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Human rights violations and sodomy laws in Africa: A study of the discriminatory laws and inhumane legislation and its impact on the health and safety of the LGBTI community within the criminal justice cluster

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From sodomy laws in the apartheid era, to the institutionalisation of section 9 (3); (which is a protection order in the South African Constitution), which prevents total discrimination of persons based on race, gender, and sexual orientation; the rights of the lesbian, gay, bisexual, transgender and intersex (LGBTI) community, and their health and safety are not guaranteed when imprisoned for any crime that they may have committed. Sodomy was a common law crime in South Africa and despite the protection order South Africa still suffers from the disparaging homophobic tendencies from communities who are unsympathetic to the plight of the LGBTI. Through politics, religion and social aspects in South Africa and the African continent, there are great exclusionary measures. Human rights violations against the LGBTI in Africa has an ominous history including discrimination, persecution and prosecution of the LGBTI community. In most African countries, where being gay or being part of the LGBTI community is regarded as a crime, there is no guarantee that the LGBTI's physical health and safety will be protected by the penal system when imprisoned. This article aims to look at the anti-gay laws that are still existing in most of the African countries; their discriminatory and inhumane stance and how that stance has an impact on the health and safety of the LGBTI community within the criminal justice cluster and specifically, within the penal system. The article will unpack the homophobic and exclusionary measures created by African countries towards the LGBTI community. The colonial era anti-gay laws are still applied in some African countries wherein these countries claim that homosexuality is un-African and ungodly. It seems to be a confusing stance as Christianity and the Bible were introduced by the colonisers. The article will in addition discuss the policies on the treatment, categorisation and health of prisoners and whether these policies cater for the LGBTI community within the criminal justice cluster.

Contribution: Recommendations that will come out of this article will explore possibilities of transformation of legislation, policies and rules such as the United Nations Standard Minimum Rules for the treatment of prisoners that should cater to the needs and the protection of the LGBTI community when incarcerated.

Keywords: Human Rights; offender; LGBTI; health; treatment; categorisation; sodomy; UN Mandela Rules; UN standard minimum rules for the treatment of prisoners; criminal justice cluster.

Introduction

Human rights violations of prisoners in general have been evidently depicted throughout history. As early as 1166, Henry II (King of England) gave a directive that gaols (pronounced jails) be constructed at the Assize in Clarendon. This came about in the middle of the 12th century when it was discovered that some countries were without public gaols or prisoners' cages. As a result of this directive, private prisons were built by prominent individuals who wanted to protect their political aspirations and personal desires. Then in 1128, the Tower of London, which was originally built in 1066 by William the conqueror, as a fortress for the defence of London, saw its first prisoner by the name of Rennulf Flambard dying in this facility. More well-known private prisons were the Castle of Spielberg, the Conciergerie and Bastille in Paris, the pozzi or wells of the Ducal Palace in Venice and the Seven Towers of Constantinople. The gaols were nothing but storage areas for prisoners.

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As years went by, in the period between 1776 and 1858, the overflow of the convict population increased and therefore compelled the British authorities 'to house prisoners in old, abandoned transport ships anchored in harbours and rivers' (Cornelius 2001:50–51). The *Hulks Act* of 1776 stated precisely that offenders were to be sentenced to hard labour. The conditions of the hulks were terrible: they were poorly ventilated, extremely overcrowded and had no consideration for segregation. All offenders, young, old, male and female were housed together in those filthy conditions.

While this was occurring during this period of history; an Italian jurist and economist, Cessare Beccaria (1738–1794), who was known as one of the early reformers in history, encouraged the segregation of offenders according to their age, gender and offence and further suggested that offenders should be treated humanely whether they were convicted or not. This system was adopted and widely used by many countries including South Africa. However, at the time, his statements challenged the prison system and thereby made him unpopular and as a result of this, his book *Crime and Punishment* was published anonymously in 1764. Beccaria contributed greatly in the determination of purposes of punishment.

Another prominent reformer, Jeremy Bentham (1748–1832), extended the utilitarian doctrine by developing a model prison and called it the Panopticon. The Panopticon was a 'circular prison with cells around the circumference, open to the centre'. Although the Panopticon prisons were never built in England there were nevertheless some American prisons, which were built using Bentham's design. These prisons were declared a failure and Bentham was ridiculed ever since (Craig & Rausch 1994:103).

Later on, William Penn established the Pennsylvania system. Inmates in this prison lived in total seclusion from each other; they ate, slept, exercised and worked alone. The only contact they had with the outside world was through the visitors who were carefully selected for them by the officials. They were offered a Bible, which was the only reading material provided to them. Officials were adamant that if inmates were to speak to one another they would poison each other's thoughts. The system was also considered a failure as it did not accomplish its intentions. Cilliers (2000) contended that 'no one could function under such abnormal circumstances'; because of the total silence and total isolation, prisoners became mentally deranged.

Throughout history, the human rights violations and the treatment of prisoners, evidently indicate that penological systems were possibly not meant to participate positively in the reformation, reconstruction of offender's morality but they were meant to be places of brutality and cruelty. The harsh inhumane treatments that were sometimes meant as a public spectacle, such as whipping, branding, execution, mutilation, flogging and banishment not only violated and discriminated against the human rights of the offenders but they also violated and threatened the offender's mental health and well-being. As outlined in this article, the main aim of this article is to take a closer look at the anti-gay laws that are currently existing in most of the African countries; their concentration on discriminatory and inhumane viewpoints have a huge impact on the health and safety of the LGBTI community within the criminal justice cluster and specifically, within the penal system. The article will unpack the homophobic and exclusionary measures created by African countries towards the LGBTI community through politics, religion and social viewpoints. The colonial era anti-gay laws are still applied in some African countries wherein these countries claim that homosexuality is un-African, and ungodly. It seems to be a confusing stance as Christianity and the Bible were introduced by the colonisers and therefore the religious concept was surely not an African concept. Africans had their own spiritual belief systems before the introduction of Christianity and the Bible. There are studies that have proven that homosexuality and its non-existence within the African continent has been a myth. The book titled *Boy-Wives and Female Husbands* studies African homosexuality from East Africa, West Africa, Central African and the Southern African region of Africa (Murray & Roscoe 1998:9). The notion that homosexuality is Ungodly, may have been prompted by the Bible story in Genesis 19:24 where it says in the Good News Bible 'Suddenly the Lord rained burning sulphur on the cities of Sodom and Gomorrah'. This particular text, that is, Genesis 19:24–25 speaks of the destruction of the two cities: Sodom and Gomorrah, along with its occupants as they were practicing a sinful act such as sodomy.

This article in addition discusses the policies on the treatment, categorisation and health of prisoners and whether policies within the criminal justice cluster cater for the LGBTI community. These policies or rather directives on the treatment and categorisation of inmates will be based on the applied policies and directives within the South African penal system. The author's intentions in this article is to draft recommendations that will explore possibilities of transformation of legislation, policies and rules such as the United Nations (UN) Standard Minimum Rules for the treatment of prisoners and see how they can cater to the needs and the protection of the LGBTI community within prisons.

Research methods and design

This review article will be qualitative in nature; therefore, data will be sourced from legislation, articles and policy directives. Criminal justice systems in the African continent and specifically penitentiary system are the 'least-studied' in the whole world and, therefore, one can certainly not have proper information on the nature of prison conditions in Africa and their treatment of inmates (Sarkin 2019).

The aim for the review will be to point out challenges that are created around the LGBTI community when they go through the criminal justice system, as legislation and the anti-sodomy laws are not favourable to their sexual orientation and therefore this may have a huge impact on their health and well-being when they are locked up in prison.

These challenges are mostly brought in by the viewpoint that homosexuality is not an African concept and it is a practice that is anti-God. Countries such as Namibia refuse to give condoms to its inmates, as they state that sodomy is unlawful, therefore inmates have no legal right to condoms. This manner of thinking will lead to extreme health risks of inmates who may contract HIV and AIDS, as no one can ever control what happens after lock-up time. These types of legal principles and prison management do not make any sense when one looks at the overall picture of maintaining health and safety of inmates while incarcerated.

The challenges or rather the denial that African countries have in relation to homosexuality was thoroughly sought out in a systematic review approach wherein out of 160 peer-reviewed articles, the author selected less than 50 publications. The inclusion and exclusion criteria that is required when applying a systematic review approach when sourcing data, focused on the following topics: Health and Safety of the LGBTI in the Criminal Justice Cluster, Human Rights Violations, Anti-Gay and Sodomy Laws, UN Standard Minimum Rules on the Treatment of Prisoners and the South African White Paper on Corrections. This study is epistemic in nature, meaning that the author intends to look at concepts that relate to knowledge and the notions pertaining to African cultural systems, and indigenous knowledge systems including phenomenology on the history of Africa and its acceptance of the LGBTI community. Epistemology, as defined by the Stanford Encyclopaedia of Philosophy (2018), is 'the study of knowledge and justified belief'. The study concerns itself with establishing whether knowledge is sufficient and necessary, whether it has sources, what are its limitations and if there is a justifiable belief on the knowledge itself. While learning about communities in Africa and their treatment of the LGBTI, one needs to have justifiable knowledge about these communities. Endogenous knowledge, as explained by Velthuizen (2012) is an incorporation of conceptions such as indigenous knowledge, exogenous knowledge, cultural meaning making, learning tools and technical tools. Endogenous is an internally developed knowledge inborn from the knowledge acquired from developing societies and their developing societal structures. Endogenous denotes to that which is created, manufactured, developed or initiated from within. It suggests that inherent knowledge may be unhinged by interaction with immediate or other impacts.

The phenomenon of the history of Africa and its acceptance of the LGBTI community varies from one country to the other. The word phenomenon, which is something that can be seen and felt, has its meaning rooted to the general philosophy and study of phenomenology, which focuses on 'structures of consciousness from the first person's point of view', and the 'study of the development of human consciousness and self-awareness as a preface to or part of philosophy' (Philosophy 2018).

Culture, on the other hand, is ordinarily not a lesson learned from school, however, it is a practice of enculturation. The process of enculturation sees individuals in societies learn their culture through experience, observation and instruction. This is a steady process of acceptance and attainment of the qualities, norms and values of a culture of a group by an individual of a specific ethnicity or people living a particular way of life.

By using certain cultural symbols, we are able to share and pass values, communicate and develop as a community. Culture is made up of generally accepted behaviour, customs and activities, which are imitated and passed on from one group to the other. Culture allows society to communicate and transmit memories recollected throughout generations. Cultural norms and values on the whole, clarify the significance held by 'events and phenomena'.

Literature review and theoretical framework

Homophobia in Africa: Exclusionary measures through politics, religion and socio-cultural aspects

Although human beings are part of a shared humanity, with culture, humanity can be distinguished by different historical, cultural and geographical locations. These differences must be notable as they improve our human relations. Cultural norms in Africa have played a significant role in matters of litigation and resolving disagreements. The reason for including conflict resolution methodologies from three different countries, that is, South Africa, Rwanda and Uganda is to emphasise the fact that African problems can be resolved using African cultural systems. The other reason that propelled the author to include dispute resolution mechanisms in this article is because dispute resolution mechanisms rely heavily on cultural concepts in resolving matters. As it is outlined in the research methodology that African countries are in denial on matters pertaining to homosexuality, they are continuously instilling colonial legislations and religious belief systems such as Christianity to resolve a phenomenon of homosexuality, which has been inherent and an existing phenomenon in African communities for ages. If African countries could use customary laws and principles such as the Gacaca Court of Rwanda to resolve matters relating to the LGBTI community, then the criminalisation of the LGBTI community will not exist. The criminalisation of the LGBTI is an unfair practice and community courts such as the Gacaca court can listen to such matters and resolve them, without taking anyone to prison.

In South Africa, the post-apartheid era saw the use of the Truth and Reconciliation Committee in resolving the deeds that were committed during the apartheid regime. Other African countries such as Rwanda used the Gacaca court system, which was and still is the quintessence of Rwanda's traditional practice. This method of resolving differences was similarly revitalised to expedite trails in the 'post-genocide' Rwandan community to heal the pain and matters related to the massacre and mete out transitional justice 'through truth-telling and confession'.

The Gacaca traditional court system is an authorised system, which was motivated by customs. Gacaca is the revitalisation of a customary court system of wise men who remain to be equally the icon and realisation of justice at rural community or family disputes by ways of rural community gatherings that are chaired over by elders, where every person may possibly request to express themselves. The aim of the Gacaca method is to attain 'truth, justice and reconciliation'. This court system also aims to encourage the community to heal by ensuring that the punishment of offenders of crimes is quicker and not as much of an expense to the government. The systems' intentions are to ensure the following: that the events that occurred during the genocide are reconstructed, to enable more efficient legal proceedings by using more courts and to reconcile and unify all Rwandans (Velthuizen 2012).

Uganda used the customary practice of the Acholi people in resolving differences, which is called the *mato oput* (to drink a bitter potion), was founded on the thoughtfulness of life. The meaning of life in the Acholi ways is aimed at building relationships. Within the Acholi people, community and relationships are important; therefore, every individual exists in and for the community. The ancestral spirits of those who have passed on are also of significance to the living and the community at large. Therefore, any wrong doing, crime, violence and corrupt act is regarded as a destabilising factor in societal coherence, both for the living who are still residing within the community and the dead who dwell in the spiritual world.

One would think that with such grounded cultural norms, countries such as Uganda would accept homosexual activities because their cultural norms and values speak of forging relationships, acknowledging the role of every individual in and for the community, valuing ancestral spirits and therefore viewing crime and violence as a threat to unity, both for the living and the dead (Velthuizen 2012).

Equally so, South Africa has Chapter 9 institutions, such as the South African Human Rights Commission, which has been frequently requested to give advice and support to other countries with their progressions of deepening respect for human rights (Southern African Catholic Bishops' Conference Parliament Liaison Office 2012). The Human Rights Commission is harnessed on the ideals of ubuntu, which are intrinsic to South Africa's multiple beliefs. It would be odd if 'dignity, humaneness, conformity and respect', were distant to any of the South Africa's cultural structures.

While that is so, sexual diversity has been considered non-existent in the African continent as a whole. African leaders have on frequent basis made an assertion that same sex relations are not African and individuals who claim to be gay or lesbian have been corrupted by a white foreign agenda, which therefore requires them to be removed from the African society. Countries such as Uganda and Nigeria have even instituted additional discriminatory laws with harsher and extremely inhumane legislation that outlaws any person or any conduct that is deemed not heterosexual. These laws also impose prison sentences for people who do not inform authorities of any same sex relations known to them and that includes the NGO workers, healthcare workers, who may be supporting LGBTI persons. This then gives a guarantee to the state that those suspected to be gay or lesbian will be reported accordingly.

Social, political and religious aspects are difficult to separate when one speaks of Africa in its entirety, on any issues relating to *same-gender desires.* A study conducted by Hellweg (2015:887), on the topic of 'Same-sex desire, Religion, and Homophobia: Challenges, Complexities, and Progress for LGBTI Liberation in Africa' focused on a few case studies, at a round table on LGBTI persons in Africa. Case studies that were submitted originated from South Africa, Uganda, Kenya and Zambia. The proposed focus was on specific literature, theology, public health and religious contexts of the Muslim and Christian religions that seemed to support the LGBTIQ community whilst there were great disputes on matters related to the LGBTI community. The study emphasised that homophobia in Africa is the consequence of 'both external and internal causes', for instance, colonialism, nationalism and religious proselytisation. They found that this topic was neither a challenge that relied on Western activists to fix or determine nor has it stemmed from intolerance of Africans alone. The authors in this round table saw religion as neither essentially a difficulty nor a benefit, but rather a territory for valuable re-negotiation.

Religion has been the most difficult to negotiate, however the author also finds that religion, is also a social aspect and must be negotiated in the areas where people reside and pay their respects according to their different belief systems. There seems to be a general belief that homosexuality is neither an African cultural norm nor is it a practice that is acceptable by African customs. While that may be the viewpoint, Msibi (2011), in his article 'The Lies We Have Been Told: On (Homo) Sexuality in Africa', argues that:

> African opponents of homosexuality often cite religion particularly Christianity and law as the reasons for their justifications for rejecting homosexuality. While specific passages in the Bible seem to condemn certain homosexual acts, the Bible itself is a foreign document in much of Africa. This apparent contradictory acceptance and use of Christianity clearly presents a dilemma in understanding the debate about a 'sodomite-free' Africa. If Africa rejects ideologies brought from the West, then surely religion brought from the West cannot be used to reject something that is being rejected for its foreign roots. (p. 69)

While South Africa has been commended as the first in the world to legally forbid any unfair discrimination on the grounds of race, gender and sexual orientation, homophobic tendencies and hate crimes have never seemed to cease. South Africa's High Court had in 1998 struck down the sodomy law that made homosexual sex illegal. The legal developments as Vincent and Howell (2014) claimed was not to say that South Africa and its politicians were endorsing sexual equality but they were rather playing along with the

changes that were introduced by the new democratic country and therefore, they incorporated sexual orientation in the equality clause of South Africa's democratic constitution. The African National Congress (ANC) in its campaigning at the time had to demonstrate a significant change in reversing apartheid ideals to that of a democratic country by bargaining the issues relating to equality. Apart from that, there was a subtle petitioning for one of the most important individuals during the transition period and that was Judge Edwin Cameron who had openly spoken about his sexual orientation and health status.

The changes in South Africa that were brought in were other accomplishments for the LGBTI community, such as the right for same-sex couples to co-adopt children, the acknowledgement of same-sex partnerships as related to benefits such as state pensions and other employment benefits and immigration rights for same-sex couples were brought about by litigation and not law-making by parliament. Parliament was ordered to correct the defects in the then applicable laws. Then in 2003, legislation or the right to change sex was approved. More legislation followed that allowed the LGBTI community equality included the *Employment Equity Act*, the *Promotion of Equality and Prevention of Unfair Discrimination Act* (2000) and the *Domestic Violence Act* (1998), which sees the cohabitation of same-sex couples in its definition of the word, domestic. The *Labour Relations Act* of 1995 protects any employee on the basis of their sexual orientation, while the *Medical Schemes Act* of 1998 recognises a dependent as including same-sex partners.

South Africa appears to accept the LGBTI community on paper; however, just like any other African state, politicians and religious groups do not accept their sexual orientation and have also demonstrated homophobic tendencies towards the LGBTI community. Vincent and Howell (2014) in their article titled 'Un-natural, Un-African and Un-godly' elaborate on the notion of what the three words mean in the homophobic discussions in democratic South Africa. 'Un-natural' relates to the notion that same-sex couples cannot bear children or pro-create as heterosexual partners can, while 'Un-African' refers to the idea that homosexuality is not an African notion or culture, and 'Un-godliness' signifies that the current religions do not perceive same-sex marriages as pleasing to God.

Highly influential politicians, religious and social leaders such as the former president Jacob Zuma had shared his remarks on the topic of same-sex marriage, saying it is a disgrace to the nation and to God. King Goodwill Zwelithini proclaimed that homosexuality can be understood as a system of moral decay. South African politicians are internationally viewed as forward thinking as opposed to their neighbouring countries in Africa on matters relating to the acceptance of the LGBTI community; however, they are also of the view that the notion of the LGBTI community is not an African concept. Reverend Kenneth Meshoe, the leader of the African Christian Democratic Assembly, mentioned in the debate on the Civil Union Bill that it will permit adults to have children who are motherless or fatherless by substituting the natural parent with a legal parent of a different gender. He insisted that government should defend the rights of children by guarding them against the 'narrow interests of groups that want to legally perpetuate a sinful lifestyle' that is not just unnatural and unhealthy 'but that is frowned upon by all traditional, cultural and religious and tribal groups in Africa' (Vincent & Howell 2014:476).

When the LGBTI community wishes to have same-sex marriages, we refer them to biblical texts that consistently emphasise that their union is a sinful act. In a brief explanation of the biblical text of Sodom and Gomorrah in Genesis 19:24–25, one sees the total destruction of the cities as they practiced sodomy. The story of Sodom and Gomorrah has been used to warn those who do not want to accept the biblical texts as the gospel truths. This warning can be seen in Matthew 10:15 where it says In the Good News Bible: 'I assure you that on the Judgement Day, God will show more mercy to the people of Sodom and Gomorrah than to the people of that town'. In the book of Matthew again (11: 24) the same warning is repeated, 'You can be sure that on the Judgement Day, God will show more mercy to Sodom than you'. There are similar texts in the Bible, apart from the quoted two that have used the story of Sodom and Gomorrah as a warning for those who refuse to follow Christianity to begin to atone for their sins and accept the gospel.

It is interesting to the author to observe that the sentiments from the former president; President Jacob Zuma, the late King Goodwill Zwelithini and Reverend Kenneth Meshoe see homosexuality as a disgrace to the nation, a moral decay and that children should be protected from the narrow interests of groups that want to legally perpetuate a sinful lifestyle. The two politicians and leaders, that is, the former President Jacob Zuma and the late King Goodwill Zwelithini are expected to be aware of cultural norms as they exercise their own traditional and cultural practices such as having polygamous relationships and practicing virginity testing on girls in the KwaZulu-Natal region. When they practice what is acceptable to them on matters relating to the traditional Zulu culture, then we refer to them as respecting their culture. This is irrespective of how society may feel about the violation of the human rights of young females who are subjected to virginity testing. It is important to note that this act of virginity testing only applies to girls and not boys.

Reverend Kenneth Meshoe on the other hand has stated that the 'sinful lifestyle' of same-sex marriages is unacceptable. One can pardon his assertions, as a pastor in a church, however, he has adopted the Bible and its texts as literal as they are inscribed. The *lex talionis* rule, also known as the principle of 'an eye for an eye' (Silverman & Vega 1996:48) is a retributive ideology and harsher sentencing practice that is seen in the Hebrew Bible, which is also known by some as the Old Testament. The seemingly harsh criminal laws portrayed

in the Torah (the first five books of the Hebrew Bible) were never mostly applied literally by the society of its origin. Thus, 'an eye for an eye', as known through the lens of the Oral Law, was never literally understood to mean the definite disfigurement of an offender. This rather meant that one will pay or give monetary compensation that will be of the same value as the victim's eye. Reverend Kenneth Meshoe's literal description of what is sinful and what is not may have to be assessed against his understanding of the Bible and its application within society. The retributive ideology or the *lex talionis* rule is not even allowed in today's criminal justice system. In the current penal systems, the philosophy of rehabilitation is emphasised more than the philosophies of retaliation and retribution.

Contrary to the viewpoints of the politicians and leaders, activists and researchers have been trying to host an Africa-wide summit, which is aimed at addressing the insinuations of many African countries that are determined to regard homosexuality as a criminal act. Velthuizen (2012) stated that, in order to address this, a study was conducted by the United Nations (UN) High Commissioner for Human Rights, encapsulating the discriminatory laws, violence and practices based on sexual orientation and gender identity (SOGI) in Africa. The November 2011 report (UN High Commissioner for Human Rights 2011) concluded with a description of the violence and discrimination in all regions that implement structural homophobia through policies, laws and pracitices (Velthuizen 2012).

South Africa had committed to host a regional meeting, which was intended to put emphasis on the UN report and to recommend ways that the UN should tackle the matter from a continental stance.

Judge J.Y. Makgoro, while speaking about Africans in her article 'Ubuntu and the Law', claims that the 'new constitutional dispensation, like the idea of freedom in South Africa, is also not free of scepticism'. Frequently, when crime and criminal activity are endemic, cynics would howl at the absence of ubuntu in society and attach this to the absenteeism of what they interpret as the leniency, which is said to have been conveyed about by the constitution with its embedded Bill of Rights (Mokgoro 1997). The African renaissance that has now turned out to be globally newsworthy, validated the probability that traditional African values of ubuntu have for persuading the progression of a new South African law and jurisprudence (Mokgoro 1997).

The concept ubuntu, similar to many African theories, is not simply outlined. To outline an African concept in a foreign language and from an intangible as dissimilar to a tangible method is to defy the actual quintessence of the African viewpoint and can likewise be above all indefinable. In an exclusive awareness, ubuntu appears as one of those substances that you may be familiar with when you notice it.

Ubuntu has similarly been depicted as a philosophy of life, which in its most essential logic signifies 'personhood, humanity, humaneness and morality'; a simile that defines group commonality where such group cohesion is vital to the existence of communities with a dearth of assets, where the central belief is that '*motho ke motho ba batho/umuntu ngumuntu ngabantu*' which, accurately translated, denotes a person is 'a person through others.' Implying that the individual's entire being is essential to that of the group: this is displayed in anti-individualistic behaviour concerning the existence of the group if the individual is to stay alive. It is ultimately a humanistic coordination towards fellow human beings (Mokgoro 1997).

The significance of the notion, however turns out to be considerably clearer when its social value is emphasised. 'Group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity' have, amongst other things remained demarcated as main social values of ubuntu. As for the extensive character of the idea, its social value will continuously rest on the method and the rationale for which it is influenced by. In consequence its worth has also been regarded as a foundation for a 'morality of co-operation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood', constantly highlighting the qualities of that self-respect in social affairs and performances (Mokgoro 1997).

To acquire a well-ordered society, ubuntu, which had high-quality worth, was an ideal tool to which customary traditional African societies did not require too much of an effort to implement and to practice. This is as a result of these societies having their own old-fashioned institutions, which performed on the basis of complementary values and customs (Mokgoro 1997). The author's entire premise on elaborating Judge Makgoro's viewpoint on the concept of ubuntu is mainly to remind Africans of who we are as a society, despite the changes that may have occurred within our communities. We aspire for an African society where matters of same-sex desires and relationships will not be closeted and silenced as it has been the custom (Msibi 2011:57).

Many countries in the Western world have taken it upon themselves to rid themselves of old-fashioned laws that are imposed on those who engage in same-sex relations. This has however not been the case for African countries as Africans are still executing and oppressing those who are engaging in same-sex relations as practising what is not African. In Malawi, Nigeria, Senegal and Uganda, the punishment imposed on those found engaging in same-sex desires have been sentenced to the harshest of treatments. In the African continent, out of 53 states, in 38 countries it is illegal to engage in 'consensual gay sex' (Msibi 2011:57).

In Africa concepts that have been widely used such as the concept of ubuntu, where a person is a person through others, should be a concept that is used in understanding the LGBTI community. If we are brought up with social values such as 'Group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity'

we ought to be more open to the new norms that our societies are opening up to. None of the people who claim to have desires for people of the same sex are pretending to be the way they are, nor are they doing it because they are doing what the western world is doing. Same-sex desires and same-sex couples within the African community have for the longest of time been closeted and never spoken about it. Politicians, religious groups and society at large would prefer an African society where matters of same-sex desires remain closeted and silenced as it has been done for many years. This is why most African countries, including South Africa, see this as a sinful act against God and this comment comes from a country that has a multitude of laws that are in support of the LGBTI community. Homophobia in African countries is driven by powerful politicians and religious organisations and they have an influence in what happens in society and the cultural beliefs that different countries have. If war torn counties in Africa could use African customs to mend their differences, it is possible that the same can be done in accepting the LGBTI community and what it stands for.

The aim of this article has been to take a closer look at the anti-gay laws that are currently existing in most of the African countries, their concentration on discriminatory and inhumane viewpoint, which has a huge impact on the health and safety of the LGBTI community within the criminal justice cluster and specifically, within the penal system. This part of the article focused on the homophobic and exclusionary measures created by African countries towards the LGBTI community through politics, religion and social viewpoints. If society is disregarding homosexuality as an acceptable norm, then it will be difficult to convince law-makers that the act of same-sex relations has no harm towards others in the community. We elaborated on how disputes have been resolved in societies by using cultural instruments within society. If we work on accepting the LGBTI community, their criminalisation will be non-existent and this would lead to possibilities of lessening the impact of health and safety of the LGBTI community.

Health and safety of the LGBTQI in the criminal justice cluster

The penal structure in South Africa in the early 1900s brought in something totally different and out of the norm. South Africa and its legal system did not develop separately from the Western ways of penitence; therefore, the South African legal system has a European heritage, even though discrimination in Europe was not supported in the early 1600s (Deacon 1996:15).

As soon as Jan van Riebeeck set up the first refreshment post for ships in April 1652 at the Cape of Good Hope, as an official of the East India Company, the company performed under a '*charter*' ratified by the States General of the Republic of United Netherlands. The legal system in use at the Cape at the time was the Roman-Dutch law. The period of the first century and a half of colonial rule in South Africa concentrated less on local economic development, instead, the colony focused on the outpost.

Many years later, in the 1900s, the prison system saw the introduction of the number gangs, which was formulated by the famous Nongoloza Mathebula and Kilikijan. The basis of the number gangs, besides their criminal tactics and activities, was that the number gang was primarily built on the practice of sodomy or homosexuality. Nongoloza's gang was named 28 while Kilikijan was named 27. The number originated from the 2 men (Nongoloza and Kilikijan) and their followers, which Nongoloza had 8 members and Kilikijan had 7 members, thus the 28 and 27 number gangs, thus the mark of the two leaders (Nel 2017:24–25).

Prior to the formation of the number gangs, Nongoloza was found sleeping with another man, and therefore, this made him and Kilikijan fight over the issue, as to whether it was acceptable for men to sleep with other men. While it was eventually settled between Nongoloza and Kilikijan that it is acceptable for men to sleep with other men, after much deliberation, the gang that followed Nongoloza was allowed to practice sodomy and the gang that followed Kilikijan was anti-sodomy. It was too early in the history of penal systems to determine the scourge that the legacy of Nongoloza Mthebula would bring to the health and safety of inmates in the South African penal system. It was also too early to determine that the name Nongoloza Mathebula would resonate with great impact and significance in the South African penal system.

When one looks at the way the White Paper on Corrections in South Africa (Department of Correctional Services 2015) determines categorisation of inmates, treatment, safety and security, it is without doubt that most of the aspects, if not all, were built around the terrifying forces that came with the number gangs.

Sexual violence between men in prison is one of the most unreported forms of assault in South African prisons. The rape of a male prisoner by another is a normal practise of violence. And, some of it, according to the author, can be attributed to the number gangs and its methods of affiliation. Sexual activities in South African prisons vary from one correctional centre to another. The majority of the sexual interactions that are reported are linked to the 28 gang, which is premised on homosexual activity. Their main aim is to collect the so-called *wyfies* (wives) whom they will spoil and defend. The 28 gang separates itself into two categories, the first category being the private line and the second being the blood line. The purpose of the blood line is to be obliged to violence while the private line is more domesticated and expected to offer sex and household services to the fighters. Most of the recruited *wyfies* are usually targeted individuals who become part of a gang through rape. Rape is a form that is mainly used to position an inmate as a *wyfie*. Most of these sexual activities, whether rape or consensual sex, lead to a high rate of HIV and AIDS transmissions in the correctional centres.

The overcrowdedness of prisons in Africa does not assist much in combating or reducing violence. The conditions are ruthless and tough. While little has been carried out in research on most prisons around the African continent, one

cannot easily discern and differentiate between the different prisons in different countries. Overall the critical matters pertaining to these prisons are issues such as health, food, sanitation and amenities. For purposes of understanding how an accused person is handled throughout the criminal justice system, it is vital to understand the nature of the institutionalisation in prisons that unpacks it as part of the whole structure and not an isolated institution of the criminal justice system (Sarkin 2019:2).

In approximately every country in the world, criminalised people and prisoners face an advanced infection rate and interrupted access to treatment and prevention. Criminalising some sexual behaviours and drug use can increase the risk of HIV, tuberculosis and hepatitis infection. Globally, there is a fluctuating number of HIV, tuberculosis and hepatitis incidences amongst incarcerated prisoners and ex-prisoners. This is because of unreasonable laws, policies and policing procedures that continue to detain individuals who suffer from these illnesses and the criminal justice cluster cannot offer them proper treatment when detained. The actions imposed by government and their inefficiency in ensuring humane prison circumstances, creates a violation of human rights to be free of discrimination and cruel and inhuman treatment, to due process of law and to health (Rubenstein et al. 2016:1202).

Jürgens, Nowak and Day (2011:1) in an article 'HIV and incarceration', prisons and detention are of the view that worldwide the conditions of imprisonment are being observed by the UN Special Rapporteur on Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment. The Special Rapporteur practises a decree that is delegated to him by the uppermost human rights body of the UN, the Human Rights Council, to inspect the state of torment and ill-treatment in all countries of the world. He grants commentaries about his conclusions and approvals to the General Assembly in New York and the Human Rights Council in Geneva.

Human rights violations, anti-gay and sodomy laws

In an article titled 'Why the law on sodomy should be repealed', Hubbard (2000) asks a very important question on *what is sodomy*? Sodomy is part of the Roman-Dutch common law taken over by the Namibian government at independence. It is a term relatively known throughout history as indicating all sorts of unnatural sexual offences, including masturbation, oral sex and anal intercourse between people of the same sex or opposite sexes, sexual intercourse with animals (bestiality) and even heterosexual intercourse between Christians and Jews. As time went by, much of the broad description of the term *sodomy* changed, allowing the forbidden activities to be split into three separate crimes in South Africa, that is, sodomy, bestiality and the remaining category of unnatural sexual offences (Hubbard 2000:1).

In 2019, Angola and Botswana united with Mozambique and South Africa as southern African countries that have legalised same-sex relation. However, Malawi and Namibia have kept colonial-era anti-sodomy laws. Namibia's anti-sodomy law was a fragment of Roman-Dutch common law, which is a type of 'law *developed through successive court cases instead of being stated in legislation*' (Currier & Gogul 2020:103).

The Namibian government inherited the *Combating of Immoral Practices Act* of 1980, which dates as far back as 1927. The application of this law in modern day Namibia, as a common-law crime of sodomy applies to anal sex between men, and 'unnatural sexual offences' covers mutual masturbation and 'other unspecified sexual activity between men', such as oral sex.

Namibian politicians misuse anti-sodomy laws to defend homophobic rhetoric in their positioning of 'politicised homophobia'. A method of indoctrination that powers anti-colonial opinions, politicised homophobia portrays same-sex as an unsolicited colonial importation and LGBTI rights as ongoing Western colonialism. Politicised homophobia settles the inconsistency between anti-sodomy laws as a colonial legacy and the current nationalist concept of LGBTI rights as ongoing Western colonialism and activates both notions in service of the state. In a 2008 report outlining the colonial roots of anti-sodomy laws, Human Rights Watch observed how judges, public figures and political leaders have, of late, protected those laws as strongholds of nationhood and cultural legitimacy. Homosexuality, as they now assert, comes from *the colonising West*. What they had disregarded is that the West introduced the first laws, which were meant to enable government to prohibit and suppress it (Currier & Gogul 2020:104). The Namibian state rallies anti-sodomy laws to defend the rejection of giving incarcerated inmates access to condoms, by means of arguing that sodomy is unlawful, therefore inmates have no legal right to condoms. This then puts incarcerated men who have sex with other men at the risk of contracting HIV or AIDS because of legal principles and prison management that does not make any sense.

Msibi (2011) remarked that:

> One element of the prevalent discourse about same-sex desire, or same-sex couples in Africa is the idea that homosexuality – same-sex desire – is a Western import. African leaders seem intent on freeing Africa from this dreadful Western disease. These sentiments have been legitimized by leaders from Namibia, Zambia, Kenya, Zimbabwe, and, as shown above, Malawi and Uganda. (p. 62)

While the Constitution of South Africa sees 'all people are equal before the law', the challenge is that the equality that will be attained will be more of a fronting than a certainty if societies still lack knowledge because of historical inequalities. It would be essential to have an enlarged association of the LGBTI community representation, wherein the underprivileged and deprived will be eligible for information and representation that will talk about issues from historical facts, the health and safety of individuals and how they can engage a particular government to understand their

standpoint. This will assist in the LGBTIs' ability to express themselves widely in order to attain justice. In this situation alternate processes may be agreed to and solutions, which may affect justice will be more reachable (South African Law Commission 1997).

The United Nations Standard Minimum Rules on the Treatment of Prisoners

The UN Standard Minimum Rules for the Treatment of Prisoners, which is now called the Nelson Mandela Rules, point out the variance in legal, social, economic and geographical circumstances in the world and therefore all of the rules may be applied differently in different spaces and at all times. Their main purpose is to *serve* to inspire a boundless effort to demolish practical difficulties in the path of their purpose, knowing that they indicate, as an all-encompassing, the least positions which are recognised as suitable by the UN.

Basic principles

Rule 1

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times. (p. 8)

The Resolution adopted by the General Assembly on 17 December 2015 [on the report of the Third Committee (A/70/490)] 70/175. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)

The General Assembly was guided by the principal purposes of the UN, as set out in the Preamble to the Charter of the UN and the Universal Declaration of Human Rights. It was inspired by the determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, without distinction of any kind and in the equal rights of men and women and of nations large and small, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained to promote social progress and better standards of life with greater freedom.

The resolution 68/190 took into consideration the recommendations of the Expert Group with regard to the issues and the rules of the Standard Minimum Rules that had been identified for revision in the following areas:

1. 'Respect for prisoners' inherent dignity and value as human beings (rules 6, para. 1; 57–59; and 60, para. 1)
2. Medical and health services (rules 22–26; 52; 62 and 71, para. 2)
3. Disciplinary action and punishment, including the role of medical staff, solitary confinement and reduction of diet (rules 27, 29, 31 and 32)
4. Investigation of all deaths in custody, as well as of any signs or allegations of torture or inhuman or degrading treatment or punishment of prisoners (rule 7 and proposed rules 44 bis and 54 bis)
5. Protection and special needs of vulnerable groups deprived of their liberty, taking into consideration countries in difficult circumstances (rules 6 and 7)
6. The right of access to legal representation (rules 30; 35, para. 1; 37; and 93)
7. Complaints and independent inspection (rules 36 and 55)
8. The replacement of outdated terminology (rules 22–26, 62, 82 and 83 and various others)
9. Training of relevant staff to implement the Standard Minimum Rules (rule 47)' (Anon. 2016).

Standard Minimum Rules for the Treatment of Prisoners Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

They regard categorisation as follows:

Separation of categories

- 'The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus, men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate.
- Untried prisoners shall be kept separate from convicted prisoners.
- Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence.
- Young prisoners shall be kept separate from adults' (United Nations n.d.).

It is important for all African penal systems to follow the guidelines as provided by the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). This will assist greatly in ensuring that the prisoners are kept safe and secure behind bars and avoid any unnecessary attacks on other prisoners. Most African countries have not signed a treaty with the UN Standard Minimum Rules for the Treatment of Offenders and that is worrisome, to say the least. It is also important that the UN on the treatment of prisoners consider that we have a different kind of prisoner, which will need special care and placement once incarcerated. The LGBTQI community has never been thought of when these rules are made and therefore it becomes difficult to

separate them accordingly once they enter the criminal justice cluster.

The White Paper on Corrections in South Africa and the categorisation of inmates

The White Paper on Corrections in South Africa (Department of Correctional Services 2015) sees the safety and health of offenders as part of rehabilitation:

The safety and health of inmates

- 'In order to ensure the safety and health of inmates the department has to provide a safe and secure environment. Inmates are dependent on the department to provide for their safety as they are deprived of some freedom of choice, freedom of association and of freedom of movement.
- The constitution guarantees the freedom and security of the person, which includes:
  - the right to be free from all forms of violence from either public or private sources;
  - not to be tortured in any way; and
  - not to be treated or punished in a cruel, inhuman or degrading way.
- By its very nature, incarceration can have a damaging effect on both the physical and mental well-being of inmates and the department is thus obliged to provide for these special health needs of inmates in its institutions. This also requires that those providing this healthcare be trained in the specific health needs and health problems encountered in a correctional centre environment. Inmates must also have the ability to seek healthcare solutions that are appropriate and attainable in a correctional centre environment. The responsibility of the department is not just to provide healthcare, but also to provide conditions that promote the well-being of inmates and correctional officials'.

It is important to note that the White Paper on Corrections in South Africa (Department of Correctional Services 2015) says little about the incarceration of the LGBTI community. As a limitation to my study, I note that there are aspects within the LGBTI community that the author could have outlined such as prostitution of gay people in male prisons and their health and safety in prostitution. How the Department of Correctional Services handling such a situation as it brings an imbalance in the system, no one knows. The incarceration of inmates in general brings about the limitation of rights. Rights such as conjugal rights are an example of the limitations that the penal system in South Africa is compelled to implement. When there is prostitution in a male prison, one should wonder how that is handled or managed, as prisoners are not at all interested in same-sex desires and if prostitution is not controlled, other prisoners may begin to require their conjugal rights.

Recommendations for transformation

The Constitution of South Africa, together with the Bill of Rights, is grounded on the norm that 'all people are equal before the law'. This is what Potgieter and Reygan (2012) translate as 'full citizenship of sexual orientation' is what is needed within all African countries. Potgieter and Reygan (2012) have pointed out that 'sexual minorities', such as the 'lesbians, gays, bisexual, transgender and intersex' people have found themselves being continuously exiled from society, regardless of the legislative order that is provided for the protection of their rights by the Constitution of South Africa. The term 'sexual minority' as Potgieter and Reygan (2012) further asserted, should not be misunderstood as a lack in number, however the term represents the lack of access to rights of full citizenship. The high rate of violent crimes against the LGBTI community, demonstrates that the LGBTIs are not identified by 'fellow citizens' as 'having the right to full citizenship'. This lack of identification of full citizenship is an exclusionary measure created by members of society who refuse to regard the LGBTI as full citizens. This term of sexual minorities is generally used in literature in classifying lesbian, gay, bisexual and transgender individuals. It is evidently clear therefore that citizenship ought to be inclusive in nature and excluding sexual minorities within any system of society in general as this may lead to social injustice.

In countries such as Cameroon, homosexuality is strongly attacked by all spectrums of social strata. Lawyers defending lesbians, gays, bisexuals and transgender individuals are usually threatened with death to withdraw from defending homosexuals (Linonge-Fotendo 2013:98). The fight to prove that homosexuality is an African practice and therefore deserves to be accepted as one of the cultural norms that were somehow hidden and closeted for reasons known to the colonisers, requires great attention. Books such as *Boy-wives and Female Husbands Studies of African Homosexualities* edited by Stephen O. Murray and Will Roscoe (1998) has a wealth of knowledge on homosexuality throughout the African continent, captured by anthropologists (Murray & Roscoe 1998:14). The book also celebrates, in my view femininity as a woman soldier who could not be defeated by the Portuguese army for ages is spoken about in relation to her sexuality and bravery as she led her army that defeated the Portuguese for many years (Murray & Roscoe 1998).

It is therefore recommended that African countries should align themselves within a wider conversation that speaks about understanding the history of Africa in relation to the LGBTI community. African countries can only transform if they begin to accept that homosexuality has always been part of their social structure, however, this was a hidden fact. The more the issues of inhumane laws and anti-sodomy laws, including the treatment of homosexuality can be discussed, the better it will be for Africa to transform its legal instruments and consider the LBGBTI community as part of the wider community. Issues of health and safety have come out strong in matters relating to penal systems. HIV, incarceration and the conditions of imprisonment have been observed by the UN Special Rapporteur on Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment. For purposes of transformation, African countries should have

access to these commentaries that are compiled by the Special Rapporteur, in order to correct their mistakes in the handling and violation of human rights for the LGBTI community who are incarcerated within the penal systems of the criminal justice cluster in the different African states.

Conclusion

In conclusion, although the author had every intention to go through as much data as possible from sodomy and antigay laws in Africa, it is difficult to condense in one article. Especially, when one focuses on issues relating to sexual orientation: the rights of the LGBTI community, and their health and safety. Countries such as Namibia are very confusing on their application of the sodomy law and its enforcement. And, just like any other African country, they are set on the principle that homosexuality is un-African, regardless of the research that has been carried out to prove otherwise. Despite having all legislation to protect the LGBTI community, South Africa still suffers from the disparaging homophobic tendencies from communities who are unsympathetic to the plight of the LGBTI community. Human rights violations against the LGBTI community in Africa has a horrible history, which includes death as a sentence or capital punishment in some countries. While the article has discussed the treatment, categorisation, and health of the LGBTI community within the criminal justice cluster and the application of the UN Mandela Rules on the Treatment of Prisoners, the prisoner's physical health and safety once incarcerated, is not guaranteed. It is important to note that the UN Mandela Rules on the Treatment of Prisoners and the White Paper on Corrections says little about the incarceration and handling of the LGBTI community. As a limitation to this study, the author notes that there are aspects within the LGBTI community that the author could have outlined further, such as prostitution of gay people in male prisons and their health and safety in prostitution. The aim of this review article was to point out challenges that are created around the LGBTI community when they go through the criminal justice system, as legislation and the anti-sodomy laws are not favourable to their sexual orientation and therefore this may have a huge impact on their health and well-being when they are locked up in prison. Countries such as Namibia are in denial and refuse to give inmates condoms, as they state that sodomy is unlawful, therefore inmates have no legal right to condoms. This thought process will lead to heightened numbers of HIV infected inmates and will therefore create health risks for all other inmates who are incarcerated in African penal systems. It is crucial for Africa to resolve its issues by tapping into the African cultural norms and systems that have assisted them in times of civil wars where many had lost their lives.

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J.M.M.-M. is the sole author of this article.

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