rights position (Kaoma, 2012; Wockner, 2010).

* **Conservative Evangelical USA influence on Africa**

US Evangelical “Christian right” groups are heavily involved in influencing public policy related to sexual orientation in nations in Africa including Nigeria and Uganda, for example, after becoming discouraged about stopping equality progress in the USA (Williams, 2013; Kaoma, 2012) For example, Kaoma (2012, p. 1) pointed out that the draft Constitution Mugabe wants to pass “includes anti-gay provisions shaped with help from the US-based Christian right group American Center for Law and Justice (ACLJ) through its Zimbabwe office. The proposed provisions explicitly prohibit homosexuality and, mimicking American efforts, define marriage as between a man and woman.” Furthermore, Human Rights Campaign claims that the Ugandan bill nick named “Kill the Gays”, has been supported by fundamentalist US Christians, who have opened dozens of churches in Uganda and other countries to rouse anti-gay sentiment (Pearlman, 2012).

Nobel laureate, Archbishop Desmond Tutu argues that the anti-homosexuality legislation Uganda is considering is an instrument of oppression similar to apartheid. He argued “The depiction of members of the LGBTI community as crazed and depraved monsters threatening the welfare of children and families is simply untrue, and is reminiscent of what we experienced under apartheid and what the Jews experienced at the hands of the Nazis. To those who claim that homosexuality is not part of our African culture, you are conveniently ignoring the fact that LGBTI Africans have lived peacefully and productively beside us throughout history” (Tutu, 2012, p. 1).

* **Religious Influences in SA:**

The Rhema Church in SA and the more conservative Dutch Reformed churches are vocal about their anti-homosexual sentiments and proposed reparative treatments, and are mobilizing against the liberal South African constitution.

Some religious leaders like Archbishop Desmond Tutu and Dr Allan Boesak , however are strongly outspoken against the anti-homosexual sentiments of some African countries the SA government and conservative churches. Even the Dutch Reformed church senate ruled that gay members should not be discriminated against.

**Social Regulation[[6]](#footnote-6) – Analyzing the patterns related to LGBTQ rights**

Reynaud (1979) distinguished three types of regulation i) autonomous regulation, emerging from the conscious collective action of individuals (internal actors within a group, more often than not against intervention); ii) control regulation, emerging from external actors (imposed rules, like legislation) aiming at framing or even changing the autonomous regulation; and iii) joint regulation that results from the addition of different legitimacies (internal and external and different groups working together) working together on regulation and how regulation is put in practice (Reynaud, 1979; Klarsfeld, Ng, and Tatli, 2012). We believe that South Africa’s equality clause’s inclusion of sexual orientation is an instance of joint regulation in the meaning given by Reynaud. Socially there is escalating anti-gay autonomous regulation occurring in SA. We see the USA social context as more an instance of pro-equality autonomous conscious collective action and the USA legal context as a combination of joint regulation and control regulation as described by Reynaud.

**Joint Regulation versus Autonomous Conscious Collective Action: Comparative Context:**

Some regulation can be understood to occur as an instance of the “conscious collective” and/or normative coherence. South Africa has a short constitutional history as part of a short history related to equality of civil rights and social inclusion, embedded in a prior history of apartheid. Thus, unlike in the USA, there is not a long overarching tradition of expanding rights and expanding inclusion both at the social and legal levels that would normatively discourage backward social and constitutional steps, both of which are currently threatened or occurring in SA. An attempt at control regulation in the form of a constitutional amendment denying same-sex marital equality, called the Federal Marriage Amendment (see for example HR Joint Resolution 56, 108th Congress) was proposed in the USA several times between 2002 and 2008, the House of Representatives only voted on it once, defeating it by a wide margin, and the Senate never let it out of committee so it never had a chance to go through the long state ratification process. Had it done so, it would have been the first attempt to include a constitutional amendment taking away rights rather than expanding them. The current discussion in South Africa about taking sexual orientation out of the constitution’s equality clause thus occurs in a different context with a shorter constitutional history than that of the US.

**The Equality Clause’s History considered as joint regulation in SA.**

The ANC in exile, preparing to take power, needed to attract broad support, including from whites, and including the out gay and lesbian (mostly white) relatively affluent and educated supporters who helped the ANC both from exile and internally prior to Nelson Mandela’s release and the coming 1994 election. The inclusion of sexual orientation in the Equality Clause of the draft constitution emerged from this alliance, as a way of repaying the debt and broadening the constituencies of support the ANC would get for itself as the potential new governing party, as well as for the constitution as a whole. Mandela and the ANC made many compromises in the run up to the election of 1994 and in the drafting of the constitution in order to obtain non-violent, broad-based support from South African whites. The inclusion of sexual orientation in the Equality Clause occurred in this context.

During the SA constitutional convention, chaired by then Vice President Matamela Cyril Ramaphosa, opposition to the inclusion of sexual orientation in the Equality Clause emerged from Black religious parties, to the consternation of the ANC. The ANC members of the Individual Rights Subcommittee sought to gain the support of these Black political parties by seeking a compromise on this clause, suggesting that there was not necessarily any deep conviction or enthusiasm about LGBTQ rights within the ANC. No compromise was made in the end because there was none offered by the religious parties that would have allowed any LGBTQ equality. (Wishik, personal communication and consultations with committee staff during the constitutional convention, Cape Town, April, 1995).

In the years since 1995, the ANC’s visible leadership has not taken LGBTQ rights from the formal arena into social policy with any real enthusiasm. Legislation, as discussed above, responsive to the requirements of Constitutional Court mandates interpreting the Equality Clause, as well as addressing other arenas of LGBTQ equality, has been adopted, including equal access to marriage, for example. Yet the promise of the Equality Clause in the constitution, as a form of joint regulation, was never fully realized by any enforcement mechanisms that would have helped require real equality in employment practices or in other social arenas. There has been relative silence from the post-Mandela Presidents and other senior spokespeople. In addition, the ANC’s need for coalition with the white LGBTQ constituency has diminished, as their focus has been on preserving and expanding their political base among Blacks. The Black LGBTQ constituency is generally poor and not politically well organized. Meanwhile, the ANC’s need for coalition with better-organized Black groups has increased, and the influence of the evangelical Black parties that continue to oppose sexual orientation equality has continued or grown. All this has been taking place in a context of increasing homophobia in other African countries such as Zimbabwe and Uganda.

Meanwhile, the South African Constitutional Court has consistently done what it could via control regulation to make real the potential of the equality clause, including finding that it required marital equality for same sex couples.

In 2013, the fragility and temporary nature of joint regulation that the Equality Clause’s inclusion of sexual orientation represented in 1994 and 1995 is now manifested in ANC consideration of a constitutional change to the Equality Clause. As Reynaud pointed out, “when there is a shift in the relative power of the groups” involved in joint regulation is when the compromises such regulation represent fall apart and change occurs (Reynaud, 1979 p. 317). This shift is also echoed in the lived experiences of the LGBTQ community in SA due to marginalization and negative social sanctions.

Meanwhile, in the USA, civil rights have a history over the long term of moving from segregating and discriminatory toward expansion of rights. This is often an instance of “conscious collective” regulation and sometimes of joint regulation. Sometimes led by federal legislation and sometimes by the states, expansion of rights is a strongly normative trajectory. There are exceptions. Civil rights become fragile in the US at extreme conflict points. War was used to justify incarceration of Japanese Americans during WWII for example, and currently the “war on terror” is being used to justify interrogations without legal warnings of so-called terror suspects and other repressive legal acts. Extreme conflict about abortion rights has continued after the 1973 Roe v. Wade decision by the US Supreme Court, an instance were at least one current Supreme Court Justice feels that the Court got too far out ahead of the conscious collective without a strong enough coalition, and caused this reaction (Heagney, 2013). The state level bans on same-sex marriage that followed the Hawaii Supreme Court’s 1993 threat to require it under that state’s constitution are another example. Yet some of those bans have already effectively fallen within the last 20 years (Colorado, for example, now has a marriage equivalent civil unions law weakening the impact of their ban on same sex marriage) and the Supreme Court of the United States is currently being asked to recognize a constitutional right to marital equality. Whether they leave this to continue being decided at the state level, where the combination of conscious collective and joint regulation is pulling and tugging, or decide it federally will be revealed by June of 2013. At the state level, as was described above, the direction has been toward equality and inclusion at least since 2004, a bare 10 years after the anti-gay reactions to Hawaii’s threatened marital equality. This egalitarian trend has picked up speed since2008 as the collective conscious has continued to move with the enlarging younger generations.

US states have also attempted at other times to stem the tide of civil rights expansion, passing Jim Crow laws after the 19th century post civil war Reconstruction era However, so far each such state level effort has eventually been stopped by federal legislation, federal constitutional amendment, or federal and state constitutional decisions. This so far has been the history in the LGBTQ arena, with the US Supreme Court striking down state laws punishing same sex sexual conduct and a state law barring LGBTQ civil rights ordinances, and state supreme courts forcing some states toward marital equality. There is no reason to expect that this trajectory will not continue.

At the social level, in the USA social mores also tend to move toward inclusion over time and by generation. Polls make it clear that a large majority of people under 30 in the USA supports gender and racial equity and inclusion and support LGBTQ full equality and inclusion in society. Thus the egalitarian impulse at the level of conscious collective has strength over the long run in the USA.

**A short tale of two Countries**

We conclude that SA has a higher level of national control regulation than does the USA, with more laws of national scope in place creating a broad scope of progressive legislation towards LGBTQ equality. SA was at the forefront of LGBT rights in the 1990s when it was the first nation in the world to include sexual orientation equality in a national constitution, legalized gay marriage in November 2006, and was the first country to recognize an official Gay flag in October, 2012. However, with a weakening of the coalition that led to the initial joint regulation represented by constitutional equality, that guarantee of equality, elaborated via additional control regulation, has never been fully enforced or effective. Evidence of this includes the recently proposed draft amendment document calling for the removal of LGBTQ rights from the Constitution of South Africa, an example of autonomous anti-gay regulation that has made it through the Constitutional Review Committee into the ANC’s National Assembly for parliamentary caucus, which poses a real threat to its progressive laws.

While the USA has a major instance of control regulation in the form of the anti-gay national law, the Defense of Marriage Act (DOMA), and very few national laws in place supporting LGBTQ equality, that one anti-gay law is under serious threat. The combination of joint and control regulations in the form of pro-LGBTQ equality legislation at the state level are enforced via access to legal remedies that align with other civil rights enforcement and are part of the conscious collective action history related to civil rights and nondiscrimination. Also, the USA seems to have a higher level of autonomous pro-gay regulatory activity based on the conscious collective and greater normative coherence regarding LGBTQ equality. This also includes autonomous societal rules activated spontaneously by actors, where the USA seems to take the lead over SA in its widespread acceptance of LGBTQs in American society at large, whereas there seems to be increasing widespread rejection in SA of LGBTQs after a phase of tentative acceptance.

The questions remains now - what are the lessons to be learned and what does the future for LBGTQ rights look like in each country? This will be the focus of the last section of this paper.

**Future Trends, Lessons Learned[[7]](#footnote-7) and Concluding Thoughts**

South Africa has witnessed unparalleled changes toward a more civil society in its post-apartheid era during the past 19 years. It also boasts one of the most progressive Constitutions in the world, as well as subsequent anti-discrimination legislative provisions that afford the LGBTQ community in SA full formal legal rights. However, the rising homophobic sentiments of key players in the ANC government machinery, the possible spillover of the strong anti-gay African wave of legislation criminalizing homosexuality, in some cases punishable by death, increasing signs of homophobia in the South African society underpinned by heteronormativity, and the phenomenon of corrective rape, are grounds for deep concern for LBGTQ future social reality, inclusion and legal rights in SA. If these trends persist it does not bode well for the continuation of equal rights for the LBGTQ people in South Africa.

The USA has witnessed rapid legal reform in the last decade, both at the state and federal levels (MAP 2009, 2011). It may be on the cusp of further legal reform at the federal and constitutional level. As was stated earlier, pending federal legislation and US Supreme Court cases could result in ending discrimination in access to federal benefits including tax and estates law treatment, social security and retirement. It is possible that there will be a decision finding a constitutional basis for access to same sex marriage, or at least federal recognition of such marriages when legal at a state level. Immigration reform may extend to same sex couples and federal employment nondiscrimination law may be extended to sexual orientation. Legal protections against gender identity discrimination are also spreading.

In the private sphere reform also continues, with more employers supporting LGBTQ equality with transgender medical benefits, tax-equalizing subsidies to offset same sex partner benefit costs, and public advocacy for the repeal of the Defense of Marriage Act (LA Times, 1/28/13). Nonetheless, as the millions of petition signatures and demonstrations in response to consideration by the Boy Scouts of America’s policy barring gay scouts and scout masters demonstrate, LGBTQ equality and inclusion are still very controversial. The relatively rapid pace of de jure reform is accompanied by vocal and hostile antigay actions such as hate crimes, increasingly sophisticated antigay messaging from the pulpits of Christian and Catholic churches and powerful policy groups such as Focus on the Family, continuing school board bans on students wearing pro-gay slogans on their clothes, bans of books and curricula addressing LGBTQ subjects, and “conscience exception” excuses for religiously motivated employer discrimination against LGBTQ applicants and employees. Thus, while the trend is for more inclusion and equality, it isn’t without its continuing challenges and half steps backward.

While both SA and the USA have solid equal opportunity laws and regulations in place with regard to race, gender and disability, SA is ahead of national US law on sexual orientation, although the trend in the USA is toward greater legal equality. What is more important is that there seems to be a serious disconnect between substantive social equality and legislative equality in SA due to a strong heteronormative sentiment (coupled with a conservative religious element). It seems that in SA control regulation alone cannot succeed in creating actual equality in society, absent a strong enough coalition for joint regulation and absent a sufficient history of egalitarian autonomous regulation via conscious collective action. An even stronger conservative religious element in the US, and some remaining heteronormativity, has been less able to stop the trend toward full social acceptance of sexual orientation equality and gender identity equality. Polls show that people under 30 in the USA are broadly supportive of LGBTQ equality, with an overall majority also being supportive. Thus where there is a longer and stronger tradition of egalitarian autonomous regulation via conscious collective action, the absence of national formal regulation, accompanied by parallel formal and joint regulation at more local levels like states and municipalities, has proved quite effective, although not comprehensive, at supporting rapid progress toward genuine social equality.

From this comparison it also seems that there is no ‘one-way’ of progression, or a straight line of progression in terms of advancing LGBTQ rights, in either the USA or SA. It is rather a step forward and a step or two steps backwards that is evident. Each country’s control and joint social regulation of LGBTQ rights are impacted differently by autonomous regulation of LGBTQ rights, and the combinations affect how social regulation and social equality progress.

In conclusion, the USA seems to take the lead over SA in its widespread acceptance of LGBTQs in American society at large, whereas there seems to be increasing widespread rejection in SA after a phase of acceptance.

Also, in a neo-institutionalist vein, it is suggested by this comparison, that there might be some kind of mimicry between countries or states based on i) their proximity (regional influences) or ii) relative level of (reciprocal) ideological influence. For instance it seems that South Africa might be influenced to be more homophobic due to the influence of its African neighboring countries, (regional influences) who are in their part also influenced by the USA’s Conservative Evangelical ideologies. This Evangelism in turn strikes a cord with the more conservative religious groups in South Africa.

It is suggested that South Africa should build strong identity and cooperation ties beyond Africa if it is to not follow the anti-LGBTQ wave that seems to be sweeping through Africa, and being echoed by conservative elements in South Africa. South Africans also need to stand united and strong against any Constitutional changes that will minimize any group’s human rights and cause inequality. A renewal of the coalition that brought equality into the constitution as a form of joint regulation may be necessary to turn the tide back toward greater equality. Otherwise, removal of equality from the constitution on the basis of sexual orientation could open up the door for more Constitutional changes, and another era of human rights abuses in South Africa.

Meanwhile, in the USA, it is suggested that formal regulation continues to be needed. If the US Supreme Court ends the explicit federal discrimination against same sex couples contained in DOMA, immigration reform may not be needed. However, employment, housing and educational discrimination based on sexual orientation continue in many states and absent federal legislation such as ENDA will continue. It is time the federal law and constitutional law were applied to sexual orientation in the USA to pre-empt the states and prevent formal discrimination from continuing.

In the USA, the paradoxical limitations and strengths of a civil rights approach to equality become more evident over time. Increased male dominance in the US GLBTQ movement and the choice to focus on marriage and the military, rather than the broader and more traditional civil rights issues such as employment and public accommodations, has reinforced an assimilationist pressure (Torregrosa, 2013). This is seen with regret by some people in the LGBTQ community, particularly those who appreciated the freedom of outlaw status that has rapidly disappeared. Much of the new boundary testing is coming from youth, who are coming out sooner and expressing much more gender fluidity, with associated refusal to accept existing identity labels. This identity complexity will challenge law and policy in and outside workplaces. Meanwhile, the struggle continues to extend LGBTQ legal equality to the federal level, by constitutional decision and/or federal legislation,. Until federal law addresses LGBTQ people’s fundamental rights to full equal protection of the laws, LGBTQ people in the USA remain at the mercy of their location of residence and their individual employers, even as their neighbors, families, and churches welcome them more frequently than ever before.

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| **Table 1: Summary of the LGBTQ Equality Legislation In South Africa, 1994 - 2012** | |
| **Year Name of Legislation** | **Aim of legislation, employee responsibility, data gathering** |
| *Interim Constitution of South Africa* adopted 27 April 1994.  *Constitution of South Africa* (1996) | **Goal:** It is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. No discrimination allowed on race, gender, ability, language, education, **sexual orientation** or any other difference. Consequently, post apartheid South Africa has instituted progressive laws on issues of sex and sexuality, based on the non-discrimination clause of the Section 9 Equality statement in the South African Constitution. South Africa’s Constitution is one of the most progressive in the world and enjoys high acclaim internationally and applies to all South African Citizens. |
| 1994 Amendment of  *The Sexual Offenses Act of 1957* | Male same-sex conduct was decriminalized, while the consenting age for all same sex sexual acts remained at 19 regardless of gender, as opposed to the age of consent for heterosexual sex acts, which were 16. |
| *Labour Relations Act (1995)*  Includes all SA public and private workplaces. SA economically active population (approx. 18 mil) | **Goal:** to treat all people fairly according to Section 27 of the Constitution; and to inter alia: regulate, facilitate and promote:   * organisational rights of trade unions; collective bargaining; * the right to strike and the recourse to lockout; * employee participation in decision-making * resolution of labour disputes through Commission for Conciliation, Mediation and Arbitration, * independent alternative dispute resolution purpose; * the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act |
| *Basic Conditions of Employment Act (1997)* includes all SA workplaces | **Goal:** To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment, like employment contract (e.g. working hours & leave) – NO SPECIFIC MEASURES FOR MONITORING SEXUAL ORIENTATION STATUS. |
| *Employment Equity (EE) Act, 1998* - includes SA workplaces which employ 50 and more employees; but not to members of the National Defense Force, National Intelligence Agency, and the SA secret service.  *Employment Amendment Equity Bill* (Oct 2012) aimed at strengthening existing monitoring processes | **Goal:** Employment equity policy - The twofold purpose of the EEA 55 of 1998 not only requires equitable representation or getting the numbers right but also fair treatment in employment and the elimination of unfair discrimination. Therefore, organisations should also focus on fairness perceptions and the principles of organisational justice of the designated groups:  African Black; Coloured; Indian; Persons with Disabilities; Women: SEXUAL ORIENTATION IS NOT A DESIGNATION GROUP  Annual Reports submitted to DoL and Commission for Employment Equity (CEE) by 1 October each year. Employers report on number of employees, appointments, promotions, resignations, terminations, disciplinary actions, per race, gender, disability, as well as foreign nationals. NO REPORTING OR MONITORING MEASURES IN PLACE FOR SEXUAL ORIENTATION STATUS |
| Sodomy Laws Scrapped 1998 | The sodomy laws were ruled to be unconstitutional by the High Court, and the ruling was applied retrospectively to the adoption of the interim Constitution on 27 April, 1994 |
| *Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), 2000* | **Goal:** To extend anti-discrimination protections to public accommodations, and services. Prohibits unfair discrimination by individuals, and private and government organisations, for instance withholding partner benefits. PEPUDA also forbids hate speech and harassment in public and private spaces and specifically extended spousal medical and pension benefits to partners in a permanent life-partnership |
| *The Alteration of Sex Description and Sex Status Act of 2003* | **Goal:** This Act allows anyone whose “sexual characteristics” have been altered by surgical or other medical means (or anyone who is intersexed) to apply for a change of their sex status with the Department of Home Affairs. |
| *The Children’s Act of 2005* | **Goal:** Replaced the Adoption Law and allows adoption by spouses and by "partners in a permanent domestic life-partnership" regardless of sexual orientation. Artificial insemination is legal for single lesbian women.  Same sex partners should be recognized as legitimate parents. |
| 2007 - Amendment of  *The Sexual Offenses Act of 1957* | Ruled 16 as the uniform age of consent and rewrote the law in gender- and orientation neutral terms. |
| *Civil Union Act no. 17 of 2006* | **Goal:** Affords equal social and legal status for two people regardless of gender, to form either a marriage or a civil partnership. |
| 2008 – final repeal of all discrimination in *The Sexual Offenses Act* | In 2008 a ruling declared the age of consent of 16 to apply retroactively from the date of the adoption of the interim Constitution on 27 April 1994. As of 1 January 2008, all provisions that discriminate based on sexual conduct have been formally repealed. |

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| **Table 2: Summary of the LGBTQ Equality Rights In the USA (court ordered or by legislation) 1970-2013** | |
| **Type of right** | **States with such legislation or court ordered rights** |
| ***Prohibitions of discrimination based on sexual orientation in employment****, as well as some or all of the following: housing, public accommodations, insurance and education.* | ***21 of 50 States, the District of Columbia (DC) and the US military***  District of Columbia (1977); Wisconsin (1982); Massachusetts (1989); Connecticut (1991); Hawaii (1991); California (1992); New Jersey (1992); Vermont (1992); Minnesota (1993); Rhode Island (1995); New Hampshire (1997); Nevada (1999); Maryland (2001); New York (2002); New Mexico (2003); Illinois (2005); Maine (2005); Washington (2006); Iowa (2007); Oregon (2007); Colorado (2007); Delaware (2009) US Military (de facto as of 2011 when Don’t Ask Don’t Tell was repealed although that law is not an explicit prohibition of all sexual orientation related employment discrimination). |
| ***Hate crimes legislation*** *covering crimes motivated by sexual orientation animus.* | ***29 states, DC and US Federal Government***  California, Colorado, Connecticut, District of Columbia, Hawaii, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, Oregon, Vermont, Washington, Arizona, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Nebraska, Nevada, New Hampshire, New York, Rhode Island, Tennessee, Texas, Wisconsin; US Federal Government |
| ***Prohibition of discrimination based on gender identity or expression in employment*** *as well as some or all of housing, public accommodations, insurance and education.* | ***16 states and DC***  Minnesota (1993); Rhode Island (2001); New Mexico (2003); California (2003)1; District of Columbia (2005)1; Illinois (2005); Maine (2005); Hawaii (2011)2; New Jersey (2006); Washington (2006); Iowa (2007); Oregon (2007); Vermont (2007); Colorado (2007); Connecticut (2011) ; Nevada (2011); Massachusetts (2012) |
| ***Hate crimes legislation*** *covering crimes motivated by gender identity animus.* | ***13 states and DC***  California, Colorado, Connecticut, District of Columbia, Hawaii, Maryland, Massachusetts (effective 7/1/2012), Minnesota, Missouri, New Jersey, New Mexico, Oregon, Vermont, Washington |
| ***Marital equity*** *for same-sex couples* | ***12 states and DC***  Massachusetts (2004); Connecticut (2008); Iowa (2009); Vermont (2009)1; New Hampshire (2010); District of Columbia (2010); New York (2011); Maine (2012); Maryland (2012); Washington (2012); Delaware (2013); Minnesota (2013); Rhode Island (2013) |
| ***Broad civil union and/or domestic partnership laws*** | ***8 states*** *(several of these have added full marital rights more recently)*  Civil unions: Vermont (2002) New Jersey (2007); Illinois (2011); Delaware (2012); Hawaii (2012) ; Colorado (2013). Domestic partnerships: California (2005); Oregon (2008); Nevada (2009) |
| ***Prohibition of Same Sex marriages*** *by state constitutional amendment or legislation (note some of these states have broad civil union or domestic partnership laws)* | Oregon, California (appeal pending), Nevada, Idaho, Montana, Arizona, Utah, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Louisiana, Arkansas, Missouri, Mississippi, Illinois (marital equality legislation pending 2013; Tennessee, Wisconsin, Alabama, Kentucky, Indiana, Michigan, Florida, Georgia, South Carolina, North Carolina, Virginia, West Virginia, Ohio, Pennsylvania, Alaska. *Note: The US federal government prohibits federal recognition of same sex marriages and allows states not to recognize such marriages under the 1996 Defense of Marriage Act-appeal pending 2013.* |
| ***Joint adoption*** *by same sex couples permitted statewide.* | ***16 states and DC***  Arkansas, California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont and Washington. |
| ***Sodomy laws*** *repealed by state law, or struck down by state or federal court decision as of designated date range* | *Pre—1970: Illinois; 1970-79: Washington, Oregon California, North Dakota, South Dakota, New Mexico, Colorado, Wyoming, Nebraska, Iowa, West Virginia, Ohio, Indiana, Maine, Vermont, New Hampshire, Massachusetts, Connecticut, New Jersey, Hawaii; 1980-89: Wisconsin, Pennsylvania, New York, Alaska; 1990-99; Nevada, Tennessee, Kentucky, Georgia, Maryland, Rhode Island; 2000-2002: Arizona, Arkansas, Minnesota; 2003 via US Supreme Court decision in Lawrence v. Texas: Idaho, Utah, Kansas, Oklahoma, Texas, Missouri, Louisiana, Mississippi, Alabama, Florida, North Carolina, South Carolina, Virginia, Michigan* |

Sources: Human Rights Campaign (hrc.org); National Gay and Lesbian Task Force (ngltf.org)

1. Language used by targeted social identity groups changes over time. The appropriation of the former epithet “queer” by LGBT people began in the 1980’s in both academic and activist contexts and represents an anti-establishment and self-defining thread (Epstein, 1994, 2002). The “Q” in LGBTQ has also been used for “questioning” in relation to one’s gender identity. Some in the current college generation in the US have extended this acronym to LGBTQIA to include inter-sexual and allies as well (Schulman, 2013). Other terms are emerging, such as “pan” for “pansexual.” We use “Q” and “Queer” here to include in our description the parts of the sexual orientation and identity movement that have preferred this label. [↑](#footnote-ref-1)
2. In 2008, even though the new law had come into effect, the former inequality was declared to be unconstitutional in the case of *Geldenhuys v National Director of Public Prosecutions*, with the ruling applying retroactively from 27 April 1994. Consent Judgement Welcomed, 26 Nov 2008. [↑](#footnote-ref-2)
3. Including transgendered - In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*the Constitutional Court stated that the concept of “sexual orientation” as used in section 9(3) of the 1996 Constitution “must be given a generous interpretation” and thus applies equally to the orientation of persons who are “transsexual” - De Vos, Pierre (14 July 2010). "Christine, give them hell!" (http://constitutionallyspeaking.co.za/christine-give-them-hell/). Constitutionally Speaking. http://constitutionallyspeaking.co.za/christine-give-them-hell/. Retrieved 6 Feb 2013. [↑](#footnote-ref-3)
4. This section will further explore whether there is full compliance and inclusion of out GLBTQ people based on these laws and how it is supported or managed by employers regarding are employee resource groups, management training etc. This will be developed in the full paper. [↑](#footnote-ref-4)
5. The designated groups or previously disadvantaged groups are African Blacks, Coloureds, Indians, persons with disabilities, and women. Based on a court order in June 2008, Chinese South Africans and other Taiwanese or Chinese immigrants who had become citizens prior to 1994, were reclassified as “black people” and are now also a designated group under the EE Act (Booysen and Nkomo, forthcoming). [↑](#footnote-ref-5)
6. We would like to thank Alain Klarsfeld for his valuable input in shaping this analysis. [↑](#footnote-ref-6)
7. We would like to thank the anonymous reviewers for their valuable input that helped shape this section of our paper. [↑](#footnote-ref-7)