

FEATURE

The Nexus between Human Rights and Access to Justice for LGBTIQ+ People

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Introduction

After a legacy of colonialism and apartheid, South Africa in 1994 became a democratic nation in which all its citizens were granted the right to partake in all spheres of life equally. The Constitution of South Africa, described as one of the most progressive, transformative, and gender-sensitive in the world (Kibet & Fombad 2017; Mohamed 2017; Rapatsa 2014), does not seem to deter discrimination against LGBTIQ+ people.

Section 9 of the Constitution enshrines the right to equality and non-discrimination for all. In terms of this right, '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... sexual orientation'. This also means that no individual is allowed to discriminate on the basis of sexual orientation.

The progress made by United Nations (UN) member states in implementing Goal 16 of the Sustainable Development Goals (SDGs) is hindered by discrimination on the basis of sexual orientation, which seems to continue. This article explores why this is the case. The exploration is made in the context of 25 years of democracy in South Africa, as well as the inaugural evaluation of progress made by UN member states in implementing Goal 16 of the SDGs. Discrimination on the basis of sexual orientation seems to continue, having a far-reaching effect and making those affected particularly vulnerable.

Why discrimination seems to persist

Apathy is one factor that perpetuates discrimination on the basis of sexual orientation. 'Apathy' is defined by the *Cambridge Advanced Learner's Dictionary* (2008) as a noun meaning 'when someone shows no interest or energy and is unwilling to take action, especially over something important'. The *Oxford Learner's Dictionary of Current English* (1974) says it is 'absence of sympathy or interest' or 'indifference'. This indifference is fed by a lack of awareness of the impact that every citizen can make once they show interest in another, and are willing to take action over the wrongs they see perpetrated against members of their communities.

In South Africa, the majority of people have fresh and vivid memories of racial oppression and are enor-



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mously sensitive to the question of discrimination in the context of sexual orientation. One might have expected them to be willing to take action whenever, wherever, and in whatever form discrimination rears its head. This, however, is not true in the case of sexual orientation. The will is absent.

This unwillingness to take action has its root in heterocentrism, also called heteronormativity and/or heterosexism. This is the assumption or conviction that all people are heterosexual and that heterosexuality is the normative form of human sexuality (Goss 1993; Jung & Smith 1993). It denotes prejudice in favour of heterosexual people. All other forms of sexual expression or orientation are regarded as deviant. Heterocentrism is the measure by which all other sexual orientations are judged. Sexual authority, value, and power are centred in heterosexuality.

This is rooted in a largely cognitive constellation of beliefs about human sexuality and may be described as a 'reasoned' system of bias regarding sexual orientation. This system shapes religious, economic, educational, familial, historical, interpersonal, legal, political, and social institutions (Jung & Smith 1993). These institutions continue to perpetuate discrimination against all other sexual orientations; hence the unwillingness to take action, and the apparent continuation of the prevalence of discrimination.

Hate crimes and violence against the LGBTIQ+

Hate crimes and violence against the LGBTIQ+ are rampant within diverse South African communities (Sexual & Reproductive Justice Coalition 2020). Bigotry could be lying at the root of such hate crimes and violence. The *Cambridge Advanced Learner's Dictionary* (2008) defines a 'bigot' as 'a person who has strong, unreasonable beliefs and who thinks that anyone who does not have the same beliefs is wrong'. The *Oxford Learner's Dictionary of Current English* (1974) defines 'bigotry' as a 'state of being bigoted'. 'Bigoted' is defined as being 'intolerant and narrow-minded'. A 'bigot' is defined as a 'person who holds strongly to an opinion or belief in defiance of reason or argument'.



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Bigotry breeds ideology. There are different ideologies that dominate the minds of diverse communities in South Africa. These ideologies seem to be bred by bigotry. One of the ideologies is patriarchy. Black South Africans, in particular, put strong emphasis upon children as central to human worth and the continuity of lineage (Dlamini 1992; Dlamini 2005; Ward 2006). Procreation characterises their interpretation of human existence. The expectation is that each man is to contribute to the biological growth of the community and its survival (Dlamini 1992; Dlamini 2005; Ward 2006). Any obstacle to this growth is evil. Thus, childlessness is a disgrace, is evil, and a great mishap upon a man (Dlamini 1992; Dlamini 2005; Ward 2006).

It is in this context that many have great difficulty in coming to accept a sexuality which cannot be legitimated in terms of children. It is through his wife and children that a man becomes somebody in society. A man is a person who controls women and whose duty is to procreate. Not to procreate is to go against the ancestors, and against the one who endowed the man with procreative power (Dlamini 1992; Dlamini 2005; Ward 2006). For a man not to procreate equals non-existence.

Furthermore, for a man not to procreate equals emasculation. The sources of men's sense of emasculation and its relation to violence are complex and deep-rooted. Given the enduring tradition and history of patriarchal society, in which men have been accustomed to economic and political power, and the more recent realities of political and social change, in which they feel a loss of control and power, violence has become an important vehicle for re-asserting their masculine identity and influence.

Economic and political changes are fundamentally undermining the identities conferred upon men by patriarchy. Formidable obligations and a sense of responsibility are interpreted in male-specific terms: men as

breadwinners, men as guardians, men as protectors. As men fail to earn the bread and fail to act as guardians – whether in an economic or political context – they fail in their responsibility as protector. They must seek alternative vehicles for sustaining a sense of identity and self. Violence is such a vehicle.

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Many are blinded by hatred. Many within these communities do not seem to have a clear realisation that these acts of hatred and violence constitute a violation of constitutionally protected rights. This raises questions concerning the awareness of communities about what, and how much, human rights entail, and about the right to access justice by the groups of people affected. It never occurs to the minds of many that affected and aggrieved groups might lay charges against the offenders, or sue them.

Although the constitutional protection is there, hate crimes and violence against the LGBTIQ+ are rampant in South African communities, who do not even seem to realise that they are transgressing. The view that hate crimes and violence against the LGBTIQ+ are rampant finds support in the launching of the desk by the ANCWL precisely to tackle rampant hate crime (Eye-Witness News 2020; MambaOnline 2020). The view that some do not even seem to realise that they are transgressing is further supported by OUT-GBT Well-Being (2016), where it is stated that South Africa in general is a very homophobic nation, and that this might be because people have limited or no information about human sexuality, gender identity and sexual minorities. South African society has normalised homophobia. The formal democratisation of society has not decreased levels of violence. What we see are various ways in which aggression, mainly male, is continually displaced towards the vulnerable. Instead of treating South Africa as a post-conflict society, there is need to recognise that the historical consequences of impoverishment

and marginalisation, which in the past were translated into overtly political violence, are now manifesting in other forms of social conflict.

South Africa shares some similarity with other countries. Research demonstrates that criminal youth gangs function as a cohesive vehicle for sustaining male identity when other environments fail as places of belonging. The LGBTIQ+ become the victims of a displaced re-assertion of masculine authority. Comparative research on the relationship between political transition and violence has linked the social upheaval of societies in transition to displaced aggression against ‘weaker’ ones.

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Bigotry feeds fear. Individuals have different fears about the LGBTIQ+. The most commonly expressed fears are the confusion of youth; destabilising of society; eroding the meaning of family; and preying on the vulnerable. These are kinds of fears linked with the acceptance of homosexuality, and other adjoining sexual orientations. Patricia Beattie Jung and Ralph F. Smith (1993: 90) have referred to these fears as ‘imaginary consequences created by an unexamined heterosexist bias’. Although fear may be thought to be the consequence of heterosexism, it simultaneously serves to foster it.

Why LGBTIQ+ continue to suffer secondary victimisation

The LGBTIQ+ seem to continue to suffer secondary victimisation. Theoretically, there seems to be sufficient protection for all sexual minorities in respect of rights and freedom from violence in South Africa; yet, in reality, and within communities and the criminal justice system, the LGBTIQ+ seem to continue to suffer secondary victimisation.

LGBTIQ+ are perceived to be under some foreign influence. African tradition, conceived as monolithic, is positioned against Western modernity. In this opposition, homosexuality is represented as a decadent Western import and an ill-effect of economic modernisation. This is a deeply familiar opposition, and it has played itself out in recent years in debates about LGBTIQ+ identities and rights.

It takes time to break stereotypes. Because LGBTIQ+ relations seem to challenge gender stereotypes, a feeling of instability is created. Violating expected gender roles seems to contribute to an unstable society by rendering people incapable of predictable behaviours. It takes time to break down such stereotypes and integrate new ways of thinking and acting into a culture. This seems to be the primary reason why the LGBTIQ+ continue to suffer secondary victimisation.

LGBTIQ+ people call traditional assumptions into question. This could be another reason for continued victimisation. At this point, the necessity to interrogate the intersection of socio-economic phenomena with gender, heteronormativity and patriarchy becomes obvious, and leads to a need to identify the power structures that disempower people in different ways. These power structures seem to undergird the perception of LGBTIQ+ people as those who are calling traditional assumptions into question and are thus a threat to the social order. The media have played a part in portraying this view. This portrayal has included misconceptions and myths, as well as mirroring the silences in communities around the violence experienced by, and perpetrated against, the LGBTIQ+.

LGBTIQ+ people are seen as unnatural. Negative attitudes and judgments towards the LGBTIQ+ arise from misinformation, prejudice, and superstition. Such attitudes and judgments seem to have no more validity than earlier falsehoods and practices surrounding left-handedness. According to proponents of this new-

er falsehood, LGBTIQ+ equals unnaturalness. Being gay or lesbian is a problem in a heterocentric culture that denies the normalcy or validity of homosexual identity. Here, people view homosexuality as a defect or something that needs to be fixed. Such a view will not be helpful in fostering the societal access of gays and the adjoining sexual orientations.



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South Africa has, however, attempted to correct this view. This can be seen in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (CCT10/99)*, the Constitutional Court decision which extended the same benefits generally granted to spouses to same-sex partners.

Outside of South Africa, Botswana and Zimbabwe have followed suit, though only in 2019, and Angola did so in 2021. In *Letsweletse Motshidiemang v Attorney General (2019)*, the Gaborone High Court ruled that sections of Botswana's Penal Code which criminalised same-sex sexual conduct are unconstitutional. In *Nathanson v Mteliso & Others (2019)*, the Zimbabwean High Court in Bulawayo found that transgender people have the same rights as all citizens.

It is worth noting that 'two countries in the Southern African Development Community (SADC) region, namely the Democratic Republic of Congo and Madagascar, never made same-sex conduct criminal' (Viljoen 2019 ; Centre for Human Rights 2021).



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General observations

The factors discussed above have influenced the debate about LGBTIQ+ rights. What stands out clearly is that the perpetrators of discrimination do not seem to realise that rights are inter-related and mutually supporting. Affording any of the rights to any person or group enables people to enjoy all others enshrined in the Bill of Rights of the Constitution. While all citizens have a common task in shaping a society that honours all its members and encourages and nurtures relationships that foster respect, administrators of justice have an added responsibility in this and, in so doing, build up the community.

The above understanding of the place of a man in an African world-view enables the recognition of the immensely powerful influence that social conditioning has on the formation of attitudes, beliefs, norms, opinions and values. These will have a bearing upon the people who are placed in positions of administering justice, and will present a setback in the accessing of it by the LGBTIQ+.

Deconstructing patriarchy is one part of the solution. This deconstruction needs to be linked with how the more general problems of violence in society are understood and dealt with, and based on the recognition that these are not simply consequences of imbalances of economic impoverishment and political power.

While all citizens have the common task of shaping a society that honours all its members and encourages and nurtures relationships that foster respect, administrators of justice have an added responsibility here and, by taking it on, build up the community. They may need to be conscientised towards this responsibility.

Human development needs to address the issue of identity. It will have to engage more deeply with those who were marginalised by apartheid and who still remain marginalised under the new dispensation. These people need to start feeling that they have a stake in society and that they have some power.

There is a need to push human development to the fore in re-stitching our social fabric. Institutions which empower people are the points of intervention for re-establishing a sense of a stake in society, particularly for young men. In the absence of such interventions, young men are capable of forging new sources of cohesion and identity for themselves, very often through violence.

Conclusion

The South African Constitution, described as one of the world's most progressive, transformative, and gender-sensitive, does not seem to deter discrimination against LGBTIQ+ people. Progress towards Goal 16 of the SDGs is being thwarted by discrimination on the basis of sexual orientation in South Africa. Apathy, rooted in heterocentrism, seems to be one of the major drivers of continued discrimination on the basis of sexual orientation.

This is despite the expectation that the question of discrimination would propel the enormously sensitive people of South Africa to act decisively. Hate crimes and violence against the LGBTIQ+ are rampant within diverse South African communities. Bigotry could be lying at the root of such hate crimes and violence. Bigotry breeds the ideology of patriarchy that maintains that childlessness is a disgrace and evil.

Failure by some to produce children leads to a frustrating feeling of emasculation in others, which is often vented through violence. The LGBTIQ+ become the victims of a displaced re-assertion of masculine authority. Not even democracy has been seen to be able to decrease this reaction. Bigotry feeds irrational fears that continue to fuel the perceptions of the LGBTIQ+ as an unnatural threat to the social order.

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