

## WHY THE LAW ON SODOMY SHOULD BE REPEALED 2000

*In honour of Lesbian, Gay, Bisexual and Transgender Awareness Week, Dianne Hubbard of the Legal Assistance Centre presents a legal discussion of the common-law crime of sodomy.*

“What is sodomy?” The question recently asked in Parliament is not actually as strange as it sounds. “Sodomy” is part of the Roman-Dutch common law inherited by Namibia at independence. Historically, it was the legal label given to all manner of “unnatural” sexual offences -- including masturbation, oral sex and anal intercourse between people of the same sex or opposite sexes, sexual intercourse with animals, and even heterosexual intercourse between Christians and Jews.

Gradually, much of the broad content of “sodomy” fell away, and the prohibited activities were split into three separate crimes in South Africa: sodomy, bestiality and a residual category of “unnatural sexual offences”. Today the common-law crimes of “sodomy” and “unnatural sexual offences” criminalise only sexual contact between males. Anal intercourse between males is all that is left of the once wider definition of “sodomy”, but “unnatural sexual offences” covers mutual masturbation, “sexual gratification obtained by friction between the legs of another person” and other unspecified sexual activity between men. None of these sexual acts are illegal if they take place between a man and a woman, or between two women.

Why was sexual contact between women not criminalised? The answer is not clear. It was perhaps part of the general marginalisation of women. There are few reported court cases dealing with lesbians in South Africa or Namibia at all, and none in which women have been prosecuted for sexual acts with other women. Sexual activity between females simply seems to have received less attention from the predominately male lawmakers of the past.

Namibia’s new Combating of Rape Act covers a wide range of intimate sexual contact in circumstances that involve force or coercion, including oral sex, anal sex and genital stimulation between people of the same sex or different sexes. It protects children below the age of 14 against all such sexual activity, while the Combating of Immoral Practices Act gives additional protection to children up to age 16. So the common law crimes of sodomy and “unnatural sexual offences” are now relevant only to sexual acts between consenting adult men.

Our Supreme Court is still in the process of deciding whether or not the Namibian Constitution gives protection against discrimination to gays and lesbians. This issue arose in the Frank case, which involves the lesbian partner of a Namibian citizen who applied for permanent residence. The Ministry of Home Affairs said that it did not consider the couple’s lesbian relationship in its decision to refuse the request for permanent residence. The High Court said that it should have considered the lesbian relationship as a positive factor in favour of the application. The government appealed this decision to the Supreme Court, which has heard argument but not yet given judgement. This case is quite likely to address the issue of whether the provisions of our Constitution on equality and dignity protect the rights of gays and lesbians in Namibia.

But, regardless of what the Supreme Court decides in the Frank case, the law against consensual sodomy is quite likely unconstitutional. Firstly, even in the unlikely event that our Constitution is not found to protect the rights of gays and lesbians directly, the current law violates the equality provisions of Article 10 because

it treats men differently than women. Homosexual activity between women is not criminally punishable, but homosexual activity between men is – a clear case of sex discrimination with no logical justification.

Secondly, there is the right to privacy. Article 13 of our Constitution protects persons in the privacy of their homes, correspondence and communications. Since the Constitution protects us all against the spectre of hidden cameras in our bedrooms or law enforcement officers hiding in the wardrobe, how would the police go about enforcing a law which criminalises consensual sodomy? It would be reminiscent of the old apartheid days, when the South African Immorality Act gave the police authority to come bursting into bedrooms to check under the covers for “immoral” sexual intercourse between persons of different races – but that was back in the times when no one had Constitutional rights, and repression was the order of the day.

True, there is a proviso to Article 13 which makes exceptions to the right of privacy for purposes of national security, economic well-being, the protection of health or morals, the prevention of disorder or crime and the protection of the rights or freedoms of others. It is this exception which makes it possible for members of Namibia’s central intelligence service (with judicial authorisation) to put a tap on the telephone of someone who is suspected of treasonous activities. But it is doubtful if a private act involving only the two adults who consented to it would fall within the Constitutional exception. Surely private and consensual sexual encounters between adults are at the very core of the concept of any meaningful right to privacy.

And what if two consenting males engaged in sexual activity in public? They could be charged with the crime of public indecency, in the same way as any heterosexual couple who showed a similar lack of discretion. There is no need to preserve any portion of the law on sodomy for preventing the public display of intimacies better conducted in private settings.

The law on sodomy is seldom enforced with respect to consenting adults, but this does not mean that it sits benignly in the law books dying of disuse. It has been recently cited by prison officials in Namibia as a justification for refusing to provide condoms to prisoners to prevent the spread of HIV. The argument is that since consensual sodomy is illegal, providing condoms might make prison officials accessories to crime.

More broadly, according to former South African Constitutional Court Judge Edwin Cameron, the existence of the law places gay men in the position of “unapprehended felons”. It entrenches stigma and encourages discrimination in other areas of life. According to the European Court of Human Rights, criminal sanctions against homosexual acts “reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals”.

The law on sodomy also sits very oddly beside Namibia’s Labour Act, which makes it illegal for employers to discriminate against employees on the grounds of sexual orientation (section 107). This law was widely debated amongst representatives of government, trade unions and employers, and then passed by Parliament and signed by the President in 1992. Can it really be the case that employers may not discriminate against homosexuals while the criminal justice system may? That is a strange anomaly indeed.

The Constitutional Court in South Africa ruled in 1998 that the common-law crime of sodomy violates the South African Constitution, stating that its purpose is “to criminalise private conduct of consenting adults which causes no harm to anyone else” simply because such conduct “fails to conform with the moral or religious views

of a section of society”. In the court’s view, the crime has a grave effect on the rights and interests of gay men and deeply impairs their fundamental dignity.

The South African Constitution, unlike the Namibian one, specifically prohibits unfair discrimination on the grounds of sexual orientation in its equality provisions. But the South African court also found that sodomy violates Constitutional rights to dignity and privacy, which have clear Namibian analogies.

The crime of sodomy has been repealed in many countries, including Australia, New Zealand, Canada, England, Germany and most of Western Europe. Both Northern Ireland and Ireland were forced to repeal laws criminalising consensual sodomy by judgements in the European Court of Human Rights. (The United States presents an infamous exception to this international trend, as a result of a closely-decided and widely-criticised Supreme Court case which found that laws forbidding sodomy are not impermissible under the US Constitution.)

The recent South African case invalidating the South African law on sodomy contains a ringing endorsement of equality as “equal concern and respect across difference”. Equality does not mean that we should all have uniform beliefs and behaviours. In the words of Judge Sachs, at the very least equality “affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment”. At best “it celebrates the vitality that difference brings to any society”.

Namibia is a society composed of people with a wide range of beliefs. There are Namibians who believe that sex between men and women outside of marriage is sinful. There are Namibians who believe that contraception is wrong because the purpose of all sexual relationships is procreation. Namibians have a right to beliefs such as these, but our law does not impose these beliefs on the entire population. People who believe that homosexuality is wrong are also entitled to their opinions, but they do not have the right to insist that the state must endorse their beliefs and force them on society at large.

The fact that the laws on sodomy is still in force adds to the atmosphere of discrimination against gays and lesbians that has pervaded recent political discourse. As a nation, Namibia can be strong only if it accepts the fact that it is a diverse country which must encourage a culture of respect and tolerance – including respect and tolerance for gays and lesbians. What remains of the law on sodomy (and the law on “unnatural sexual offences”) is a manifestation of extreme intolerance and should be repealed.

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**CAPTION FOR PHOTOGRAPH:** This photograph shows a musical instrument called an *ekola*. According to information collected by musicologist Percival Kirby in the 1940s, this instrument was played by sodomites in Kwanyama communities. It was reportedly played as an accompaniment to the “song of the sodomite”, which the *ekola* player sang along with a chorus. The *ekola* was also encountered along the Angolan-Namibian border in the 17<sup>th</sup> century by the traveller Cavazzi, who published a drawing of the instrument in 1694. (Information from Percival R Kirby, “A Secret Musical Instrument: The Ekola of the Ovakuanyama of Ovamboland”, *South African Journal of Science*, January 1942, pp 345-351.)