

PERSPECTIVES

Political analysis and commentary from Africa



STRUGGLE FOR EQUALITY

**SEXUAL ORIENTATION,
GENDER IDENTITY AND
HUMAN RIGHTS IN AFRICA**

 **HEINRICH
BÖLL
STIFTUNG**

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Heinrich Böll Foundation – Africa

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Our foremost task is civic education in Germany and abroad with the aim of promoting informed democratic opinion, socio-political commitment and mutual understanding. In addition the Heinrich Böll Foundation supports artistic and cultural as well as scholarly projects, and co-operation in the development field. The political values of ecology, democracy, gender democracy, solidarity and non-violence are our chief points of reference. Heinrich Böll's belief in and promotion of citizen participation in politics is the model for the foundation's work.

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- Democracy
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Editorial

On October 04 2010, a pink closet set up on the University of Cape Town (UCT) campus as part of the 'Pink Week' awareness campaign was torched after being on display for just a few hours. The closet was intended to highlight prejudice against lesbian, gay, bisexual, transgender and intersex (LGBTI) people and encourage discourse on issues affecting the LGBTI community. Its malicious destruction spotlighted this prejudice and stood as a strong example of the pervasiveness of homophobic attitudes across the social spectrum of South African society. While the continuous violence against black lesbians certainly is the most brutal manifestation of hate crimes against LGBTI people, the notion that they are confined to the streets of townships is simply not true.

The incident also serves as a reminder that despite having successfully fought for one of the most advanced gay-right laws in the world the struggle for equality of LGBTI people in South Africa is, like in the rest of the African continent and indeed the world, an ongoing one.

Homosexuality is outlawed in 38 African countries. In some countries offenders can be punished with death and in many more with harsh jail sentences. Recent developments have attracted international attention and once more underlined the precarious human rights situation of LGBTI people on the continent. In Uganda, an Anti-Homosexuality Bill was tabled in parliament, proposing to broaden the criminalisation of homosexuality and to introduce the death penalty under certain circumstances, including for people who have previous convictions of the "offence of homosexuality" or have same sex relations while being HIV-positive. In Malawi, a gay couple was sentenced to 14 years hard labour and only freed after international condemnation.

Fuelled by homophobic utterances of political and religious leaders, opposition to homosexuality is often embedded in tradition, religion and culture. Ignoring factual history, non-normative sexual orientations and gender identities are dismissed on the basis that they are Western imports and "un-African".

The Heinrich Böll Foundation has aimed to empower LGBTI organisations to participate in public life and express the concerns of LGBTI people in the region for many years. It is hoped that this issue of *Perspectives* will help LGBTI activism in its struggle towards changing Africa into a continent where LGBTI people enjoy the full range of human rights.

What is clear from the articles gathered here is that despite the myriad of challenges and hostile environment there is an ongoing engagement and growing movement towards equality for LGBTI people throughout the continent. So while there may be a long journey ahead, we remain optimistic.

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The battle for the recognition of LGBTI rights as human rights

Introduction

Over the past couple of years, there has not been a shortage of examples of human rights violations of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons throughout the continent.¹ The violations have been perpetrated by both state and non-state actors. The violations vary from the denial of basic rights to, in some extreme cases, physical violence against LGBTI people and sometimes even death.² Some states have taken efforts to strengthen criminal laws³ by increasing penalties or broadening the list of offences that LGBTI people can be charged under. Current and former heads of state continue to make statements condemning same sex relations.⁴ Various religious formations have also taken the opportunity to oppose same sex relationships.⁵ There are currently 38 countries on the continent that actively criminalise same sex intimacy and, while not expressly criminalised in other countries, other laws, like vagrancy or public nuisance laws, can be used to prosecute and persecute LGBTI individuals and groups. It is also accepted that the violations that are taking place implicate a range of human rights that are protected.⁶

While all of this has been going on, a burgeoning movement of activists fighting for the struggle of legal recognition of rights of LGBTI people has emerged.⁷ Gradually, other mainstream civil society formations have also embraced the issue of the multiple violations of LGBTI peoples' rights as a human rights issue. In the fight for rights, like in any other struggle, there will be prioritisation of strategies, more preference given to some arguments than others and contestations over the choice of strategies that will be used to articulate the problems. This article seeks to provide an overview of what exists at the regional level focusing on the opportunities and challenges at the African Union and at the African Commission on Human and Peoples' Rights. It then highlights

the key issues that will confront the nascent movement as it begins to organise at both the country and regional level.

The African Charter on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (The Commission) has been, until the establishment of the African Court on Human and Peoples' Rights (The Court), the sole body granted the mandate to investigate the violations of rights and to protect against the violations of the rights guaranteed under the African Charter on Human and Peoples' (The Charter). There is no suggestion, anywhere in the Charter, that there is any individual or group that is barred from the enjoyment of rights guaranteed under the Charter. Human rights simply attach to all human beings by virtue of being human. The provisions of the Charter guarantee rights to 'every individual'⁸ 'every human being'⁹ and 'every citizen'.¹⁰ The non-discrimination article, Article 2, entitles every individual to the enjoyment of all the rights in the Charter without distinction of any kind. The Charter enumerates grounds upon which one cannot be discriminated against but the list is not exhaustive as it makes provision for 'other status'. In other comparable jurisdictions and domestic courts, 'other status' or 'other grounds' has been interpreted to include sexual orientation. The African Charter, like all instruments providing for the protection of fundamental rights, provides a sufficient basis for the recognition of all rights without distinction, including those of LGBTI people. It makes provision for life and integrity of the person,¹¹ respect for dignity inherent in a human being and the prohibition of torture, cruel, inhumane and degrading treatment, the right to liberty and to the security of his/ her person, among other rights which are essential for the protection of the violations that many LGBTI people are subjected to.¹² Article 60¹³ and 61¹⁴ of the Charter enable the



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Commission to have reference to international law and norms generally accepted as such.

While the Charter does provide a basis for limiting a whole range of rights, the limitation is a balancing exercise that judicial bodies often undertake bearing in mind the facts and the rights in question. The Charter does not present a basis for a blanket exclusion of any group. The argument that the rights of LGBTI people do not find expression in international human rights law or that it detracts from universally accepted human rights norms is one that has been raging at the UN and may soon rear its head at the African Union¹⁵.

It is for those who say that the Charter does not protect rights of LGBTI people to set out what the basis of the limitation will be. In asserting the rights, the violations that LGBTI people are subjected to have to be tested against the Charter or national human rights laws. Accepting that the Charter provides protection to everyone requires engaging with those tasked to giving it content that enables the rights to be realised.

The African Commission on Human and Peoples' Rights

The Commission has over the years pursued violations of LGBTI peoples' rights by member states. During member states' reports the Commission has out of its own accord and based on shadow reports, asked member states to respond to documented violations. It has also made the observation that discrimination on the basis of sexual orientation is incompatible with the African Charter, and asked states to consider whether subjecting suspects to invasive medical examinations did not contravene the Charter and expressed concern on the lack of tolerance on the grounds of people's sexual orientation.

What is less clear however is the reason why the Commission has been unable to reach a decision to grant observer status to the Coalition of African Lesbians (CAL), a regional human rights organisation working on the protection of human rights of lesbians. CAL meets the criteria for receiving observer status and all other organisations that applied with CAL for observer status in 2007 have been granted such status. During the November 2008 session, the Commission decided to refer the matter to its own private session in order to deliberate further whether the rights, which are human rights, that CAL seeks to protect are

justiciable under the Charter. What makes the CAL application an interesting issue is that the usual arguments around discrimination on the basis of sexual orientation do not arise or have not yet arisen. CAL only seeks to get observer status in order to engage with the Commission on issues affecting lesbians. It is not challenging any laws, practice or conduct that discriminates on the basis of sexual orientation. The issues that CAL would like to bring to the attention of the Commission are not controversial. Violence perpetrated against lesbians and forced marriages, among other issues, have been dealt with by the Commission before. At present, there is no country on the continent that criminalises the identity of being a lesbian,

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this is common refrain by groups or bodies that do not want to be involved in work around sexual orientation. If the Commission grants observer status to CAL this might signal the readiness of the Commission to start looking at freedom of association issues, where state parties refuse to register organisations doing human rights advocacy on sexual orientation and gender identity. If the application is rejected however the Commission creates a stalemate because if the identity of being a lesbian is a barrier to being recognised for the purpose of receiving observer status, it remains unclear what the positions of the Commission will be when rights have been violated on the basis of sexual orientation.

The African Union

To date the African Union has not taken any overt position on sexual orientation. It is an issue that many governments are unhappy about. It is understandable that many activists have not seen it as an issue that should be pushed overtly, because chances are that consensus will be easy to reach and it will not be the one that is desired by the movement.

There has not been a government that has provided leadership or even an indication that it may be willing to take this issue on. Engagement with various individual governments to enable them to either sponsor or support the issue is work that must still be undertaken. The African Union's other regional counterparts have taken decisive and concerted steps in outlawing discrimination against sexual minorities. In the European Union, membership requires repeal of anti-homosexuality legislation. The Treaty of Amsterdam also requires anti-discrimination legislation to be enacted by its member states. In as recent as 2008, the 34 countries of the Organisation of American States (OAS) approved a resolution titled Human Rights, Sexual Orientation and Gender Identity.¹⁶ It soon followed this up with another resolution in June 2010.¹⁷ The first resolution expressed concern about acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity, among other things. This resolution was passed despite the fact that some of the member states continue to still criminalise same sex intimacy. The second resolution asked member states to consider ways to combat discrimination against persons because of their sexual orientation and gender identity.

Decriminalisation may not end homophobia but taking the laws away will make a difference to people whose daily lives are interrupted and live in fear of being outed and blackmailed.

In the African Union, there are moves that suggests that the issue is approached with caution by governments. In a move interpreted as an attack on freedom of sexual orientation, Egypt sought and got a resolution at the 15th African Union Summit held in Kampala in July 2010¹⁸. The resolution calls on member states to reject the divisive nature of efforts at the UN seeking to impose controversial concepts, falling outside the internationally and regionally agreed legal framework on human rights, in particular regarding social and value systems

and matters. The recent UN debates on sexual orientation appear to have created an impetus for the Egyptian backed resolution as the language used borrows heavily from the alternative statement at the UN. In 2008 France proposed the UN declaration on sexual orientation and gender identity. Only six African countries, all former French colonies, signed on to the statement. An alternative statement led by the Organisation of the Islamic Conference claimed that the declaration threatened to undermine the international framework of human rights, "at the attempt to introduce to the United Nations some notions that have no legal foundations in any international human rights instrument." Thirty one African countries signed on to that statement.

Key challenges for a nascent movement

The idea that the violations that are faced by LGBTI people essentially constitute a human rights issue is nothing new¹⁹. The pervasive arguments include the charge that the movement has not had enough time to develop its language and strategies that will work on the continent. While there is merit in borrowing the human rights strategies that have worked in other parts of the world, there is a need to look at the factors that may serve to limit the effectiveness of those strategies.

Why the focus on decriminalisation? Most of the criminal laws do not target identity but they focus on conduct, same sexual conduct. In the LGBTI initialism, the "G" has received considerable attention because it has mainly been gay men who have been targeted by the law through arrests. Although prosecution under the statutes that prohibit consensual same sex intimacy has largely been unsuccessful because of the burden of proof, the existence of the laws continue to legitimise violence, harassment and many forms of discrimination because of their sexual orientation. Decriminalisation may not end homophobia but taking the laws away will make a difference to people whose daily lives are interrupted and live in fear of being outed and blackmailed. For individuals and organisations operating in a legally sanctioned homophobic space, living without the stigma and clout of illegality makes a world of difference.

The unabated violence directed at black lesbians in South Africa has led to a creation of a false dichotomy. Some argue that decriminalisation may not be a priority for the rest of the continent

because violence continues in South Africa despite decriminalisation. The violence is not an argument against decriminalisation but the key lesson is that rights cannot be won in parliament and in courts alone. A sole focus on legal regimes that prevent discrimination in a context where the state is the main violator by maintaining discriminatory laws in its statute books does little to target the inequality, indignity and stigma produced by criminalising identities and sexual acts. There are other violations such as lack of access to basic rights, the fear of being outed, discrimination in employment or in accessing health care that will not be addressed by decriminalisation. Decriminalisation and the prevention of discrimination are complementary in the fights against stigma and discrimination on the basis of sexual orientation.

When is it going to be LGBTI time? The late emergence of the LGBTI movement as a movement for rights on the continent made it easier to co-opt the LGBTI initialism. LGBTI activism started at a time when LGBTI gained prominence and a large degree of acceptance in many Western and English speaking countries. Viewed in a positive light, LGBTI has come to represent inclusivity and to place an emphasis of variant sexual orientations and gender identities. The issues and priorities have received unequal consideration, with mainly the LGBTI receiving token attention and the G receiving a bigger share of the focus. In the battle for legal recognition of rights the invisibility and marginalisation of the issues confronting other groups may be damaging to unity of the movement if not addressed. In mainstream LGBTI work, challenges confronting transgender and transsexual persons in changing official documents, the availability of facilities for people seeking gender re-assignment surgery or the invisibility of lesbians receive scant attention. The recent *Muasya*²⁰ case in Kenya is an exception to the silence and invisibility of the violations of rights of people who are intersex.

Is litigation the right strategy? Many activists have sought different strategies to advance LGBTI rights. These strategies have varied from documenting human rights violations, civic education work through theatre and exhibitions, working with religious leaders and looking for strategic entry points in law reform processes. There are currently

no pro-active legislative efforts to repeal laws that are discriminatory on the basis of sexual orientation and this is understandable as there are few members of parliament who would be willing to support such an initiative. Engagement with the law reform process has been reactive, mainly in the form of opposing legislation aimed at criminalising same sex relationships. If the law has to change litigation has been identified as one of the tools that can bring about reform in this area. Litigation as a strategy for change in a context where homophobia has no respect for the rule of law, constitutional promises and international human rights standards requires more work outside of the courtrooms

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than inside. It takes more than legal arguments to make a successful constitutional challenge. The existence of a movement that focuses on rights, the establishment of strategic partnerships with other civil society formations, doing work with the judiciary, and the acceptance by key actors that the continued harassment and persecution of gay and lesbian people are human rights issues are increasingly seen as pre-requisites if one wants to use the courts as a site for legal advocacy.

What will be crucial will be how the rights are framed and asserted. Asserting the right to be free from cruel and degrading treatment as asserted in the *Oyo and Mukasa* case²¹ seems much easier than a direct challenge to the constitutionality of laws that criminalises same sex sexual conduct. An incremental development in the courts by asking the courts to develop the content of rights such as privacy and equality may serve the purpose of laying a solid foundation that courts will sue when later confronted with the bigger questions.

Where the battles have been successful, it was not only due to the legal arguments. In the *National Coalition on Gay and Lesbian Equality* case,²² the South African law was struck down in court but

the battle was won during the constitution making process. The inclusion of sexual orientation as a ground upon which one may not be discriminated against clinched the deal. A vibrant civil society movement, a positive image of the LGBTI community in American popular culture, is credited for making it happen in Texas v Lawrence in the United States. The Voices of Tolerance campaign, the multi-faceted nature of the movement and the ability to mobilise key and strategic allies was instrumental to the Naz Foundation challenge in India.

The movement needs to know its partners: It is easy to know what the judiciary thinks because they have to give reasons for their decisions. It will be a mistake however to believe that other key legal actors are not just as conflicted, have concerns or do not have reservations about the protection of sexual minorities. In other contexts, the traditional allies of the LGBTI movement have been the women's human rights movement. Competition for space, scarcity of resources, and the argument that taking on LGBTI work may adversely impact on their main constituency has meant that many women's rights groups are not readily associated with the LGBTI movement. Linked to this is the criticism of the narrow framing of issues when presented as LGBTI. The complaint is that the sexual rights approach is more inclusive and it captures the African dilemma that starts at a place where human sexuality in general is a taboo subject. In a context where people can be subjected to a death penalty for committing adultery or where laws that exempt men who are married from prosecution when they rape their wives continue to exist, it is argued that the emphasis on discrimination on the basis of sexual orientation borrows too heavily from the West and neglects the social context. Some feminist groups²³ have begun to fill this void by expressly including sexual orientation and gender identity in their work. Mainstream human rights organisations have come on board but for many this is a very recent development. Reasons for refusing to engage range from: "but homosexuality is against the law in my country" to "my board is very homophobic, they won't let us do this work". Many lawyers, including human rights lawyers, who ordinarily uphold the right of every accused person to legal representation, refuse to represent LGBTI people in court. Lawyers who take on these cases do so at great risks to their personal and professional

integrity. Even some of those lawyers who take on the cases sometimes cannot wait for the opportune moment to declare that they are not gay, but just helping. These strategic partnerships remain crucial and there remains a need to continue engaging with these groups as convincing them of the legitimacy of the claim is part of the work that leads to decriminalisation.

HIV/AIDS is an entry point but it may not necessarily lead to rights:

Public health strategies that focus on men who have sex with men (MSM) and identifying them as a group that is vulnerable to HIV/AIDS has been a useful entry point. In official policy it has led many states to acknowledge that the community exists and that resources needed to be allocated to cater to their health needs. The limits of this approach has been that when states provide treatment, fulfilling their public health obligation, it does not always translate to decriminalisation even when the criminal laws are identified as enhancing vulnerability. While it is understandable that the entry point has not been aggressively pushed because there are benefits in engaging with the state, even at a minimal level, this relationship has to evolve to encompass human rights in their entirety as opposed to treating the symptoms of the problem. Providing access to treatment to MSM is a progressive step but it does not take the issue any further if the very same man who can receive treatment can be arrested and prosecuted because of his sexual conduct.

It is early days, visibility remains a challenge. The movement still operates underground in many countries. Human rights of LGBTI people are a contested claim or continue to be made invisible. What is without doubt, there is a struggle throughout the continent and the community is out and active. There may be disagreements over priorities and strategies but LGBTI is firmly on the agenda. It would be naive for anyone to believe that this battle will be won through rights by only arguing that privacy, equality, access to health or any other rights are infringed by laws that criminalise same sex sexual conduct. Building a movement is the greatest challenge for now.

Endnotes

- 1 See: <http://www.mg.co.za/article/2010-06-04-homosexuality-and-the-battle-for-africas-soul>, <http://www.mask.org.za/homophobia-increasing-in-kenya/> and <http://www.awid.org/eng/Women-in-Action/Announcements2/Rights-to-Redress-and-State-Accountability-Responding-to-Violence-against-Sexual-Minorities-in-Africa>. For more detailed reports see: www.iglhc.org, www.hrw.org, www.mask.org.za.
- 2 South African lesbians targeted for murder: <http://www.afrol.com/articles/26384>; Murder of Sierra Leone's lesbian activist condemned: <http://www.afrol.com/articles/14448>
- 3 Uganda Anti homosexuality bill: http://en.wikipedia.org/wiki/Uganda_Anti-Homosexuality_Bill; Burundi repeal laws criminalising homosexual conduct: <http://www.hrw.org/en/news/2009/04/24/burundi-repeal-law-criminalizing-homosexual-conduct>; The love that dare not speak its name: <http://www.independent.co.uk/news/world/africa/the-love-that-still-dare-not-speak-its-name-1863913.html>; Burundi Government Moves to Criminalize Homosexuality: Activist Groups Express Outrage: <http://www.iglhc.org/cgi-bin/iowa/article/pressroom/pressrelease/750.html>; Nigeria's anti-gay bill causes protests: <http://www.afrol.com/articles/24541>.
- 4 Mutharika criticises gay movement: <http://www.mask.org.za/another-latest-post-with-the-same-id-number-by-date/>; Malawi president: We need children rights, not gay rights: <http://www.digitaljournal.com/article/293558>; African statesman condemns homosexuality as an 'abomination': <http://www.guardian.co.uk/world/2010/may/25/gay-rights-africa-malawi>; Zimbabwe: President, PM Speak On Gays: <http://allafrica.com/stories/201003260002.html>; Namibian president announces purges against gays: http://www.afrol.com/News2001/nam008_gay_purges.html; Museveni Warns On Dangers of Sodomy: <http://allafrica.com/stories/201006040260.html>; Gambia News: President Jammeh Gives Ultimatum for Homosexuals to Leave: <http://www.gambianow.com/news/News/Gambia-News-President-Jammeh-Gives-Ultimatum-for-Homosexuals-to-.html>.
- 5 Zambia Church Condemns Gay Activists: <http://allafrica.com/stories/201005050727.html>; Zambia: Channel funds to projects, not gay rights, donors urged: <http://www.lusakatimes.com/?p=25974>; Ugandan Church attacks gay community: <http://www.afrol.com/articles/10483>; African bishops unite to denounce homosexuality: <http://www.monitor.co.ug/News/National/-/688334/998598/-/x4kdcml-/>; Position of the Church of Nigeria (Anglican Communion) on the bill for an act to prohibit marriage between persons of the same gender, solemnization of same and for the other matters related therewith: <http://thinkinganglicans.org.uk/uploads/CoNposition.pdf>, Thousands Attend First Anti-gay Protests In Ghana: <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=183484>.
- 6 The *right to non-discrimination and to be free from violence and harassment* is usually denied by omitting sexual orientation in anti-discrimination laws, constitutional provisions or their enforcement, the *right to life* is violated in states where the death penalty is applicable for sodomy. The *right to be free from torture or cruel, inhuman or degrading treatment* is infringed upon by police practices, in investigations or in the case of lesbians, gays and bisexuals in detention. *Arbitrary arrest* occurs in a number of countries with individuals suspected of having a homo/ bisexual identity. The *freedom of movement* is denied to bi-national couples by not recognizing their same sex relation. The *right to a fair trial* is often affected by the prejudices of judges and other law enforcement officials. The *right to privacy* is denied by the existence of 'sodomy laws' applicable to lesbians, gays and bisexuals, even if the relation is in private between consenting adults. The rights to *free expression* and *free association* may either be denied explicitly by law, or lesbians, gays and bisexuals may not enjoy them because of the homophobic climate in which they live. The *practice of religion* is usually restricted in the case of lesbians, gays and bisexuals, especially in the case of churches advocating against them. The *right to work* is the most affected among the economic rights, many lesbians, gays and bisexuals being fired because of their sexual orientation or discriminated in employment policies and practices: http://www.hrea.org/index.php?doc_id=432.
The Coalition of African Lesbians (CAL), Centre for Popular Education and Human Rights (CEPEHRG) in Ghana, Centre for the Development of People (CEDEP) in Malawi, Friends of Rainka in Zambia, Gay and Lesbian Coalition of Kenya (GALCK), Gays and Lesbians of Zimbabwe (GALZ), Out - LGBT Wellbeing, Forum for the Empowerment of Women (FEW), International Center for Advocacy on Right to Health (ICARH) in Nigeria, Lesbian and Gay Equality Project, the Mozambican Association for sexual minority rights, Sexual Minorities of Uganda (SMUG).
- 8 Article 2, 3, 5, 6, 7, 9, 10, 11, 12, 15, 16 and 17.
- 9 Article 2.
- 10 Article 13.
- 11 Article 4.
- 12 For an analysis of the normative framework for the protection of LGBTI rights provided by the Charter and how it can be used by those seeking to make claims before the Commission rights see Murray, R., Viljoen, F.: Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union, *Human Rights Quarterly* - Volume 29, Number 1, February 2007, pp. 86-111.
- 13 The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.
- 14 The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.
- 15 See section on African Union.
- 16 AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity (Adopted at the fourth plenary session, held on June 3, 2008).
- 17 AG/RES. 2600 (XL-O/10), Human Rights, Sexual Orientation, and Gender Identity (Adopted at the fourth plenary session, held on June 8, 2010).
- 18 Decision on the promotion of cooperation, dialogue and respect for the diversity in the field of human rights, Doc. Assembly/AU/17(XV) Add.9.
- 19 <http://www.declarationofmontreal.org/declaration/DeclarationofMontreal.pdf>; <http://www.yogyakartaprinciples.org/>; Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles: O'Flaherty and John Fisher, *Human Rights Law Review*, 8:2(2008). The judicial annotations to the Yogyakarta Principles provide additional information about the international instruments and jurisprudence upon which each Principle is based: <http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf>.
- 20 <http://www.mg.co.za/article/2009-09-22-kenyan-challenges-state-over-prison-facilities>.
- 21 In *Victor Juliet Mukasa and Yvonne Oyo v. Attorney General* (Misc. Cause No.247 of 2006) the Court held that two individuals who were identified as lesbian had been subjected to arbitrary arrest, detention, and physical mistreatment by law enforcement officers. The High Court found that the police had violated a number of human rights instruments, including the Universal Declaration of Human Rights.
- 22 *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, CCT 11/98 (1998).
- 23 Charter of Feminist Principles for African Feminists: http://www.africanfeministforum.org/v3/files/Charter_of_Feminist_Principles_for_African_Feminists.pdf.

Understanding homophobia in Africa today¹

Malawi is “a God-fearing nation”, intoned Malawian Member of Parliament, Edwin Banda, as that parliament voted to amend the constitution to prohibit same-sex marriage (August 2009 - homosexual acts, or “unnatural offences” were already illegal). In expressing this view, Banda joined a chorus of prominent Christian leaders across the continent who have harshly condemned homosexuality and who steadfastly reject entreaties to respect sexual orientation either as a human right, or as a God-given attribute. Since the mid-1990s this has included politicians like Robert Mugabe of Zimbabwe (Catholic) and Yoweri Museveni of Uganda (Born Again). African theologians have also taken a lead role in what is effectively a schism of the worldwide Anglican community. The breakaway “Primates Council” created following the Global Anglican Futures conference in Jerusalem (July 2009) is headed by Nigeria’s Archbishop Peter Akinola. No less than seven of its eight councillors hail from Africa. Not to be outdone, Roman Catholic leaders like Archbishop Zacchaeus Okoth of Kisumu (Kenya) have chimed in with the view that homosexuality is against “both African culture and biblical teaching”.

The schism in the Anglican community, together with inflammatory homophobic rhetoric, are deeply upsetting to African sexual and human rights organisations, to a vocal minority of liberal African theologians, and to their allies and donors in the West who support a tolerant, charitable, and/or science-based approach to the issue. Not only is there the direct danger of provoking violence and fuelling existing discrimination against sexual minorities (with all the negative sexual health implications that that carries), there is also the dismaying potential that hyperbolic and illogical claims, plus “witticisms” about “Adam and Eve not Adam and Steve” from some Christian leaders, could reinforce stereotypes in the West about

African backwardness. One can see the latter in exasperated, condescending or out-of-context generalisations about Africans and so-called African sexuality that periodically appear in Western media.

In the context of the long history of racism in Christian practice in Africa, any debate that appears to polarise largely along racial lines has a disproportionate power to distract attention from the big debates.

Of course, homophobia is not unique to Africa, nor to Christians. It is also true that Africa, and by extension the world as a whole, faces imminent and more obvious problems of climate change, civil wars, economic malaise and so forth. Scapegoating and fear-mongering against a relatively small and largely invisible sexual minority may seem like small political potatoes when set beside these other issues. So why is there such a fuss about homosexuality, and why such a seeming common front across so wide and complex a region as Africa?

These are important questions, not least of all because the anti-homosexual rhetoric has been heating up lately and in many cases is backed by the repressive power of the state. In part this is because new sexual rights associations are springing up across the continent and vocally challenging the status quo, sometimes in alliance with “uppity” feminist and HIV/AIDS service associations. There is a high potential for violent backlash, vigilantism, and extortion.

Additionally, in the context of the long history of racism in Christian practice in Africa, any debate



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that appears to polarise largely along racial lines has a disproportionate power to distract attention from the big debates. An analogy can be found in the early days of the HIV/AIDS epidemic. Blanket denunciations of Western imperialism and overheated accusations of racism were made against white researchers and health care professionals by some African intellectuals and politicians. This contributed to AIDS denialism at a critical moment in time and almost certainly impeded effective responses to the disease at a huge cost in human suffering.

All this is to say that the impasse between “African homophobes” and “Western liberals” is more than small potatoes. In this article I would like to consider several historical factors that have contributed to the strength of African opinions on the matter in the hope, perhaps, of lessening the polarisation. History then suggests other, broader issues that will need to be considered if homophobia – Christian and otherwise – is to be addressed enough to prevent more bad laws such as Malawi’s from being introduced using God’s name.

Let me begin by identifying my own faith. I am not a Christian. I am a historian trained in more or less conventional Western methods of research and analysis of evidence. I respect the scientific consensus on sexualities, which is simply to say that human sexuality does not easily conform to wishful thinking about “normal”.

Abundant evidence shows that same-sex sexuality existed throughout Africa long before Arabs or Europeans colonised so much of it.

Respecting science includes understanding that scientists are people who are influenced by the social context in which they work. In Africa, in the past, this meant that scientific results were often influenced by assumptions arising from prevalent attitudes of racism, sexism, and homophobia. Moreover, science was frequently made to serve the grossly unjust structures of colonialism, for example, racially segregated cities, schools and hospitals in the name of health. But the scientific method has over time exposed those assumptions and produced

progressively more powerful insights into human health and human sexuality among other things. If Africa is to address the development challenges it faces, science cannot be ignored or dismissed as inherently anti-African.

A consequence of this critical faith of mine is that I find isolated quotations from the Bible or select anthropologists to be unconvincing on the topic of what “nature” or “God’s will” or “tradition” supposedly tells us about homosexuality. Indeed, through more than a decade of research into the history of same-sex sexuality in Africa I have found no support at all for the argument that homosexuality is un-natural or un-African. On the contrary, abundant evidence shows that same-sex sexuality existed throughout Africa long before Arabs or Europeans colonised so much of it, and that even under colonial rule Africans were independent agents in determining new expressions of culture, including sexual mores.

This continues today. It is true that Western donors have financially and morally supported the emergence of sexual rights associations and networks in Africa, and are actively promoting a broad agenda of gender transformation that includes women’s empowerment, children’s rights, and full, frank sexuality education. This agenda is deeply at odds with most African “traditional cultures” (just as it is at odds with entrenched patriarchy elsewhere in the world, including the West). But the sexual rights movement in Africa preceded Western interest in the issue, builds on African initiatives, and is shaped by a new and quite courageous generation of African leaders. These men and women are not puppets of the West and indeed, sometimes get cross at well-meaning outsiders telling them how they should identify or organise their struggles.

That said, I respect that many Africans are attracted to, and moved to become better people, through their Christian faith. This includes many African gays and lesbians. I therefore try my best to understand what motivates the prejudices against sexual minorities that get justified as the will of God. Those prejudices have consequences that seem out of keeping not only with the Christian (and *ubuntu* or humanist) ethic, but even with self-preservation. As UNAIDS and most other major global health care donors, educators, and providers have forcefully argued, secrecy, falsehoods, stigmatisation, and denial make a poor base upon which to build

effective interventions against sexual ill-health. Given that millions of Africans are infected with HIV/AIDS, and given that research shows African men who have sex with men have especially high rates of infection and frequently have female sexual partners as well, then denying the main sexual rights arguments seem positively dangerous to the society as a whole, not just sexual minorities.

So why are African Christian leaders so vocal in denying the sexual rights argument? I see at least six big footprints from history which, when we ignore them, only makes the conflict worse.

To begin with, most African societies traditionally stressed marriage with many children connected through a host of rituals to large extended families. There were material (labour), political (marital alliances, patron-client relationships), and metaphysical (religious) benefits to such families. Sexuality was thus not regarded as an individual choice or orientation but in a sense belonged to the wider community. Social obligations to marry and have children even extended beyond the grave. Ancestors required abundant offspring to maintain their memory and power as benevolent spirits down through the generations.

Africans who oppose human rights for homosexuals in the name of the Bible have generous backers in Western “faith-based NGOs” such as True Love Waits.

Christianity in Africa incorporates many of these cultural beliefs. Adding to the mix are strong taboos around the public airing of sexual matters. Discretion, even secrecy, is respected while (outside certain limited ribald contexts) open discussion of the intimate details of sex is offensive. Secretive bisexuality or closeted forms of homosexuality are thus widespread and tacitly accommodated without upsetting the cultural norms.

“The gay lifestyle”, particularly when imagined in terms of stereotypes of promiscuity and decadence, is an affront to all of the above traditional values. Adding to this in some cases are specific historical incidents where homosexuality was associated with

cruelty or conquest. In Uganda, for example, dozens of young Christian converts were tortured and murdered by the Muslim *kabaka* (king) of Buganda when they refused his demands for sex in the late 19th century – up to a million pilgrims a year pay homage at shrines to these boys and young men. In Nigeria, the destruction of the great empire Songhai in 1591 by invaders from Morocco and Spain was reputedly accompanied by widespread homosexual rape. Who knows what local abuses took place during the slave trade, the many subsequent wars of conquest, and the spread of prisons and labour camps during the colonial era?

Second, African theologians are quite correct that the King James translation of the Bible contains several more-or-less explicit denunciations of homosexuality. For those who hold this or equivalent translations in other languages to be authoritative, no amount of science or argument derived from the ancient Greek or Hebrew texts can challenge the faith. The vast majority of Christian missionaries who evangelised in Africa in the 19th century fit into this category. Indeed, the earliest documented fulminations against homosexual practice in Africa were by Europeans and Americans. The most famous case, which sparked an official government enquiry, focused on allegations of sodomy among African men and boys working in the mines of South Africa. That scandal – in 1906-07 – was sparked by a letter by an American missionary denouncing what he considered immoral practices among Africans. It continued to simmer through the 1910s and 20s due in large part to the intrepid campaigns of Swiss missionary, Henri Junod.

Western missionaries continue to be very active in promoting the King James or equivalent understanding of human sexuality. Africans who oppose human rights for homosexuals in the name of the Bible have generous backers in Western “faith-based NGOs” such as True Love Waits (a ministry of LifeWay Christian Resources of the Southern Baptist Convention of the United States – very active in Uganda).

Third, the proselytisation of Christianity in Africa was intimately associated with the propagation of European culture, capitalist enterprise, and colonial rule. There were many humble and heroic missionaries who devoted their careers to improving African lives. They typically formed the bedrock of the education and health systems, as well as promoted industry and other material

forms of development alongside their spiritual teaching. Yet Christian missionaries were also often at the forefront of the theft of land, advocacy of racist laws and forced labour, and the violent suppression of aspects of African culture, including around marriage and sexuality. For example, many African societies traditionally allowed teenagers to experiment with non-penetrative sex, a custom that gave an outlet to sexual energy without compromising chastity. Missionaries flatly denounced the practice as immoral. In other cases, such as polygyny and bride-price, they used their influence with the state to introduce laws and taxation policies designed to insinuate Western middle class standards of morality and modesty.

Professional anthropologists, frequently working in the service of colonial states that sought to buttress conservative tribal structures, tended to ignore the flexibility and accommodation implicit in “tradition”.

Sometimes the message was confusing and alienating, even to those Africans who were otherwise attracted to Christian principles. Why cover women’s breasts? Was God ashamed of something He created? Why insist that monogamy was God’s will for marriage when polygamy appeared to be common among early Christian patriarchs? Did God change His mind? And why speak of camels and eyes of needles to Africans while blessing Europeans who accumulated untold wealth, frequently at the expense of African dignity, self-sufficiency, and family ties?

Africans who remember the paternalism, cultural chauvinism or worse of European missionaries (and these traits continued well into the 1990s if you consider apartheid South Africa) today bridle at what sometimes sounds like an encore performance. If heterosexual monogamous marriage with abundant children was formerly God’s will, and Africans could be punished or publicly humiliated for suggesting otherwise, how is it that homosexual, non-reproductive relationships outside

the rubric of church or family ritual are now proof of God’s love?

Fourth, secular European “missionaries” also played a role in fomenting the stereotype of homosexuality being un-African. As noted, most African societies placed a very high value on proper and fecund heterosexual marriage. But they also understood the need for discretion and accommodation of exceptions to the ideal. Professional anthropologists, frequently working in the service of colonial states that sought to buttress conservative tribal structures, tended to ignore the flexibility and accommodation implicit in “tradition”. Over the decades, thick books by European authors established the unquestioned fact that “the abnormal in sexual life is despised in Africa”, as one (German) author put it in 1925. A generation of African nationalist leaders took ownership over this type of statement as it offset another common European stereotype about Africans’ supposed promiscuity or uncontrolled lust for white women (“Black Peril” as it was known). A sad irony of the current debates is that many of the strongest proponents of an exclusively heterosexual “African sexuality” unwittingly draw upon European experts of sometimes dubious professionalism to support their case.

Fifth, Africa since the 1980s has been through wrenching economic strain. Many of the sharpest declines in average income, access to land, and social services followed closely on the heels of Western-advised “structural adjustment programs”. Average declines meanwhile concealed great gains by local elites, so that the disparities between poor and the ostentatiously rich grew ever-greater. Something new appeared as well – street kids, children with no extended family or rural homesteads to take them in. For them and the poor more generally, the only realistic options for survival left were migration, crime, and prostitution.

The International Monetary Fund is most notorious in Africa for its role in fomenting this crisis. Other donors, however, notably the World Bank and USAID, also promoted forms of “cultural adjustment” alongside the economic adjustments: changes in social relations implicit within the privatisation of land or the imposition of user fees for social services and health care, notably. The burden of these adjustments fell disproportionately on poor women and children who lost many of the claims for resources they could make in the traditional

moral economy and had to turn to the market to survive. Of course this turn had been a long time in the making but the rapidity of change, and the desperation of the sellers, was new and often dismaying. One did not need to be a conspiracy theorist, a sexist or even a homophobe to be angry at the stunning hypocrisy of powerful Western advisors and greedy local elites who spoke of development, women's empowerment, and human rights while engineering conditions that virtually necessitated survival sex for millions of Africa's poorest.

Future success in promoting human rights for sexual minorities also requires sensitivity to a broad range of complicating factors. That includes awareness of the history of Western imperialism and neo-colonialism in Africa.

This context of economic and perceived moral decline has created a crisis for the mainstream churches in Africa. Breakaway independent churches (Zionist or Ethiopian with eclectic mixes of ancestral and witchcraft beliefs) have long been a worry for the mainstream Christian faiths. Now, however, there is a profusion of competition both from breakaways and from dynamic (and often well-funded) alternatives such as Wahhabist Islam and Pentecostalism. Pentecostalism is growing especially rapidly in Africa today in part because it promises healing and financial benefit to its sometimes-desperate adherents.

The mainstream churches cannot directly match those promises, or the imagery that appeals to pre-Christian beliefs in ancestors and sorcery. But they can defend their turf by branding themselves in populist terms. The turn to ever-more strident professions of heterosexual purity is one aspect of this, which can also be seen in tensions between mainstream and fundamentalist expressions of Islam.

Finally, mainstream church elites are often closely linked to political elites in African countries. For the latter, denouncing homosexuals is an easy gambit to strengthen their anti-imperialist

credentials and win votes. Not to suggest cynicism, but family ties, old-boy networks, and material benefits play a role in encouraging church leaders to publicly sanctify the political homophobia. When men with a reputation for ruthlessness denounce homosexuals as enemies of the state - men who may also be friends from the anti-colonial struggle, relatives, and personal confidants - it takes a great deal of personal bravery to speak out for gay rights. People in more established democracies may not give sufficient credit to this difficulty, or the subtlety of language required to dissent from the political leadership.

Amazingly, such bravery exists. Indeed, the noisy homophobia of certain Christian leaders in Africa obscures the fact that there is a liberal and humanist voice in Africa that opposes discrimination against homosexuals. Leaders from the anti-apartheid struggle have led the way in this struggle as well, including Desmond Tutu and Njongonkulu Ndungane (Anglican) and Allan Boesak (Reformed Church). But lower-ranking individual ministers elsewhere on the continent have also called for respect for homosexuals' rights and dignity, including Reverend John Makokha of the Riruta United Methodist Church (Kenya). Gay-friendly churches are springing up in unexpected places, notably Other Sheep Kenya and the House of Rainbow in Nigeria, the latter claiming a congregation of thousands.

In short, the split between "African homophobes" and "Western liberals" is not as neat as it sometimes appears. The debate within Africa is lively and, in my view, quietly producing results that belie the homophobic bluster. Six (predominantly Christian) African countries recently voted to support the United Nations General Assembly resolution calling for an end to discrimination on the basis of sexual orientation. Meanwhile, rigorous research on same-sex sexualities is in fact taking place even in countries like Nigeria and Malawi where the political discourse seems to be adamantly opposed.

Such research is essential for challenging the homophobic bluster. But future success in promoting human rights for sexual minorities also requires sensitivity to a broad range of complicating factors. That includes awareness of the history of Western imperialism and neo-colonialism in Africa. Western liberals who are oblivious to that history are not necessarily very credible to Africans.

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Endnotes

- 1 A version of this article was published in German in "welt-sichten" No. 10/2009 (www.welt-sichten.org).

STATE-SPONSORED HOMOPHOBIA

Experiences from Nigeria

Lesbian, gay, bisexual, transgender and intersex (LGBTI) people in Nigeria like in many other African countries face legal challenges on grounds of their sexual orientation and gender identity. Both male and female same-sex sexual activity is illegal in Nigeria. In the 12 states of the Muslim North of the country that have adopted Sharia law; same-sex sexual activity is punishable by death or by up to 14 years imprisonment throughout the country.

The lack of tolerance is also evident in the statements of political and religious leaders that denounce the rights of LGBTI people. In February 2009, the then foreign minister, Ojo Maduekwe has gone even so far to claim that LGBTI people do not exist in the country. At the Universal Periodic Review of Nigeria, a process which involves a review of the human rights records of all 192 UN Member States once every four years, the minister stated:

“Mr. President, [...] the United Kingdom wanted to know the position of Nigerian Government on lesbian, gay, bisexual and transgender rights. As we have indicated in our National Report, we have no record of any group of Nigerians, who have come together under the umbrella of “Lesbian, Gay and Transgender” group, let alone to start talking of their rights. Of course, as citizens, all Nigerians have their fundamental rights guaranteed by the Constitution. During our National Consultative Forum, we went out of our way to look for the Gay, Lesbian and Transgender group, but we could not come across Nigerians with such sexuality. If they are an amorphous group, then the question of violence against them does not arise, let alone negotiating special rights for them. With regard to same-sex marriage, this is illegal in Nigeria, and until the law is changed, it remains so. The British in their wisdom bestowed the law against same-sex marriage to us, for which we are grateful.”

This is despite the fact that more than ten non-governmental organisations (NGOs) have openly declared the protection of LGBTI rights as one of their focus areas of work. These include Alliance Rights Nigeria, the International Centre for Reproductive Health and Sexual Rights (INCREASE), the Centre for Youth Policy Research and Advocacy (CYPRAD) and the Support Project in Nigeria (SPIN), The Initiative for Equal Rights (TIER), Queer Alliance and Global Rights Nigeria.

Each time I hear any of these claims I recall a conversation between two Nigerian young women who met at a conference in the United States:

Chi: *I travelled home with my partner. It was difficult. We could not hold hands in public. Funny, it was right there but they could not figure it out. Or do you think they were pretending?*

Kike: *Possibly, but maybe not. Friendship between girls is often without extra meaning back home.*

Chi: *Funny. My parents know but they have chosen to look the other way. They remind me to get a man when I am through with my studies and settle down.*

Kike: *Silence*

Chi: *Many times people do not even know my partner is female, she looks so dyke! That may have fooled them in the village. Hey, come to think of it, are there butch women in Nigeria?*

Kike: *And what have you been taking me for?*

Chi: *(laughing out loud) Interesting. Is this what dykes look like in Nigeria?*

Kike: *Hey, stop teasing, am I not dyke enough?*

Chi: *(still laughing) I can't wait to get home. I'm going to tell Pete that I met a Nigerian dyke. The way they carry on, you'd think no gays exist in Nigeria much less dykes.*

There have also been several attempts by political and religious leaders to deny the “Africanness” of homosexuality. In defence of the introduction of the Same Sex Marriage (Prohibition) Act 2006, President Obasanjo stated on national news that “homosexuality is unnatural, ungodly, and un-African”. The bill was sponsored by the presidency to “check excesses of a group of young people whose behaviour has become increasingly embarrassing.” Similarly the former Anglican Primate of the Church of Nigeria, Peter Akinola has argued in a position paper submitted by the church to parliament that: “Same sex marriage, apart from being ungodly, is unscriptural, unnatural, unprofitable, unhealthy, un-cultural, un-African and un-Nigerian. It is a perversion, a deviation and an aberration that is capable of engendering moral and social holocaust in this country. [...] Outlawing it is to ensure the continued existence of this nation. The need for doing this is urgent, compelling, and imperative.”

The Same Sex Marriage (Prohibition) Act 2006 was first tabled to the national assembly by Justice Minister Bayo Ojo in January 2006, but it wasn't passed during the first reading. One year later in January 2007 the bill was approved by the Federal Executive Council and resent before the national assembly.

The proposed bill called for five years imprisonment for anyone who undergoes, performs, witnesses, aids, or abets a same-sex marriage. It also prohibited any display of a same-sex amorous relationship and adoption of children by gays or lesbians.

The same bill also called for five years imprisonment for involvement in public advocacy or associations supporting the rights of lesbian and gay people. Included in the bill was a proposal to ban any form of relationship with a gay person. The intent of the bill was to ban anything remotely associated with being gay in the country.

The bill received some opposition from within parliament and widespread condemnation from local and international human rights and development organisations for violating the freedoms of expression, association, and assembly guaranteed by international law as well as the African Charter on Human and Peoples' Rights, and for compromising the fight against the HIV/ AIDS epidemic in the country.

One of the strongest opponents of the bill was Davis Mac-Iyalla, a LGBTI rights advocate who heads Changing Attitude Nigeria (CAN), a country chapter of a pro-LGBTI organisation based in the United Kingdom. Mac-Iyalla had already been repeatedly arrested by police in pro-LGBTI demonstrations in previous years. His stiff opposition and fierce criticism of the Anglican Church in Nigeria finally forced him into self-exile to the UK.

The bill eventually failed to come to a vote in the national assembly and died with the end of the Obasanjo administration after general elections held in April 2007.

In January 2009 a similar bill to ban "same gender marriage" was tabled before the national assembly. The Same Gender Marriage (Prohibition) Bill 2008 defines "Same Gender Marriage" as "the coming together of persons of the same sex with the purpose of leaving together as husband and wife or for other purposes of same sexual relationship." It places criminal sanction of three years imprisonment for defaulters. It also does not recognise marriage entered into outside of the country.

This bill like the Same Sex Marriage (Prohibition) Bill of 2006, goes beyond criminalisation of same sex marriage. It has provisions criminalising consensual sexual conduct between adults to be punishable by two years imprisonment.

The major difference between the 2006 and the 2008 same sex marriage prohibition bills is the provision of stiffer penalties for those who aid and abet or witness the solemnisation of the union between persons of same sex, meant to further alienate LGBTI persons and deny them access to support and services. Like the previous bill, the 2008 bill aims to create a platform for indiscriminate arrests and imprisonment of individuals solely for perceived or actual sexual orientation or gender identity.

At a public hearing on 11 March 2009 local and international civil society urged the assembly to reject the proposed legislation. It has since not received any further attention and civil society is hopeful that it will die with the end of the current administration on 29 May 2011.

Meanwhile, fuelled by the mere introduction of the same sex marriage prohibition bills, violence and human rights violations against LGBTI people continue throughout the country. In February 2006, the national defence academy expelled 15 cadets suspected of homosexual acts after anal examinations. In August 2007, police in the northern city of Bauchi arrested 18 men suspected of same-sex relations, charging them with belonging to an unlawful society, committing indecent acts, and engaging in criminal conspiracy. They are currently out on bail and reporting to court for their trials. In the same year two civilians and two military men were arrested in Kano for allegedly engaging in gay relationships and were only released after intervention of the Coalition for the Defence of Sexual Rights. In April 2008, two young women were arrested and tried and sentenced by a Sharia court for lesbianism to six months of imprisonment and 20 lashes.

The conversation between Chi and Kike about how far they have gone in asserting their rights represents the voices of many others who are asserting their queerness as African citizens. Why must we create a different standard for homosexuals when it comes to defining citizenship? Africans are not a homogenous group; we must admit that there is a place for everyone, queer and straight alike. After all, what is truly African but our diversity and dynamism? Let us accept it, nurture it, and celebrate it.



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Identity, Law, Justice

Thinking about sexual rights and citizenship in post-apartheid South Africa

Introduction

South Africa's hard won gains are notable and has received global acclamation. However, on closer inspection, a more nuanced picture is evident. The translation of law into tangible and accessible justice for homosexuals indicates that dignity, equality, and respect are a struggle still being waged. At the receiving end of homophobia and bigotry are black women in particular, confirming that more needs to be done to ensure that our progressive laws filter beyond the urbanised middle class.¹ It is not surprising that the social attitudes of South Africans toward homosexuality, is far from acceptance, as shown in some preliminary findings in a recent survey.² Some of these issues inform this brief perspective, outlining a few conceptual thoughts in relation to the concrete landscape of what issues about identity, the law and justice for homosexuals say about the meaning of sexual rights and citizenship in South Africa. Undoubtedly this is a complex argument but a few preliminary thoughts are sketched here.

Context

We have moved from an apartheid state riddled with forced divisions that characterised homosexuality as a behaviour through a model of illness and pathology, motivated by legal sanctions. In contrast, the post-apartheid landscape brought the promise of freedom under broad constitutional reforms enshrined in a bill of rights and facilitated the protection of rights. The current context has therefore steadily and progressively shown that we have 'shifted' from a model which conceives homosexuality as a behaviour to one in which identities can be produced.

Perhaps the most profound effect of the post-apartheid project is the equality clause.³ With the adoption of the South African Constitution in 1996, there emerged a strategic space, quite unprecedented in the country's history, in which

homosexual identities took on a public identity.⁴ This process, flowing from the constitution, leads to the secularisation of sex. By this I mean a constitution that is not tied up to the religious doctrine of any faith, but one integrally linked to a bill of rights. For example, a secular state also implies that the courts are to remain neutral on religious matters. In this sense citizens in the post-apartheid project are also freed from the rigid parameters of the Afrikaner Christian Nationalism that underpinned

At the receiving end of homophobia and bigotry are black women in particular, confirming that more needs to be done to ensure that our progressive laws filter beyond the urbanised middle class.

the machinery of the apartheid state.

With the emergence of the democratic state in 1994, and supported by legal protection on the grounds of sexual orientation in the constitution, South African decriminalisation campaigns (induced in large measure by the activism and public education of the National Coalition for Gay and Lesbian Equality in the nineties) have focused strategically on challenging the unconstitutionality of homosexual same-sex conduct within a discourse of rights (see table 1).⁵

I have indicated elsewhere that where apartheid policed, politicised and criminalised the 'sexual acts' of homosexuals, post-apartheid, in turn, sexualised lesbian and gay identities, thereby freeing homosexuality from the clutches of a pathological discourse.⁶

However the promise of legal reforms, while



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bringing benefits for the homosexual in legal and material terms (see table 1), the translation of constitutional equality and protections remain a critical challenge for civil society to advance and protect rights to equality, dignity and respect where homophobia and other structural problems still persist, of which naming, shaming and denial is central.

The common prevailing culture of denial *vis á vis* homosexuality is in and of itself a hostile response towards homosexuality. The view from this position is that homosexuality is a Euro-American perversion that has contaminated African 'tradition'. The assumption that homosexuality is a sign of European and Western decadence is underpinned by homogenising discourses by some in African societies that view 'tradition' as static, unchanging and fixed. Central to this discourse is the common and totalising logic that homosexuality is 'un-African' with the argument often focused on homosexuality's absence in pre-colonial Africa.

Another point about homosexuality in relation to sexuality and language is that homosexuality is primarily shrouded in codes of silence, secrecy and taboos that prevent public discussion and exposure. However, public responses in the African context usually dramatise a contestation over the legitimacy of homosexuality, which I claim is constructed in the representation of same-sex practices. In this sense, homosexuality becomes a crisis of representation in relation to culture and politics. Put simply, gay and lesbian identities are therefore also racialised as white and limited to the Western male.⁷

This reality always confirms what Gayle Rubin theoretically predicted in the eighties (she was writing about the Western context then but it is relevant here), that re-thinking sexuality always entails reconceptualising the battles and contestations fought over sexuality: "The realm of sexuality also has its own internal politics [...] They are imbued with conflicts of interest and political manoeuvring, both deliberate and incidental. In that sense, sex is always political."⁸

Central to this is the widespread cultural, religious and conservatism toward homosexuality, underpinned by what many feminists term 'sexual politics', a factor in understanding the circuits of power informing identity issues because the gendered hierarchy is sexualised by men. The point is that hetero-polar regimes of gender have made sex dangerous for women.

The violent effects of the sexualisation of gender, represented by for example, the socialised attribute of 'virility' for men within patriarchal institutions (such as the family, culture, religion) are often rape, sexual harassment, sexual abuse of children, prostitution and homophobia. These practices express and actualise the distinctive power of men over women. Because sexuality is the nexus of

The assumption that homosexuality is a sign of European and Western decadence is underpinned by homogenising discourses by some in African societies that view 'tradition' as static, unchanging and fixed.

relationships between genders, much oppression is mediated and constituted within sexuality.

Notable in this regard is the violent manifestation of gendered violence against black lesbians in particular. Over and above the fact that several black lesbians have been both attacked and murdered, the gendered effects of this form of homophobia have received little attention in the law and activism post-apartheid.⁹ A number of recommendations relating to the deaths of lesbians are made in this text, and I suggest that violence and oppression against women, based on their sexual orientation, has relevance for the meaning of citizenship, belonging and social justice, confirming that silence on these issues is not an option.

Given that identity is constructed in relation to a complex pattern of social relationships and social forces, the law could be viewed as one facet of a more complex set of social relations that affect identity formation. As a strategy of power enacted by the apartheid state, the law also placed limits on the freedom for the homosexual.¹⁰ The homosexual became a contested person in relation to apartheid legal formulation; characterised by derision, and produced in relation to struggle, domination and exclusion. However, the law, it seems, does not operate purely in a negative sense to dis-identify the homosexual, but also facilitates the productive emergence of an identity. In this way the law

functions in a paradoxical sense. Thus, legislation in the post-apartheid economy facilitates identity politics that asserts homosexuality as a positive affirmation for the homosexual, enabling claims to citizenship.

Law and citizenship

Anglo-American law studies have demonstrated how sexuality, especially homosexuality, has come to be configured as an object of identity via the law. This implies that the law cannot be understood as neutral or objective, but rather that it is discursive, especially where identity formation in the case of the homosexual is formulated through processes of repudiation. The point, in this instance, is the extent to which intellectual models have also challenged the homosexual in terms of the insider/outsider sexual binary, especially with regard to exclusion and belonging in sexual politics, social change and citizenship.¹¹

Fundamental to understanding the homosexual in relation to the law in South Africa is recognising the extent to which the homosexual, like the black African in South Africa, has been described from political citizenship. The aspiration to citizenship becomes an important marker in post-apartheid constitutional law South Africa, and suggests that citizenship, following Weeks, invokes a sense that “membership and involvement, [...] brings entitlements and duties”.¹² Citizenship implies a position with civic rights and privileges that enfranchise and entitle the homosexual citizen to full protection in the exercise of these rights, providing they do not infringe on the rights of others. I am suggesting like scholars such as Richardson¹³, that citizenship has an uncanny relationship to the nation-state, and that it is always sexualised.

Citizenship rights may accrue or be withdrawn depending on particular legal and political formulations, and it is in this sense that identities are systematically constructed and constituted. Claims to citizenship are not new and have been a major element of sexual politics since the 1970s, reinforced within the feminist project in terms of a discourse of rights in the broader struggle for emancipation from a hetero-patriarchal system for women.¹⁴ Similarly, the emancipatory project of homosexuals in South Africa is integrally linked to how rights (products of social relations and historical circumstances) accrue.

The fact that the law may be a medium through which the social, political and ethical aspects of

life are fashioned and lived, suggests an important effect of Foucault’s notion of juridical-discursive power and holds much promise for the type of legal reform in post-1994 South Africa. Judith Butler suggests, via a reading of Foucault’s model of inscription, that “[the] law is not literally internalised, but incorporated, with the consequence that bodies are produced which signify that law on and through the body”.¹⁵ Such a pattern of thinking also reinforces Moran’s conception of the law as a site of struggle through which social relations

Fundamental to understanding the homosexual in relation to the law in South Africa is recognising the extent to which the homosexual, like the black African in South Africa, has been described from political citizenship.

are produced.¹⁶ Extending this aspect of Butler’s idea, we find that for her the law, like gender and identity, resists internalisation, but is rather shown to be a set of effects, performatively constituted on the body. This, in effect, also confirms that the law politically constitutes gay and lesbian identities as a set of effects and practices. And this performative constitution suggests the body “has no ontological status apart from the various acts which constitute its reality”.¹⁷ When we think about violence against lesbians, it is notably the *bodies* of such women that are subject to extreme acts of intrusion by men, indicating that the bodies generate incredible meanings as to what is acceptable and what is not.

Sexual rights

As indicated earlier, activism and legal reform in the post-apartheid context have been mobilised by processes of decriminalisation in relation to same-sex conduct. I am not focused on how legal principles effect changes. The uses of the law also simultaneously ascribe meanings to the position of the homosexual in the post-apartheid project. Legal victories (see table 1), confirm the assertion and affirmation of identity as political in the context of its contested nature with regard to public discourses.

In all of this it is assumed that in this country, up until now we worked with a model of sexual rights. My assertion is that we did not, but that is changing. Instead, initially our claims about sexuality were principally aligned to the meanings of human rights as something we should aspire to achieving because it did not exist during apartheid. It is also the gendered effects of violence (notably gender-based violence) that have brought some of us closer in the last few years to rethinking sexuality in terms of sexual rights.

The case for rights was more dominant in the second half of the twentieth century, and focused on mobilisation and resistance to oppression in many countries (such as the case against apartheid which was declared by the UN as a crime against humanity). Likewise sexual orientation in South Africa was also framed in relation to human rights that focus on the rights of sexual minorities within a universalist conception that often overlooks the historical specifications of regions and nations. But, the overarching philosophy of human rights is premised on promoting human rights in terms of developing solidarity with individuals and organisations whose own rights are jeopardised. This was in part an effect of the global anti-apartheid effort, which secured a peaceful resolution to the apartheid crisis.

I conceive human rights for homosexuals, in the context of South African politics and legal jurisprudence, to be *performative*.¹⁸ The effect of rights on the private and public lives of homosexuals serves to expand and reinforce the life opportunities.¹⁹ In the specific case of homosexuality in Africa, legitimisation of attack and abuse is constructed as a message that deviation from traditional constructions of masculinity and femininity aligned with African patriarchy is not acceptable.²⁰

Whereas activism in the nineties secured reforms for lesbian, gay, bisexual and transgender (LGBT) people in terms of human rights, we are now witnessing, particularly the emerging activism related to violence against black lesbians to be premised on a model of sexual rights. As such, sexual rights then, places the premium on intersecting factors of race, class, gender and sexuality. Sexual rights claims in this model of thinking responds to an ending of violence, discrimination and prejudice. Indeed such an approach also alerts us to the possibility that sexual rights are not simply about

intersecting discriminations but fundamentally also about the ability to live in freedom, one in which the values and meanings of pleasure and desire are also emphasised. Black lesbian activism in this country is increasingly demonstrating that an intersectional understanding of rights is to be viewed as something transformative.

Conclusions

As indicated in this brief perspective, the law has responded in both negative and positive ways in producing the homosexual within a rights discourse. The latter, a pragmatic political strategy, claims Stychin, emanates “not only from those favouring progressive legal reform, but also from those opposed to it”.²¹ This view underscores the resistance to the apartheid state’s intention to further criminalise homosexuality by the Law Reform Group in the 1960s.²² In fact the law constitutes and regulates homosexuality in the context of decriminalisation in South Africa. A second, related issue is that the law controls the promotion of homosexuality. Like Stychin²³, I am suggesting that in the process of constitutional recognition, and the process of decriminalisation that has evolved since 1994, the law constructs, inscribes and constitutes the homosexual as a regulatory force. It is also possible to deduce that the homosexual (at least when pertaining to the law) in South Africa becomes a consumer of citizenship rights. The homosexual is therefore constituted in the intersection between law and human rights, where the question of equal protection before the law is interpreted in relation to access to justice. Access to justice for LGBT people, is being given a new dimension by the kind of activism displayed against ‘corrective rape’ of black lesbians.

The possible ‘freedom’ for the homosexual proposed in the above view suggests that an effect of the law as a regulatory regime, is indeed its political significance, which is reinforced by the right to express agency (political action) in relation to rights claims. The legal recognition of homosexuality in post-apartheid South Africa demonstrates a particular political formation of gay subjectivity, a feature that is marked by opposition and resistance. Decriminalisation (see table 1), in my view, similarly entails forging identities through acts of resistance that affirm homosexuality, facilitate identity formation as political, and recuperate rights to citizenship and belonging.²⁴

Similarly we must recognise that all is not kosher with these hard won gains. Same-sex desires, practices and identities are equally diverse across class, race, ethnicity, generation, networks, resources and opportunities. These structural factors also have relevance for the kind of *choices* people will exercise in claiming citizenship. Economic differences in the LGBT communities also confirm that racialised over-determination of privilege in apartheid South Africa, cannot be overlooked in the post-apartheid context. While we might have an emerging black middle class, the majority of black lesbian and gay people are still subjected to major inequalities in our society. This is a factor that goes against the grain of any homogenised view that suggests full equality is achieved, even if LGBT legal protections are in place. The benefits of marriage might be a hard won right available to a few, but the choice to exercise that right is shaped by a myriad of factors for an under-resourced person with no employment, internally closeted with a low

self-esteem, and subject to cultural and religious bigotry.

So while the law has opened up a space for citizenship to be claimed, thereby ensuring recognition, inclusion and self-determination, the claim for citizenship is not a special privilege, but a necessary precondition for equal membership in the democratic project and in nation-building. Decriminalisation in effect suggests a journey towards social justice, if by the latter is understood the right of homosexuals to social equality that in no way infringes the rights of others, but asserts the right to also challenge cultural hetero-sexism. The achievement of legal equality is therefore also an ongoing contestation in the construction of an identity politics that is impossible to separate from the socio-political factors upon which it hinges. Legal victories are thus critical and important in reinforcing citizenship, but these victories do not immediately and simultaneously eradicate the persistent threat of homophobia, a reality that has not been erased in the post-apartheid project.

TABLE 1

DATE	CASE	JUDGEMENT
March 10, 1993	Van Rooyen v Van Rooyen	Deputy Judge President Flemming rejects custody to a divorced wife in a heterosexual marriage who was involved in a lesbian relationship
February 4, 1998	Capt. Langemaat v Department of Correctional Services, Safety and Security	The High Court rules that medical aid regulations that do not recognise same-sex relationships are unconstitutional
October 9, 1998	National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others	The Constitutional Court (CC) abolishes the crime of sodomy
December 2, 1999	National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others	The Constitutional Court rules that the long-term same-sex partners of South African citizens or permanent residents should be treated as spouses when it comes to immigration regulations
May 13, 2002	Muir v Mutual and Federal Pension Fund	The Pensions Fund Adjudicator awards full pension benefits to the surviving same sex partner of a deceased Mutual and Federal employee
July 25, 2002	Satchwell v President of Republic of South Africa and another	The Constitutional Court ruled that the long-term same-sex partner of a judge should be entitled to the same pension payout as a judge's spouse
September 10, 2002	Du Toit and another v the Minister of Welfare and Population Development and others	The Constitutional Court ruled that same-sex couples should be allowed to adopt children
October 2002	J and B v Home Affairs	The Constitutional Court rules that same-sex couples should be allowed to be registered as the parents of children born to one of them
September 19, 2003	Du Plessis v Road Accident Fund	The Supreme Court of Appeal determines that the heir in a same-sex life relationship has a right to recover funeral expenses expended by him
November 30, 2004	Fourie v Minister of Home Affairs	The Supreme Court of Appeal declared the common-law definition of marriage unconstitutional, following an appeal by Marie Fourie and her partner, Cecelia Bonthuis

DATE	CASE	JUDGEMENT
December 8, 2005	Minister of Home Affairs and another v Fourie and another	The CC endorses the Supreme Court of Appeal decision (30/11/04) that confirms the unconstitutionality of (1) common law definition of marriage; (2) current marriage formula. Such declarations are deemed invalid and suspended for 12 months from date of judgement, allowing parliament to correct the defects
November 30, 2006	Civil Union Act 17 of 2006	The Civil Union Act is signed into law by the Deputy President of SA, providing for the legal recognition of same-sex partnerships
December 6, 2006	State vs NCGLE	Civil Union Bill Signed into Law by the then Deputy President

Endnotes

- 1 See for example: Mkhize, Nonhlanhla; Bennett, Jane; Reddy, Vasu; Moletsane, R. (2010). *The Country We Want to Live in: Hate Crimes and homophobia in the lives of black lesbian South Africans*. Cape Town: HSRC Press.
- 2 Roberts, Ben & Reddy, Vasu (2008). Pride and Prejudice: Public attitudes toward homosexuality. *HSRC Review*, 6(4): 9-11.
- 3 According to Section 9, Act 108 of the Constitution of the Republic of South Africa, no one may: 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 Signed by President Nelson Mandela into law at Sharpeville (the scene of a bloody massacre by the apartheid state against protestors in 1960) on December 10th, 1996.
- 5 See: Reddy, Vasu (2009). Queer Marriage: Sexualising Citizenship and the development of freedoms in South Africa. In: Steyn, Melissa & Van Zyl, Mikki (eds) *The Prize and the Price: Shaping Sexualities in South Africa*. Cape Town: HSRC Press; Reddy, Vasu (2006). Decriminalisation of homosexuality in post-apartheid South Africa: A brief legal case history review from sodomy to marriage. *Agenda*, 67: 146 – 157.
- 6 Reddy, Vasu; Sandfort, Theo & Rispel, Laetitia (eds) (2009). *From Social Silence to Social Science: Same-Sex Sexuality, HIV & AIDS and Gender in South Africa*. Cape Town: HSRC Press.
- 7 Reddy, Vasu (2001). Institutionalizing Sexuality: Theorising Queer in Post-Apartheid South Africa. In: Constantine-Simms, Delroy (ed) *The Greatest Taboo: Homosexuality in Black Communities*. Los Angeles and New York: Alyson Press.
- 8 Rubin, Gayle (1984). Thinking Sex: notes for a radical theory in the politics of sexuality. In: Vance, Carole S. (ed) *Pleasure and Danger: Exploring Female Sexuality*. New York: Routledge and Kegan Paul, p. 267.
- 9 See for example a detailed exposition of these issues in Mkhize, Bennett, Reddy & Moletsane (2010).
- 10 The Law is an important consideration in this chapter as well. The primary empirical context refers to how the law frames a possible freedom for the queer subject in the post-apartheid project. Much has been written about the legal framing of the homosexual that this argument addresses in relation to the specific cases to be cited, and the meanings such cases elicit for understanding queer identities. Relevant critical studies in the area of the law are: Moran (1996); Stychin (1995).
- 11 See: Bernstein, Mary & Reimann, Renate (2001). *Queer Families, Queer Politics: Challenging Culture and the State*. New York: Columbia University Press; Bell, Dianne and Binnie, Jon. (2000). *The Sexual Citizen: Queer Politics and Beyond*. Cambridge: Polity Press; Blasius, Mark (ed) (2001). *Sexual Identities, Queer Politics*. Princeton: Princeton University Press; Cooper, Davina (1994). *Sexing the City: Lesbian and Gay Politics Within the Activist State*. London: Rivers Oram Press; Currah, Paisley (1997). Politics, Practices, Publics: Identity and Queer Rights. In: Phelan, Shane (ed) *Playing With Fire: Queer Politics, Queer Theories*. New York and London: Routledge; Evans, David (1993). *Sexual Citizenship: The Material Construction of Sexualities*. London: Routledge; Fuss, Diana (ed) (1991). *Inside/out: Lesbian Theories, Gay Theories*. New York and London: Routledge; Wilson, Angelia R. (ed) (1995). *A Simple Matter of Justice? Theorising Gay and Lesbian Politics*. London: Cassell. Fuss (1991) focuses to a limited extent on the law. These studies have as a common purpose the interrogation of sexuality, queer politics and citizenship, some which directly address the law. Discussion of citizenship is not a new phenomenon in relation to the law and, in particular, sexuality. Although my argument does not prioritise earlier work on citizenship, subsequent analyses have drawn extensively from a model based on Marshall primarily in relation to three sets of rights informing citizenship: civil or legal rights, political rights and social rights. The question of gender and sexuality has been, for the most part, been absent from much scholarship on citizenship until the early nineties. See: Marshall, T.H. (1977). *Class, Citizenship and Social Development*. Chicago and London: University of Chicago Press; Marshall, T.H. (1950). *Citizenship and Social Class*. Cambridge: Cambridge University Press.
- 12 Weeks, Jeffrey (1995). *Invented Moralities: Sexual Values in an Age of Uncertainty*. Oxford: Polity Press, p.117.
- 13 Richardson (2000). *Rethinking Sexuality*. London, Thousand Oaks and New Delhi: Sage Publications.
- 14 See: Gouws, Amanda (ed) (2005). *(Un)Thinking Citizenship: Feminist Debates in Contemporary South Africa*. Burlington, VT: Ashgate Publishing & Lansdowne, CT: UCT Press; Millet, Kate (2000). *Sexual Politics*. Urbana and Chicago: University of Illinois Press.
- 15 Butler, Judith (1999). *Gender Trouble: Feminism and the Subversion of Identity*. New York and London: Routledge, p. 134-135.
- 16 Moran, Leslie J. (1996). *The Homosexual(ity) of Law*. London and New York: Routledge, p. 9.
- 17 Butler (1999), p. 136.
- 18 In Butler's view the act, or activity of gender is both intentional and performative where the latter entails public, repetitive actions of movement, gesture, posture, dress, labour, production, interaction with objects, and the manipulation of space. The term 'performative' has less to do with 'performance' than it has to do with "the effect of a regulatory regime of gender difference in which genders are divided and hierarchised". See: Butler, Judith (1993). Critically queer. *GLQ*, 1 (1): 17-32.
- 19 For an expanded discussion of human rights from a variety of disciplinary perspectives see: Savić, Obrad (ed) (1999). *The Politics of Human Rights*. London and New York: Verso.
- 20 See: Dunton, Chris & Palmberg, Mai (1996). *Human Rights and Homosexuality in Southern Africa*. Uppsala: Nordiska Afrikainstitutet; Reddy, Vasu (2001). Homophobia, human rights and gay and lesbian equality in Africa. *Agenda*, 50: 83-87.
- 21 Stychin, Carl F. (1995). *Law's Desire: Sexuality and the Limits of Justice*. London and New York: Routledge, p. 3.
- 22 See: Gevisser, Mark & Cameron, Edwin (eds). 1994. *Defiant Desire: gay and lesbian lives in South Africa*. Braamfontein: Ravan Press.
- 23 Stychin (1995).
- 24 See: Reddy (2006).

Women's rights and lesbian rights

Feminist principles, identities, and heteronormativity in the South African women's movement

A belief among some is that the South African women's movement is fragmented and weak.¹ Gouws notes for instance that a demobilised women's movement cannot hold the state to account, or enforce a feminist-centred discourse into state politics.² This article, while not focused on engaging the state, explores the dynamics of this 'fragmented' women's

NGOs focused on the rights of women, and those NGOs focused on the protection of sexual orientation work in a social and political environment that sees feminist discourses as threatening, rather than aiding, democracy.

movement; the 'politics' and philosophies that underlie and drive the activism towards gender equality. In this article, I consider the principles and contexts that govern non-governmental organisations (NGOs) set up to protect women's rights, as well as those defined by an agenda that aims to protect the non-normative gender identities of lesbian, bisexual, transgender and intersexed (LBTI) women in South Africa.

Salo narrates the importance of South African feminists negotiating their relationships to interest groups, such as lesbian and gay organisations, that have diversified the women's movement post-1994.³ Similarly, Gqola's argument for a "re-sharpening of our interpretive lenses accompanied by a refining of the tools we use to demolish the status quo"⁴, suggests that feminist principles, however heterogeneous and complex, should constitute a

critique of the range of power relationships that exist in a particular society at a particular historical moment. This should always include gender, race, class, geographical location and sexual orientation, and the intersections between them. As the social and political landscape changes, so too should feminist principles allow for flexibility.

Basic feminist principles of freedom, choice, and the ultimate obliteration of patriarchy, are critical tools in working towards the end of women's oppression; in abolishing damaging masculinist ways of looking at, and controlling the world. However, in multiple ways, and through various guises, our ostensible democracy in South Africa has seen a backlash of any feminist critique of patriarchy reflected in the state, through discourses of culture, within academic institutions, and through religious fundamentalism. This is despite South Africa's progressive constitution which includes the protection of the rights of persons from discrimination on the basis of gender and sexual orientation. NGOs focused on the rights of women, and those (usually separate) NGOs focused on the protection of sexual orientation as a protected category in the constitution, work in a social and political environment that sees feminist discourses as threatening, rather than aiding, democracy.

Fractures and ruptures

A number of fractures within the South African women's movement complicate an eradication of gender inequalities. One such fracture is the dichotomy between feminist academics and activists within the women's movement. Mtintso notes for instance that this dichotomy is "a drawback for gender equality"⁵, and that synergy between "the popular women's movement and the feminist movement should also be emphasised, as both are interdependent"⁶. She articulates the importance of feminist academics and feminists working at NGOs: "On the one hand, the development of feminist



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theory can be informed by the practical experiences of women in... the popular movement. On the other hand, feminist theory can help these popular activists understand the limitations of struggling for practical gender interests only".⁷

Within the world of South African NGOs, and of particular interest in this paper, is the split between those working to protect the rights and interests of women as a particular group, and those focused on the interests of self-identified lesbian, bisexual, transgendered and intersexed women. There are few organisations that focus chiefly on LGBTI concerns, while those set up to protect the rights and interests of women are much more dominant and visible. In some ways, this is an effect of the post-colonial focus on gender equality in South Africa, where 'gender' is most often understood as synonymous with 'women'. Furthermore, deeply entrenched norms around heterosexuality often mean that the concerns of gender non-conforming women are rendered marginal, and at times, invisible.

The disconnect between what is understood as 'women's issues' and 'lesbian's issues' is reflected in the separation between 'mainstream' women's rights NGOs and LGBTI NGOs. Human Rights Watch highlights this disconnect on the continent.⁸ They identify the critical need to "build common ground with women's rights movements and other movements addressing gender across the continent"⁹, and the importance of "cross-regional cooperation among LGBT [lesbian, gay, bisexual and transgender] groups"¹⁰ and in providing safe spaces for advocates of lesbian, gay, bisexual, transgender and intersex (LGBTI) rights. They note that: "Much LGBT activism in Africa has pursued the paradigm of minority rights, perhaps because that framework has a long history on the continent. Yet some of the most effective recent alliances between LGBT groups and "mainstream" movements have been based not on minority claims, but on urgent issues that provide common ground: freedom of expression and mobilisation against torture and harassment of human rights defenders".¹¹

Hames further articulates the split between the 'mainstream' women's movement and LGBTI organisations, highlighting how "lesbian struggles are largely ignored within the women's movement".¹² She asks: "Why is it so difficult for women's organisations to actively campaign around and include the issues of lesbians and transsexual or transgendered people?" She continues, arguing

that within both academia and NGOs, "neither area actively supports the view that lesbian concerns are women's concerns...deep prejudices against lesbians and gays persist ...even in certain women's organisations." "Lesbian and gay struggles in South Africa", she states, "have generally been marginalised in organisations, movements and discourses that ostensibly focus on struggles for human dignity, equality and justice".¹³

Violence against black lesbians in South Africa's townships, most likely to be based on the threat these women pose to dominant modes of masculinity, can easily be seen as outside the scope of women's rights NGOs.

Consequently, a focus on 'women's issues' that prioritises women's practical needs within a patriarchy - women's right to access land; domestic violence training for police so that they are more sensitive to women who lay charges against male abusers; increasing the numbers of women in leadership positions in parliament; making the legal system more woman-friendly – can easily slip into territory that prioritises the needs of heterosexual women while further marginalising the interests of gender non-conforming women. Violence against black lesbians in South Africa's townships, most likely to be based on the threat these women pose to dominant modes of masculinity¹⁴, can easily be seen as outside the scope of women's rights NGOs. As a consequence, it becomes possible for women's rights NGOs to maintain heterosexual practices and being-in-the-world as normative, while leaving the concerns of LGBTI persons for LGBTI people to solve. This kind of 'separate struggle' philosophy leads to fractures that impact on women's rights' activism, and weakens the possibilities of a necessary critical feminist discourse to engage the multiple levels of civil society as well as the state. Horn appears to agree, arguing that: "the growing visibility of 'homophobia from the left', including on the part of actors in the women's movement, suggests that there is still a need for education, as

well as dialogue, about the links between sexuality, heteronormativity and the broader agenda of women's equality".¹⁵

She further argues that "within the women's movement there is still notable antipathy to the inclusion of sexual rights, in particular sexual orientation, as a serious advocacy issue"¹⁶. This is the case even when, as Mtetwa argues, "the possibility that a woman who transgresses social and cultural norms can be accused of being a lesbian has the effect of paralysing the expression of all women's sexuality, including that of heterosexual women".¹⁷

Recently publicised violence against black lesbians who live in South Africa's townships has reflected that a public response from feminists is necessary. And there have been a number of responses from organisations and coalitions set up to deal with this phenomenon, such as the 07-07-

It is fundamental that women's rights organisations play a central role in, among other issues, advocating and lobbying for LGBTI rights.

07 Campaign and the One-in-Nine Campaign. Both these coalitions have been effective in bringing to public consciousness heterosexist violence against black lesbians in South Africa. In this context, it is critical for feminists across various spaces to publicly demand government intervention, and proper legal processes to ensure the rights of lesbians who have been the victims and survivors of hate rape. However, while some individuals from more 'mainstream' women's organisations work with LGBTI organisations in curbing the 'corrective rape' of lesbians, the partnerships between the two does not appear to be structured and effective. It is fundamental that women's rights organisations play a central role in, among other issues, advocating and lobbying for LGBTI rights as well as supporting LGBTI organisations in providing safe spaces for women who are victimised because of their non-normative gender and sexual identities.

LGBTI organisations and feminist principles

Within certain LGBTI spaces, however, there are

particular essentialist ideas of identity that weaken rather than strengthen feminist ideologies necessary to build a strong feminist women's movement.

Notions of an authentic 'lesbian' or 'gay' identity plays a significant role in fixing rather than creating space to critique an essential way of being-in-the-world. Cock notes, in this regard, the existence of: "a form of political essentialism which asserts that the homosexual identity "trumps" all other identities and claims that homosexuality necessarily implies an intrinsic commitment to a revolutionary and transformative agenda. This is clearly not the case. The complicated terrain of sexual politics in South Africa demonstrates the competing force of multiple identities and that gay and lesbian people can be deeply conservative, exploitative, and racist".¹⁸

One example of this kind of essentialism is when self-identified lesbian identity involves the encapsulation of a masculine subjectivity that understands dominance, control and violence – the values that (mostly) boys learn and are socialised into as they grow into men – as normative and ideal. In this instance, the mirroring of an unhealthy gender binary (male/female) and destructive heterosexual masculinity sustains and reinforces damaging gender constructions, rather than disrupt patriarchal heteronormativity.¹⁹ A critique of the emulation of damaging heterosexual masculinity must be articulated by organisations working in the interests of LGBTI persons. Butler's use of the term 'queer' as a critique of identity is useful here. Arguing that the term creates space for the complexity of our lives as 'evolving and transforming' people, she narrates how: "the word "queer" would allow people to have a less fixed and normative idea of what their identity is and permit them a greater vocabulary for gender infrasexuality".²⁰

While there is some resistance to the term within South African LGBTI spaces, due to its 'northern' roots, there is some usefulness of the term to disrupt fixed ideas of gender and sexual identities, allowing for a range of subjectivities that disturb harmful heteronormative ways-of-being in the world. By subscribing to 'queer', rather than strict identity constructions, the existence of the range of non-normative gender and sexual subjectivities - including alternative heterosexual roles, practices and relationships – can find a place. In some ways, this also reduces the imperative inherent within fixed identity labels to conform to particular expectations of a 'straight' or 'lesbian' marker. This

term allows for a more flexible methodological approach to sexual rights advocacy, without losing the political value of group solidarity that comes from naming.

Funder-driven approaches, feminist principles and 'gender work'

According to Antrobus²¹, "Advocacy must be based on an analysis of what needs to be changed and why...this analysis must be feminist because only feminism gives an analysis of patriarchy and how it is linked to the structures and relationships of power between men and women that perpetuate violence, poverty — the crises that confront us".²²

But in South Africa, and in most postcolonial countries, it is 'gender work' that has been centralised. Lewis notes for instance how a very technician and fragmented language around gender has overtaken critical and radical scholarship, or thinking and practice, about gender. Lewis refers to "terms such as 'gender-aware', 'gender sensitivity', 'gender focal point', 'gender disaggregated data', 'women's empowerment' and so on"²³ which has

It is critical that organisations working in the interests of both women and LGBTI women specifically create space to reflexively think through their understandings of gender and sexuality, and their methodological approaches to working with women.

substituted: "a feminist language that gestures towards processes, towards what is complicatedly social and humanistic. The formulaic language is reinforced by a global system in which information is processed as digestible sound-bites, segments of directly useful information that can be quickly registered, applied and then forgotten. In this process, gender knowledge and research within the holistic context of theory, epistemology and radical practice is being side lined more and more".²⁴

For both women's rights NGOs and LGBTI NGOs, it is overwhelmingly 'gender research' that provides funding from donors. HIV/AIDS and poverty, and

its links to women's health, is often the focus that determines funding. Research that centralises sexual pleasure for both 'women who have sex with women' as well as 'women who have sex with men' does not access funding easily. These are not central to a 'development' agenda on the African continent. In her paper titled 'The politics of doing gender in South Africa', Lewis discusses how "a technology of development has come to serve as an overarching framework for thinking about gender in South Africa"²⁵. She highlights how the complexity and multi-layered-ness of human beings are reduced; integrated into the developmental process; "a very brittle and atomistic sort of language about gender...taking the place of a feminist language that gestures towards processes, towards what is complicatedly social and humanistic"²⁶. Catering to the needs of the state's developmental agenda, and/or donors, she argues, 'constrains independent feminist research and thinking.'

Working in the area of gender is necessarily slippery terrain, and feminists across women's rights NGOs and those working in the interests of LGBTI women, constantly need to re-look at our definitions as social and political realities change. The links between gender and sexual orientation are inextricable. Pursuing 'gender work' without feminist principles most often produces mediocre results, lacking in the possibility to mainstream feminist ideologies. More often than not, 'gender' is understood as women's problem, and violence against lesbians is understood as the problem of lesbians to solve. It is critical that organisations working in the interests of both women and LGBTI women specifically create space to reflexively think through their understandings of gender and sexuality, and their methodological approaches to working with women.

To conclude, it was at the South African Women's Initiative's (SAWI) protest conference almost two years back where a revolutionary feminist discourse was at play. Very few feminist academics attended this conference, but LGBTI advocates together with those advocating for more 'mainstream' women's rights, expressed their unhappiness with patriarchy. They did this through critiquing South Africa's economic policies, through drumming, dancing and poetry celebrating women and their struggles against racist and heteronormative patriarchy. This points to the ways that gender can never be separated from other

social constructs such as sexuality, race and class. It reminds us of Bell Hooks words: “Significantly, I learned that any progressive political movement grows and matures to the degree that it passionately welcomes and encourages, in theory and practice, diversity of opinion, new ideas, critical exchange, and dissent. [...] Again and again I have to insist that feminist solidarity rooted in a commitment to progressive politics must include a space for rigorous critique, for dissent, or we are doomed to reproduce in progressive communities the very forms of domination we seek to oppose”.²⁷

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Not yet Uhuru¹ for LGBTI people in Zimbabwe

Interview with Fadzai Muparutsa

In Zimbabwe, a country whose president, Robert Mugabe, is on record as calling homosexuals as “worse than dogs and pigs”, the issue of homophobia is not a new phenomenon. Giving religious and traditional reasons, church leaders, politicians and ‘cultural magistrates’ have vilified homosexual orientation as “un-African” and “a threat to nationhood”. All such demonisation has driven lesbian, gay, bisexual, transgender and intersex (LGBTI) communities underground for fear of incarceration and arbitrary arrests. In this interview, Admire Mare speaks to the Gays and Lesbians of Zimbabwe (GALZ) Programme Manager for Gender, Fadzai Muparutsa.

MARE: Have you had any problems as an association working in Zimbabwe because of the whole stigma that surrounds the issue of homosexuality? If there are problems, how have you managed to survive in such a homophobic political climate?

MUPARUTSA: Yes, GALZ has experienced stigma and discrimination not only because of state-sponsored homophobia, but because there is a tendency to bring personal feelings into professional spaces.

The political climate also has a negative impact on the working environment that GALZ operates in. Some organisations distance themselves from GALZ out of fear of being labelled supporters of the homosexual cause.

GALZ has been known to use the human rights framework effectively, making it easier to sustain the relationships that have been built over the years.

MARE: Can you shed more light on the recent press reports where two GALZ members of staff who were briefly arrested before being released? What were the motivations around the arrests? And how far has the trial proceeded?

MUPARUTSA: Ellen Chademana and Ignatius Mhambi were arrested on Friday 21 May 2010

on charges of “possessing dangerous drugs and pornographic material”. The police went further to search the house of Chesterfield Samba, the Director of GALZ on the morning of Wednesday 26 May 2010.

On Thursday 27 May 2010, Ellen Chademana and Ignatius Mhambi were released on bail until a trial set for Thursday 10 June 2010 on allegations of possessing indecent material and displaying a placard seen as insulting to President Robert Mugabe.

Ignatius Mhambi was acquitted of charges of possession of pornographic material on Friday 23 July 2010, while Ellen Chademana was remanded out of custody pending further investigations by the state.

MARE: Political observers have argued that the crackdown on homosexuals especially from the ruling Zanu PF leadership has to do with the attempted citizen’s arrest² on President Robert Mugabe in London by LGBTI activist Peter Tatchell. What’s your opinion on this?

MUPARUTSA: GALZ has documented state-sponsored homophobia from before the attempted citizen’s arrest on President Mugabe to date. There have been various factors that have led to the increase in state-sponsored homophobia and the harassment of LGBTI people in Zimbabwe. After the attempted citizen’s arrest in 1999, LGBTI members reported an increase in harassment at nightclubs by patrons who were accusing them of working with Peter Tatchell.

It is important to underscore that cases of state-sponsored homophobia from before the incident are well documented in GALZ and the reasons vary with whatever situation is going on at the time.

State-sponsored homophobia often increases when political temperatures are high in the country. For example, during the Constitutional Reform process of 2000, GALZ members were



Fadzai Muparutsa

Fadzai is a human rights activist and Programme Manager for Gender with Gays and Lesbians of Zimbabwe (GALZ). She has worked with young feminists, human and women’s rights organisation to influence policy making and implementation; challenging attitudes, beliefs and values that are homophobic.

invited to present oral submissions. Soon after their presentations aired, there was an increase in state-sponsored homophobia as well as verbal and physical harassment of GALZ members and in particular those who made the submissions.

The other thing about state-sponsored homophobia is that it's used to discredit, this is also known as sexuality baiting. For instance, The Herald, which is a state-owned newspaper, carried an article during the 2002 elections that likened Movement for Democratic Change-Tsvangirai (MDC-T) to homosexuals.

MARE: There is also the issue of “corrective rape” that has been doing the rounds in both local and international media. What can be done to alleviate this scourge in a country where the police tend to be partisan in the discharge of their duties?

MUPARUTSA: “Corrective rape” is a reality for some lesbian and bisexual women in Zimbabwe and unfortunately none of the women who have approached GALZ have faith in the justice system, which is a serious problem.

As part of the Gender Office strategy, there is a need to make use of existing policies and documents that govern the conduct of law enforcement agents, for example, we would look into the code of conduct that all agencies are meant to adhere to and find areas in which GALZ or its partner organisations can provide training on how to assist those who have survived rape. Another document to make use of is the Domestic Violence Act, which was enacted in 2007. There are provisions in the act that allow for training.

All in all the issue here is that dispensing of duties should not be determined by one's sexual orientation. When a citizen of Zimbabwe has experienced violence, the responsible agencies should work to ensure safety and protection.

MARE: Given that homosexuality is such a stigmatised and politicised issue in Zimbabwe, how are LGBTI people managing to express their sexual orientation? Do you have your own pubs, restaurants or hang out places?

MUPARUTSA: There are no pubs, or public spaces that gay people can freely express themselves without backlash; but this doesn't mean to say that there aren't clubs and such where gay people hang out, they're there, just not as open as in other countries. As a result, if members of GALZ want

to be in their drag, then they'll come to the GALZ office, which has a recreational centre for the members.

MARE: Zimbabwe is currently in the middle of a make-or-break constitution making process. Out of three principals making the current inclusive government, Robert Mugabe and Morgan Tsvangirai have already condemned the practice of homosexuality. What do you think are the political motives behind this condemnation?

MUPARUTSA: My views are that sexual orientation is an issue to rally around that is being used as a political tool by both political movements to garner support. I think they are homophobic to get votes.

MARE: Although the MDC-T as a party has disassociated itself from Morgan Tsvangirai's statements, don't you think him as a leader saying such statements reflects the general party thinking? What have you done to seek audience with the prime minister's office on the correct party position?

MUPARUTSA: Morgan Tsvangirai is entitled to personal opinions, but as a leader he should have thought carefully about what it would mean. Firstly, GALZ was of the opinion that MDC-T stood for human rights and democracy, but after the

Gays and Lesbians of Zimbabwe (GALZ) was founded in 1990 for purposes of serving the needs and interests of LGBTI people in Zimbabwe and pushing for social tolerance of sexual minorities and the repeal of homophobic legislation. Under the directorship of the late Keith Goddard, GALZ rose to prominence in the mid 1990s when it challenged illegal bans by government on its participation at the annual Zimbabwe International Book Fair (ZIBF). Since then, the association has been involved in a number of high-profile campaigns. Currently, the director of GALZ is Chesterfield Samba. The organisation has a membership of 415 people. It provides services to its members through the three main programming areas, which are, health, gender and information and communication. The health office provides workshops on health and well-being. Through its information and communication programme, it produces and distributes a monthly magazine known as *Whassup* and a quarterly publication, the *Galzette*. The health programme provides counselling to members or medical referrals when needed. Although the environment in which GALZ operates is hostile, it has managed to build relationships with various human rights organisations in Zimbabwe, in Africa as well as with international organisations.

homophobic statements it is unclear.

But because he was speaking at an official function, as the prime minister, it is difficult to separate personal feelings and professional obligations. A statement from MDC-T distancing itself from the remarks did not do much to repair the damage done.

Morgan Tsvangirai wrote an article in the MDC-T newsletter, trying to clear up the statement he had made, again, the damage had already been done. Although we wrote to the prime minister's office seeking audience with him, we did not get any feedback from his office.

MARE: President Robert Mugabe recently re-iterated his homophobic stance when he said he would not allow any gay rights to find their way into the new constitution. What are your thoughts on this?

MUPARUTSA: My thoughts are: is the constitutional process determined by individuals or by the population of Zimbabwe? The mandate of the government during the constitutional process is to get feedback from Zimbabweans on what they want reflected in the constitution. Apart from that, there is a basic principle that I think is lacking. There are marginalised groups that should be protected in the constitution, regardless of majority views and opinions. This is because the groups have a documented history of experiencing violence and discrimination that has a major impact on their self-actualisation as well as the contribution of these groups to the progress of the nation.

But once we get into this discussion, the usual rhetoric of, then paedophiles and those who want to have sex with animals will also be calling for their rights to be reflected in the constitution. There is a vast difference between homosexuals, paedophiles and bestiality. Homosexuals are in *consensual* same sex relationships. There is an understanding between the parties, unlike those who force themselves on young children or those who engage in bestiality.

MARE: Given that the constitution-making process is an important platform in your effort to assert recognition and tolerance of LGBTI communities. What strategies are you using to make sure the ordinary citizen who meets the Constitutional Parliamentary Committee (COPAC) outreach teams can voice your dreams and aspirations in a new Zimbabwe?

MUPARUTSA: In as much as we have been encouraging people to speak about sexual orientation during the outreach process, this is not feasible. Threats have been issued when the outreach teams go out to talk to people and we do not want to compromise the safety of our members and individuals.

As a result, there will be few or no voices speaking on sexual orientation, particularly in the more remote areas.

GALZ is planning on making its presence felt when the outreach teams are in the urban settings. We realise though, that this may give legitimacy to the thinking that homosexuality is more 'rampant' in urban areas than it is in rural areas, but GALZ believes that the safety of individuals is more important.

MARE: Besides posters and billboards in major cities in the country by Crisis Coalition in Zimbabwe, what other communication strategies are you using to reach your target audience as far as constitution making is concerned?

MUPARUTSA: GALZ's audiences are varied. At one stage during the constitutional process, GALZ was publishing articles in the local media. But after the raid which saw Ellen Chademana and Ignatius Mhambi being locked up, the organisation has revised its communication strategy.

Information to the general population, human rights organisations and other interest groups will again be finding its way out.

MARE: In a new democratic and human rights tolerant Zimbabwe, what does GALZ envisage?

MUPARUTSA: GALZ envisions legislation to ensure the protection of all citizens of Zimbabwe including LGBTI people.



Admire Mare

Admire is currently completing his postgraduate studies at the Rhodes University, School of Journalism and Media Studies. He has worked as an academic, journalist, development practitioner, researcher and consultant both in Zimbabwe and South Africa.

Endnotes

- 1 Uhuru is the Swahili word for 'freedom'.
- 2 A citizen's arrest is an arrest made by a person who is not acting as a sworn law-enforcement official.



This photograph is part of a series by renowned lesbian photographer Zanele Muholi that explores sexual and gender identities in Malawi. This series was commissioned as part of a cross-border collaboration between Gay and Lesbian Memory in Action (GALA) and Centre for the Development of People (CEDEP).

COVER IMAGE: On 17 October 2006 members of LGBTI organisations marched on the Union Buildings in Tshwane to demand full and equal marriage rights for same-sex couples. The marchers handed a memorandum to the South African Department of Home Affairs. Photo by Zanele Muholi.

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