

SEXUAL ORIENTATION AND GENDER IDENTITIES (SOGI) LAW AND SOCIAL CHANGE

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Abstract

It has been widely acknowledged in the realm of research that Africa is historically a diverse continent for gender identities and sexual orientations and practices. Research conducted through various disciplines depicts accounts of unique bond-friendships and dynamic gender roles that existed openly prior to the introduction of colonial discriminatory laws. With variation in social and legal positions with regard to LGBTQIA+ rights and recognition over time and space, the question is postulated of how the natures of social and legal change affects the relationship between these positions. The adoption of Queer Theory, as a lens of analysis, does not dichotomise the relationship of social and legal changes through a riddle of which came first, but rather acknowledges the domination of prevailing anti-LGBTQIA+ sentiments in colonial governments through the mechanism of law. The embedment of queer phobia into social institutions allowed for its continued existence post-independence through the shift in perspectives and attitudes toward LGBTQIA+ persons by individuals in society. Though individuals and collectives continue advocating for the recognition and realisation of legal rights and protections for LGBTQIA+ persons throughout the continent, varying legitimisation has only been seen in limited countries such as South Africa, Botswana, and Angola.

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Changes in society have also occurred slowly, however there are instances where social change seems to be occurring at a faster pace than legal change.

1 Introduction

Gender variance and sexual diversity, often encompassed in the Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual and more (LGBTQIA+) acronym, is largely discriminated against throughout the African continent. Historical, sociological and anthropological accounts record the existence of diverse sexual orientations and gender identities (SOGI) in Africa prior to colonial domination, ushering in discriminatory laws institutionalised through formal colonial legal systems.¹ This shift from acceptance to rejection points to a change in law and social perspectives of the original African population. While there are currently movements advocating for the decriminalisation and legalisation of SOGI rights throughout the continent, challenges emerge from both formalised law and individual prejudices. The importance of multidisciplinary cannot be discounted and can be demonstrated through the examples of political science and anthropology. Freeman writes of empirical political science, which analyses measurable variations in order to answer hypotheses,² and normative political theory which proposes and discusses theories around ‘how the world ought to work’.³ Empirical political science may provide a useful lens to analyse evidence of variations in law, both customary and western formal systems, in order to determine and account for the nature of the variations.⁴ Anthropological insights stem from field research and work, and its importance cannot be discarded – especially in the recorded works by anthropologists in Africa, without which, may have led to some African practices falling victim to the passage of time.⁵ Anthropologists work to improve the lived realities of communities during their work, drawing from empirical research and cultural

1 Same sex sexual intercourse is often criminalised under penal codes that were instituted under colonial rule. These penal codes were never removed subsequent to independence and examples of these, are section 162 of the Penal Code of Kenya and section 104 of the Criminal Offences Act 29 of 1969 in Ghana. Same sex acts other than intercourse are also criminalised under penal codes, for example article 158 of the Penal Code of Zambia and article 158 of the Penal Code of Uganda which both criminalise indecent acts committed in private or public with a person of the same sex.

2 M Freeman ‘On the interactions between law and social science in the understanding and implementation of human rights’ in F Viljoen (ed) *Beyond the law: Multi-disciplinary perspectives on human rights* (2012) 6.

3 Freeman (n 2 above) 6.

4 Freeman (n 2 above) 8.

5 S Wieringa ‘Women marriages and other same-sex practices: Historical reflections on African women’s same-sex relations’ in R Morgan & S Wieringa (eds) *Tommy boys, lesbian men, and ancestral wives: Female same-sex practices in Africa* (2006) 295.

studies.⁶ Anthropology and political science certainly do not encompass all relevant disciplines in relation to law, however showcase the potential for deeper understanding and accounts for both human rights theories and means to realise human rights. Drawing from empirical research, historical contexts and developments mentioned herein are supported by political science and anthropological methodologies.

This paper will foremost discuss theories proposed to speculate a formula for the relationship of legal and social change, moving onto a discussion on the use of queer theory in rethinking the nature of this relationship outside of a binary framework. Subsequently, it will discuss Sexual Orientation and Gender Identities (SOGI) prior to colonial rule and the characteristics exhibited by the colonial institutions legal regimes in influencing the original population's psyche toward these identities and practices. Following, it will discuss the ubiquities and status of the relationship between social change and legal change in the post-colonial era. Change is dynamic and differs in the temporal and spatial realities in which it unfolds, however if human rights are to be recognised and fulfilled, there must be an understanding of the oppression and reactions by those facing discrimination so as to identify the factors enabling the survival of oppressive structures.

2 Theoretical frameworks

The debate concerning the relationship between legal and social change comprises of arguments that explore variations in law and society over time and in specific contexts, the role of law within a specific society, the extent of legal influence over society and the inverse, and the timing of changes seen. Watson proposes that the relationship between law and society is not as close as one may think, and that the law does not always reflect the interests of the greater society or ruling class.⁷ Watson also positions law as an inevitable fate for social ideas to pass through in order to be legitimised, and that despite social pressures, these changes will regardless occur in a legal paradigm.⁸ As such, Watson holds the view that social, economic, and political conditions do not impact legal change to the extent that other theorists believe.⁹

In contrast, Friedman proposes that the main facilitating force for legal change is through social pressure, deriving from a schism in legal

6 ABS Preis 'Human rights as cultural practice: An anthropological critique' (1996) 18 *Human Rights Quarterly* 287.

7 A Watson 'Legal change: Sources of law and legal culture' (1983) 131 *University of Pennsylvania Law Review* 1121 & 1136.

8 Watson (n 7 above) 1153.

9 Watson (n 7 above) 1154.

position and social beliefs.¹⁰ He asserts that public opinion, outside of non-traditional or authoritarian states, constitute the fundamental building blocks of law.¹¹ Demands are made on institutions, which in turn translate them into legal concepts, at the risk that it may result in a change to the nature and meaning of the demand.¹² He therefore establishes the relationship in changes between law and society as one that goes hand in hand.

Watson and Friedman therefore create two binary positions – whilst they may have overlapping points, their positions portray an either/or relationship, existing mutually exclusively. The dichotomisation of the relationship into one-way structures encourages a limited conceptualisation of the relationship and its characteristics. This creates an entry point into a brief discussion of the importance and relevance of multidisciplinary in human rights writing and research.

2.1 Queer Theory as a framework

Queer theory is a relatively new theory for critical analysis by social scientists and within the humanities. Emerging within a post-structuralism context of the 1990's, the very name is a reclamation of the word 'queer' from its status as a slur, as queer refers to something that is out of the usual, something that deviates from an expected norm – in using the word queer, it allows one to question what the 'normal' is that it is being deviated from.¹³ Its position inherently poses a question concerning what society considers to be normal within the context in which it operates. The theory acknowledges how sexuality is understood through the gender binary (man/woman), positioning heterosexuality as the normal in many traditional and modern cultures and being the category through which other social, political, and cultural phenomena are to be understood.¹⁴ Warner, an inaugural queer theorist, introduces the concept of 'heteronormativity', finding roots in writers such as Adrienne Rich's conceptualisation of 'compulsory heterosexuality'.¹⁵ These constructions of gender and sexuality result in dragooning individuals into obeying institutionalised notions of cisgenderism and

10 LM Friedman 'The law and society movement' (1986) 38 *Stanford Law Review* 771.

11 Friedman (n 10 above) 771.

12 Friedman (n 10 above) 771.

13 M Hirsch *Queer theory and social change* (2000) 33.

14 GN Pindi 'Beyond labels: envisioning an alliance between African feminism and queer theory for the empowerment of African sexual minorities within and beyond Africa' (2020) 43 *Women's Studies in Communication* 109.

15 M Warner 'Fear of a queer planet' (1991) 29 *Social Text* 6 - 9.

heterosexuality – a pressure felt by many queer individuals in Africa.¹⁶

A major precursive writer of queer theory is Michael Foucault, whose writings on power and discipline is relied upon. Concepts introduced in Foucault's work *Discipline and punish* form an important component in queer theory in its understanding of the subjection of LGBTQIA+ individuals.¹⁷ One such understanding is that power effects domination on a subjected group not just through a top-down legalistic manner, but is deeply imbedded into social institutions and is not localised into a single specific relationship (such as that between classes).¹⁸ Individuals, as vehicles for power, continue social policing toward queer people through exclusionary practices and pressure. While it can be acknowledged that demands upon an institution, such as a government, can result in the change of structural and legal institutions (such as the decolonisation movements in Africa), to argue that law does not always reflect the interest of a society or ruling class is erroneous. Law is often a tool used for domination, stemming from an assertion of power that conforms to a prescribed standard of normality.¹⁹

3 Identities and domination

The vestiges left by colonialism include lingering Euro-Christian and Islamic values and norms that hold certain moral judgements against LGBTQIA+ individuals. The history of Africa cannot begin at the arrival of the coloniser – to do this does not acknowledge African people as autonomous agents of their own cultures, but to forever remain in time as the colonial subject.²⁰ The erosion of cultural knowledge has, slowly over time, led to changes in African communities and greater societies. The colonial empires demonstrated that social change can be enacted through political encroachment and the use of law to discipline and assert authority.²¹ Alienation from cultural traditions by colonial regimes resulted in the change of understanding or interpreting historic practices, such as *Oumapanga* (a bond

16 M Nagadya & R Morgan 'Some say I am hermaphrodite just because I put on trousers': Lesbians and tommy boys in Kampala, Uganda' in R Morgan & S Wierenga (eds) *Tommy boys, lesbian men, and ancestral wives: Female same-sex practices in Africa* (2006) 71.

17 M Foucault *Discipline and punish: The birth of the prison* (1975).

18 Foucault (n 17 above) 27.

19 Foucault (n 17 above) 20.

20 RF Romanow *The postcolonial body in queer space and time* (2006) 3.

21 HW Von Hesse 'Gender, flexible systems, in Africa' in H Chiang *et al* (eds) *Global encyclopaedia of lesbian, gay, bisexual, transgender, and queer history* (2019) 595.

friendship)²² – but one must be wary of clinging to an essentialist approach to an ‘authentic’ African culture.²³

Female masculinities and manhood demonstrate the flexibility and inversions of gender, sex and gender roles throughout a multitude of African cultures. Ahebi Ugbabe was an early 20th century ruler in the Nsukka Division of Igboland during colonial rule – however their dual position as a female chief and warrant chief demonstrate the leadership roles of women in precolonial Africa.²⁴ Women in the position of royal advisors could also be referred to as men,²⁵ while male diviners who dressed in traditional women’s clothes were viewed to be possessed by female spirits and would perform sexual and gender roles associated with women.²⁶ Igbo, Yoruba and Akan/Asante societies allowed for postmenopausal women to become sons, kings, or ‘honorary men’ demonstrating the dynamic nature of gender, rather than remaining the same or static throughout ones entire life.²⁷

Anthropologists have observed that same sex relationships in Africa did not have a relation to the biological sex of an individual, but rather embodied an expression of gender roles.²⁸ In Ghana, the Nzema people practiced a form of same sex marriage custom, where friends of the same sex that held physical attraction to one another could be married – this was known as ‘friendship marriage’.²⁹ Customs around this practice reflected most of the same practices held in heterosexual marriages, including payment of a dowry (a bride-price) and sharing of a matrimonial bed.³⁰ Marriages between women that have been embedded into society structures have been recorded in 40 countries throughout Southern Sudan, Kenya, Southern Africa, Nigeria and Benin.³¹ Gender and social roles of women classified as ‘female-husbands’ varied, and in cases where women were barren, as observed in Nuer culture, they were automatically considered men and could marry women.³²

Where societies may have practiced gender variance and homosexuality prior to colonial rule (such as Ghana), colonial authority asserted, through political domination, that homosexuality and gender variant practices were ‘unnatural’ and offensive. Colonial

22 Wieringa (n 5 above) 292.

23 Pindi (n 14 above) 108.

24 Von Hesse (n 21 above) 595.

25 As above.

26 Von Hess (n 21 above) 595, Von Hesse mentions the Zvibanda, Chibados, Quimbandas, Gangas, or Kibambaa.

27 Von Hess (n 21 above) 595.

28 As above.

29 K Andam ‘Ghana’ in H Chiang *et al* (eds) *Global encyclopaedia of lesbian, gay, bisexual, transgender, and queer history* (2019) 612.

30 Andam (n 29 above) 612.

31 Wieringa (n 5 above) 298.

32 Wieringa (n 5 above) 304.

laws such as The Courts Ordinance of 1935 remain in the Ghanaian Criminal Code, which penalises and bans ‘unnatural carnal knowledge’ and sodomy.³³ South Africa too retained the British colonial empires’ sodomy laws until the Immorality Amendment Act of 1969, which increased regulation of homosexual men under Apartheid.³⁴ The Botswana Penal Code contained much retention of British colonial laws, including laws against ‘carnal knowledge’ which has been used to prosecute same-sex conduct.³⁵

4 Changes in independent Africa

After the independence of African states from their colonial rulers, many of the colonial laws introduced continue to remain in place. Out of the 54 African United Nation member states, same sex sexual acts are illegal in 32 (59%).³⁶ In 2019, Botswana decriminalised same sex legal acts on the basis that previous colonial laws were incompatible with the Botswanan Constitution on the grounds of the fundamental freedoms clause (Article 3), the right to privacy (Article 9) and the non-discrimination clause (Article 15).³⁷ The government of Angola also repealed colonial era laws that criminalised same-sex sexual relations in 2019, affording more protection under the laws against discrimination.³⁸ South Africa is the only country in Africa to legalise same-sex marriage together with benefits and recognition for gender variant individuals, among other rights.³⁹ The retention of colonial laws are deliberate, as they largely reflect prevailing attitudes of discrimination and prejudice toward LGBTQIA+ persons, with possibility of social stigma being described as one of the worst fears for those in the community.⁴⁰ In addition, the effects of the preservation of these laws have attributed to queer-phobic narratives that are at times used by African politicians in asserting that same sex relations and gender variance are from a western origin despite historical evidence demonstrating otherwise.⁴¹

33 Andam (n 29 above) 613.

34 GG da Costa Santos ‘Decriminalising homosexuality in Africa: lessons from the South African experience’ in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth* (2013) 314 & 317.

35 M Tabengwa & N Nicol ‘The development of sexual rights and the LGBT movement in Botswana’ in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth* (2013) 340.

36 ILGA State Sponsored Homophobia Dataset 2019 <https://ilga.org/maps-sexual-orientation-laws>.

37 ILGA State Sponsored Homophobia Report 2019 https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf.

38 ILGA Report 2019 (n 40 above) 17.

39 Equaldex ‘LGBT Rights in South Africa’ <https://www.equaldex.com/region/south-africa> (accessed 6 May 2020).

40 Izugbara *et al* ‘Regional legal and policy instruments for addressing LGBT exclusion in Africa’ (2020) 28 *Sexual and Reproductive Health Matters* 3.

41 Andam (n 29 above) 612, Tabengwa (n 35 above) 348.

The shift from societies once accepting and celebrating queer persons to defending and, at times, advocating for violence toward LGBTQIA+ people and allies demonstrates the existence of a close relationship between legal and social change, even if it took place over a long period of time.⁴² There is also, however, room for argument that in other instances, there is a large gap between social change and legal change as the legal change may not reflect general social views at the time. In *Letsweletse Motshidiemang v Attorney General*,⁴³ The High Court of Botswana repealed colonial era laws which criminalised same-sex sexual acts, despite a large number within society believing that same-sex relationships are immoral.⁴⁴ Regardless, the demand for social change challenges the power relations existing within and between existing social categorisations of SOGI and demands a shift in the dominant paradigm of heteronormative understandings of sexual orientation, practice, and identity.⁴⁵

Social change can utilise various means to challenge a changing society, either through individual or collective action. Collective action on an international level allows the legitimisation of claims of communities, and places them in front of the international community. Organisations such as the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) contribute to United Nations human rights mechanisms through engagements with the Human Rights Council.⁴⁶ ILGA Pan-Africa engages on LGBTQIA+ issues through partaking in submissions of shadow reports for Universal Periodic Reviews (UPR) of states, as well as through regional engagement with the African Commission of People and Human Rights (ACHPR).⁴⁷ Through advocacy and educational programmes, they can target communities and individuals to directly address prejudice at a social level.

Individual action fosters notions of solidarity within LGBTQIA+ communities, such as the drag queen community in Kenya that creates safe spaces to explore gender variance and same sex relationships.⁴⁸ Demonstrations of visibility and education may take the forms of photography, art, music, dance, literature and poetry –

42 Peter Fabricius 'South Africa teeters, but avoids falling, in its high-wire act of protecting LGBTI rights without offending its African chums.' 27 February 2014 <https://issafrica.org/iss-today/just-how-serious-is-south-africa-about-gay-rights> (accessed 28 May 2020).

43 *Letsweletse Motshidiemang v Attorney General* (2019) MAHGB-000591-16.

44 Tabengwa (n 35 above) 348.

45 C Ngwenya *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) 197.

46 Human Rights Council <https://ilga.org/human-rights-council> (accessed 25 April 2020).

47 Pan Africa ILGA 'Training Projects' <http://panafricailga.org/our-work/> (accessed 25 April 2020).

48 BBC News Africa 'The secret lives of Kenya's drag queens' <https://www.youtube.com/watch?v=0Kg-HvC1QaU> (accessed 20 April 2020).

which may result in shifts of perspectives of LGBTQIA+ persons.⁴⁹ Where some individuals prefer not to interact with an institutionalised fight against queerphobia, there remains a necessity for individuals to bring about legal change from within structures themselves.⁵⁰ The contestation of dominant ideals and beliefs around African identities serves to vindicate individuals from being perceived as the deviant and perverted, shaped by moral degradation or Eurocentric influence.⁵¹ Individuals are able to demonstrate their existence as legitimate, and deconstruct concepts within an African identity that serve to restrict and shape the identity within the continuing western heteronormative archetype.

5 Conclusion

The nature of the relationship between social and legal change in regard to LGBTQIA+ discriminatory laws is full of complexities. Writers such as Watson and Friedman have demonstrated mutually exclusive approaches, utilising a vertical characterisation of law and society. However, with the use of queer theory drawing from modalities across various disciplines, the nature of the relationship between law and social change becomes clearer. Historical shifts in social perspectives and laws concerning gender variance and sexuality in Africa demonstrate the dynamic nature of change and cultivate an understanding of law as a tool for either realisation or the destruction of human rights values. Social change may be slow, enforced by interpersonal policing and within relationships, can be dynamic; either catalysed by prevailing dominant discourses or within society itself for varying economic, social, cultural, or legal reasons. Legal change can comprise of change begun by actors within the legal system itself, or through means such as strategic litigation. It can occur quicker if the institution is efficient but may also occur slowly where it functions within a bureaucratic system, relying upon state agents such as police to enforce laws. For either social or legal change, there are a number of diverse variables that must be identified and examined in their specific context. The nature of the relationship between social and legal change is one involving individual characteristics meeting in complexity and cannot be comprehensively understood with one blanket theory but must rather be examined through a variety of disciplines and must be conceptualised as containing multitudes.

49 Andam (n 29 above) 614.

50 Hirsch (n 13 above) 100.

51 Ngwenya (n 45 above) 199.