

Sex and gender transformation in Africa

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On 6 and 7 October 2016, the Academy of Science of South Africa (ASSAf) hosted the 2016 Annual Young Scientist Conference in partnership with the Department of Science and Technology; the South African Young Academy of Science; Gender in Science, Innovation, Technology and Engineering (GenderInSITE); and the South African Chapter of the Organization for Women in Science for the Developing World. The conference explored and discussed human rights in Africa in many of its dimensions to celebrate 2016 as the 'African Year of Human Rights with Particular Focus on the Rights of Women'.

A highlight of the event was a roundtable session on 'Transformation towards sex and gender equality in Africa: Where are we?' The roundtable was facilitated by Justice Richard Goldstone, retired judge of the Constitutional Court of South Africa, who chaired a panel of four people: Prof. Christof Heyns, a member of the United Nations Human Rights Committee; Ms Janet Love, National Director of the Legal Resource Centre; Prof. Barney Pitso, former Chairperson of the South African Human Rights Commission; and myself, a retired judge of the Constitutional Court.

This contribution sets out my own reflections of the roundtable and what I learnt from it. Sex and gender transformation is really about more than just the achievement of true equality between women and men and the elimination of discrimination against and the empowerment of women in society. The ultimate object is the achievement of equality of all of us as human beings regardless of our sexual orientation or gender identity. All of us should recognise as equal and respect all human beings. This is a difficult area of transformation, more especially in the light of entrenched attitudes and societal assumptions, together with our socialisation and religious beliefs or convictions. It was acknowledged, as a matter of context, that mass rape and all forms of violence against women, including sexual violence, are no longer classified merely as crimes of war or crimes against humanity; these are in essence crimes against women arising from societal discrimination, or (perhaps more accurately) discrimination by men against women.

A fundamental premise of universal human rights thinking today is that discrimination based on morally irrelevant considerations or immutable human characteristics of race, sex, religion, age, disability and the like cannot be justified and are unacceptable. This abiding and undeniable principle applies with equal logical and ethical force to discrimination on the grounds of sexual orientation and gender identity against people who are lesbian, gay, bisexual, transgender or intersex (LGBTI individuals).

Non-discrimination on these grounds lies at the heart of the worldwide human rights project, and is also central to the dignity, equality and freedom of people in Africa.

Discrimination based on sexual orientation and gender identity comes in many forms and levels of intensity. It may render people in this category subject to varied punishment in support of the prohibition – the nature of the punishment being as extreme as the death penalty which may still be imposed for same-sex relationships in a small number of African countries. Prejudice against LGBTI individuals also manifests itself when serious criminal violence deliberately perpetrated on such individuals is not properly investigated, if at all. This is usually because law enforcement authorities believe that people in this category are undeserving of and therefore not entitled to protection of their right to bodily integrity. Authorities are even more reluctant to investigate verbal abuse and infringements of dignity, which come from official or private sources, with the acquiescence of the state. Access to socio-economic rights like the right to education, housing or health care may in reality be out of reach of this category of person for the same reasons. Violence against transgender and intersex persons is underpinned by societal stigma, sex-binarism, transphobia and intersexphobia. It is driven by confusion and conflation of pre-conceived notions of an individual's gender identity, gender expression and/or physical sex (bodily) characteristics.

There are of course mechanisms and instruments available to counter these abuses both at the national and international level. For us the resolution of the African Commission on Human and Peoples' Rights on protection against violence in cases of this kind, merits special attention. And the recent appointment by the United Nations Human Rights Council of Vitit Munarbhorn as an independent expert on sexual orientation and gender identity is of considerable significance.

Scientific studies on LGBTI are not only helpful but essential to improve our understanding of humanity. But the purpose of scientific investigation into and evaluation of LGBTI individuals should not be to pathologise or justify LGBTI. As a natural part of the world's biological diversity and variety, different gender identity should need no justification. 'If you hear someone say that homosexuality is unnatural, you can be pretty sure you are not listening to a scientist' (Dr Marc Breedlove, Rosenberg Professor of Neuroscience, Michigan State University).

Attempts to pathologise have perhaps led to pseudoscience that could result in undue bias and discrimination. For example, subjecting people like our Olympic athlete Caster Semenya to all sorts of abuse and discrimination is a poignant reminder of this brutal truth. Similarly, we should reject the idea (of making the apologetic justificatory argument) that LGBTI people deserve equal rights because they are 'born this way'. In a free and democratic society founded on the prevalence of human rights, it should not matter whether one's sexual orientation is inborn or a choice. The right to dignity, equality and freedom embrace the right to make that choice.

On 24 February 2014, Uganda's president, Yoweri Museveni, signed a draconian Anti-Homosexuality Bill into law after 2 months of declining to do so. Misusing science to justify the Ugandan anti-gay law, he said he changed his mind following the findings of a special scientific committee his Health Ministry had appointed earlier in the month: 'Their unanimous conclusion was that homosexuality, contrary to my earlier thinking, was behavioural and not genetic.' However, one of the members of this committee stated that the report had not made that finding.

'They misquoted our report', said Paul Bangirana, a clinical psychologist at Makerere University in Kampala. 'The report does not state anywhere that homosexuality is not genetic, and we did not say that it could be unlearned.' The point though is that even if scientists had concluded that the LGBTI element of humanity was behavioural, there was no rational basis to prohibit it.

Gender diversity and bodily diversity (particularly intersex variations) are still misunderstood and often confused with sexual orientation in South Africa and many other countries.

As a result of cisnormative conceptions of gender, many transgender women are still classified as 'gay men' and transgender men as 'lesbian women'. Violence against transgender men is often unreported and unpunished, or conflated and misreported in 'corrective rape' statistics, often framed as an issue solely in the lesbian community, particularly in townships.

Human rights violations against intersex persons in medical settings continues because the diagnostic nomenclature and language used in medical and public discourse to name, classify, describe and understand intersex bodies are stigmatising and pathologising.

The Constitution of our country and those of many others prohibit discrimination on numerous grounds including race, gender, sexual orientation, disability and age. It is necessary to consider whether societal approaches and attitudes in South Africa are consistent with what our Constitution says. The evaluation is important because legal instruments in other countries in and outside Africa embrace these protections in their constitutions or other legal instruments. The question inevitably arises whether legal enactments or provisions, although undoubtedly necessary and positive, are enough to create a truly egalitarian society in which all human beings are equal. South Africa can be used as an example.

Our Constitution says in effect that men and women are equal. Yet, experience tells that a vast majority of men regard themselves as superior to women. It is even more significant that most women would look up to men on the basis of an implicit understanding that men are stronger and more powerful than they are. We are sometimes very much our own oppressors.

As far as race equality is concerned, it is worth noting that we have talked for many years about the transformation of the legal profession. One of the ways to achieve this is to ensure that black lawyers get more paying work. This has not yet happened in a substantial sense. A black

political leader has said that he thinks that white lawyers are better than black ones, and that he has a white lawyer. So does the overwhelming majority of black people in relatively large wealthy corporates. Self-oppression again?

We can now look at the position of the LGBTI community. Our Constitution prohibits any unfair discrimination against any person by the state or another person on the grounds, amongst others, of sexual orientation. The Constitutional Court of our country has held that gay and lesbian people should be allowed to marry and that consensual homosexual conduct is not a crime. Yet it cannot be refuted that many in our country still believe that gay and lesbian people who relate sexually to each other do so in sin.

In South Africa, as well as in the rest of Africa and much of the world, there is a disjuncture or disconnect between what constitutions or other legal instruments provide and what the courts say on the one hand, and the status of the hearts and minds of people on the other. It has been suggested that our Constitution is out of step with the hearts and minds of our people. Does this mean that our Constitution is worth nothing? Certainly not.

The Constitution is a vision for the kind of society that all of us need to work together to create and nurture. Indeed, the Constitution imposes on all of us a duty to actively contribute to the kind of society contemplated therein. This has implications for the conduct of all human beings, lawyers as well as social and natural scientists alike. All of us must know the Bill of Rights contained in our Constitution. Each of us must understand, internalise, embrace and ultimately practise its values. And then we need to propagate those values so that in time more and more people embrace them. We cannot assume that these values are understood and known by all, not even by lawyers who might profess to do so.

And then there is work for us to do as scientists. There is need for multi-disciplinary research to establish the exact causes or reasons, or the factors that contribute towards them, for the prejudices in relation to sex and gender of the people of Africa and others. We can then devise a scientific way of changing the hearts and minds of all of us so that our thinking accords with the values of our Constitution.

Although it is impossible to say with precision where we are on the road to sex and gender transformation in Africa, it would seem that we have not gone very far, and that the road ahead is long and arduous. Lawyers and the law cannot achieve this change alone. All of us need to contribute to a social revolution to achieve this result.

