

Claire Westman

Dr C Westman, Free
State Centre for Human
Rights, University of the
Free State.

E-mail:
cforgan@gmail.com

First submission: 22 July 2021

Acceptance: 5 April 2022

Published: 31 July 2022

DOI: <http://dx.doi.org/10.18820/24150479/aa54i1/1>

ISSN:0587-2405

e-ISSN: 2415-0479

Acta Academica -
2022 54(1): 1-20

© Creative Commons
With Attribution (CC-BY)



Precarity, ungrievability, and thinking beyond the law: a framework for understanding the position of LGB individuals in South Africa

Drawing primarily on the work of Judith Butler and Drucilla Cornell, this paper aims to provide a theoretical framework for understanding the position of sexual minorities in South Africa. This will be done particularly in light of the violence, discrimination, and marginalisation that is experienced by, predominantly, black gay, lesbian, and bisexual individuals from poorer South African communities. In so doing, the paper also explores how the marginalisation of and violence against LGB individuals play an important role in national identity development and the upholding of a hetero-patriarchal social order. The goal is thus to create an understanding of why, despite legal and constitutional rights, LGB individuals continue to be marginalised, violated, and discriminated against in their everyday lived experiences, and further, why, because of this socio-symbolic positioning, the law cannot necessarily guarantee these rights or protections.

Keywords: LGB rights, South African Constitution, sexual violence, grievability, legislation

Introduction

Drawing primarily on the work of Judith Butler and Drucilla Cornell, this paper aims to provide a theoretical framework for understanding the position of sexual minorities in South Africa. This will be done particularly in light of the violence, discrimination, and marginalisation that is experienced by predominantly black gay, lesbian, and bisexual individuals from poorer South African communities. The paper will further briefly explore how the marginalisation of and violence against sexual minorities play an important role in national identity development and the upholding of a hetero-patriarchal social order. The goal of this paper is not to provide a thorough analysis of the jurisprudence around sexual orientation or the rights granted to sexual minorities, or to provide specific guidelines for how to improve such rights and protections. Instead, the paper aims to create an understanding of why, despite legal and constitutional rights, LGB individuals continue to be marginalised, violated, and discriminated against in their everyday lived experiences. Consequently, the paper will not delve deeply into matters around jurisprudence; rather it will only provide some broad context for understanding the historical and current positioning of sexual orientation and how this relates to the socio-symbolic positioning of gay and lesbian individuals in South Africa. This paper will also focus specifically on matters around sexual orientation and will thus focus on gay, lesbian, and bisexual individuals (sexual minorities) rather than on LGBTQIA+ communities more broadly. This is because matters related to sexual orientation and gender identity and expression vary considerably and it is beyond the scope of this paper to address how discrimination and violence differently affect all of these varying communities. In addition, I will refer specifically to issues related to homosexuality and rights based on sexual orientation, which do not necessarily apply to alternative gender expressions and identities.

As is generally well known, since the inception of democracy, South Africa has adopted what is often considered an exemplary approach with regards to the rights, protections, and freedoms afforded to LGBTQI individuals and has enshrined these within the Constitution¹. The South African approach to LGB rights is considered particularly exemplary when considering the approaches to and treatment of LGB individuals in other parts of the African continent. The legislation relating to

1 There is much debate around the Constitution as a form of social contract that upholds hierarchical systems (based on race, gender, and sex) and the racial bifurcation of South African society. While these are important and necessary discussions, thorough explications of these are beyond the scope of this paper. As such, within this paper, I will focus on the promise of the Constitution and briefly mention some of the criticisms and limitations of the Constitution. For detailed critiques of the Constitution, see, for example, Du Toit (2016), Adams (2018), Ramose (2007), and Madlingozi (2017).

marginalised sexualities and gender expressions varies considerably across the African continent, but the overarching approach tends towards condemnation and prosecution of LGB individuals. Various African countries maintain laws that criminalise homosexuality and punish homosexual activities and behaviour, as well as non-heteronormative gender expressions, with lengthy prison sentences and in some cases even the death penalty. A notable statistic emerging from a report compiled by The International Lesbian, Gay, Bisexual, Trans, and Intersex Association (ILGA 2020) shows that of Africa's 54 countries, same-sex relations are only legal in 26 countries and are punishable by death or lengthy prison terms in countries such as Uganda, Zambia, and Somalia. These statistics are also prone to changing as countries alter their stances on LGB rights, and in some instances revoke rights that were previously afforded to LGB communities. In this sense, the legislation and constitutional protection afforded to LGB communities within South Africa is exemplary. Furthermore, these rights and protections are not only exemplary within the African context, but also on a more global scale where such rights and protections are very often not adopted or implemented. Aside from the constitutional protections afforded to LGB individuals within South Africa on a national level, there are also several other legal instruments which aim to ensure equality and to protect the rights of all individuals across Africa on a continental level. These include the Maputo Protocol; the African Charter on Human and Peoples' Rights; and the Africa Charter on Democracy (Izugbara et al. 2020).

It is important to note that while the punitive and seemingly anti-liberal and exclusionary laws adopted by many African countries are greatly criticised, largely, by Western countries, many (if not most) of these laws are, in reality, the lingering result of puritanical Christian, homophobic, and racist laws that were instated in Africa by colonial powers. That is not to imply that pre-colonial Africa was necessarily free from homophobic and heteronormative practices, beliefs, and ideologies, but rather that the laws that are now so condemned by much of the West stem from colonialism and have been uncritically adopted by post-colonial African countries (Judge 2018). As a result of these colonial-era laws, homosexuality has misguidedly come to be recognised as unAfrican and a 'threat' to African values (Ratele 2013: 143; Brown 2012: 51 and Muholi 2004: 119). Consequently, appeals to more liberal legal approaches around sexual orientation are often viewed as neo-colonialism or neo-liberalism. South Africa has moved away from these colonial laws; however, the sentiments around homosexuality still linger. As such, within South Africa, it is also thought that homosexuality is unAfrican and thus despite the progressive laws, discrimination against gay, lesbian, and bisexual individuals is rife. Evidently, even where rights and protections are legally afforded to sexual minorities by the national government and these more far-reaching legal instruments, discrimination and violence persist.

In order to understand the deeply rooted abjection and demonisation of LGB individuals, I will draw on the work of Judith Butler related to grievability and precarity. Butler asserts that certain individuals or communities are positioned as grievable while others are considered un-grievable. Those who adhere to hegemonic norms and who fall into a specific category of people are grievable, meaning that their lives matter, and they are thus worthy of rights. Those who are un-grievable, however, are not worthy of rights and protection and their lives do not matter because they fall outside of the dominant socio-political regime. Similarly, LGB individuals are in a position of precarity as a result of the intersection of race, sex, sexuality, and socio-economic positioning, combined with South Africa's historical context. Because sexual minority individuals are in a state of precarity, they are more vulnerable to marginalisation, poverty, and violence (both personal and systemic). In fact, these states of un-grievability and precarity are reinforced through violence, particularly sexual violence, as has come to be seen in the South African context.

While discrimination and violence against LGB people is not a new phenomenon, there has been an alarming number of murders and crimes perpetrated against gay, lesbian, bisexual, and transgender individuals recently. Between mid-February and May 2021 alone, there were at least eight murders of gay, lesbian, and transgender individuals in South Africa (Harrisberg 2021). Similarly, studies have shown that approximately ten lesbian women are raped per week in South Africa – some studies, in fact, suggest that this number is in Cape Town *alone* – in an attempt to 'cure' them of their homosexuality and to punish them for their defiance of heterosexual norms (ActionAid 2009). Violence can, therefore, be understood as a means through which to uphold and enforce heteropatriarchal norms systematically and strategically. Additionally, violence is used as a way to determine the national character of democratic South Africa, as will be discussed in more detail throughout this paper.

The positioning of LGB individuals as un-grievable

Since the rights of LGBTQI individuals are legally and constitutionally adopted, and yet these rights are to a large extent violated on social and personal levels, it is important to understand the more deeply rooted reasons for the violence and discrimination which is experienced within these communities. The work of Butler provides one perspective into why it is that gay, lesbian, and bisexual individuals are marginalised and victimised.

To begin to understand the notions of grievability and precarity, Butler, using a Lacanian perspective of the person, explains that all humans exist as an 'I', a self,

through their relationality with others.² That is, the 'I' cannot and does not exist in isolation. There can be no 'I' without an other from which to differentiate itself and from which to gain meaning. We are, therefore, necessarily social beings, whose never fully-formed-selves arise within a community, characterised by political, social, and historical contexts. Butler (2003: 15-16) states:

Constituted as a social phenomenon in the public sphere, my body is and is not mine. Given over from the start to the world of others, it bears their imprint, is formed within the crucible of social life; only later, and with some uncertainty, do I lay claim to my body as my own, if, in fact, I ever do.

We are all, thus, interdependent and "implicated in lives that are not our own" (Butler 2003: 17) and as such, are politically constituted through our sociality and relationality. It is precisely this relationality that leaves one vulnerable to others. For Butler (2003: 16), as bodily beings, we are "already given over". That is, we are from the start attached to, and also exposed to, others. It is through being bound to others that the self is constituted; however, through these relationships, the self is exposed to vulnerability as we are "receptive to [others] in ways that [we] cannot fully predict or control" (Butler 2012: 141). Because of this vulnerability, we are not only constituted by others, we are also dispossessed by them (Butler 2003: 14). Our subjectivity and humanity can be denied and stripped away by those very same others who are otherwise bringing our subject status and personhood into being.

Butler refers to this ontological state of vulnerability as precariousness. Precariousness is something that all humans share; it is the human condition which makes us vulnerable to others and to the larger world, and through which we come to be politically constituted (Butler 2004: 130 - 135). This state of precariousness means that we have to constantly negotiate exposure to those we know and those we do not know (Butler 2011: 386). However, while we are all in the ontological condition of precariousness, social, political, economic, and historical contexts make certain individuals even more vulnerable to violence, exclusion, and abjection. This increased vulnerability is what Butler terms 'precarity'.

Consequently, for Butler, it is important that precarity is distinguished from precariousness. Precarity refers to the ways in which some groups of people are made politically and thus contingently more precarious or vulnerable than is called for by the ontological conditions of personhood (Butler 2004: 134-135,

2 Butler uses 'Other' (capitalised) to refer to those who are apart from ourselves as other subjective beings. I will use 'other' for this same purpose, as I will use 'Other' (capitalised) to refer to those who are marginalised and made abject 'Others' through various systems and ideologies.

139; Butler 2011: 383-386). Precarity therefore implies that one cannot exist independently of society but, simultaneously, this sociality and interdependency makes some people particularly vulnerable to “statelessness, homelessness, and destitution under unjust and unequal political conditions” (Butler 2012: 148). Or as Butler (2009: ii) succinctly explains:

precarity designates that politically induced condition in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence, and death. Such populations are at heightened risk of disease, poverty, starvation, displacement, and of exposure to violence.

Political orders are set up to protect and provide for all citizens (at least to some extent), and thus to minimise the conditions of precarity (Butler 2009: ii). However, as is clearly the case, within most, if not all societies, there are those who are cast as abject Others and who are in a state of precarity due to the intersection of various socio-political, economic, and historical conditions.

Furthermore, Butler (2009: ii) asserts that precarity and gender norms are intimately linked. Those who conform to and uphold gender norms are at less risk of precarity, while those who challenge or defy such norms are more vulnerable to precarity. Butler (2009: ii) states:

Gender norms have everything to do with how and in what way we can appear in a public space; how and in what way the public and private are distinguished, and how that distinction is instrumentalized in the service of sexual politics.

Consequently, those who transgress gender norms are at greater risk of discrimination and violence. As is seen in South Africa, despite the existence of legal instruments that aim to protect members of LGB communities, such individuals are in a state of precarity and are exposed to discrimination, harassment, and violence, not only at the hands of other individuals within their societies, but also at the hands of state role players, such as the police³ and political leaders.⁴

3 For example, “[i]n a poll of survivors of homophobic hate crimes in the Western Cape, 66% of women said they did not report their attack because they would not be taken seriously. Of these, 25% said they feared exposing their sexual orientation to the police and 22% said they were afraid of being abused” (ActionAid 2009).

4 One example of this is when then Minister of Arts and Culture Lulu Xingwana was asked to speak at the *Innovative Women in Arts* exhibition held at Constitution Hill in 2009. When Xingwana saw Zanele Muholi’s photographs depicting lesbian women, she walked out of the exhibition without presenting, claiming that the photographs were immoral, offensive, and went against nation-building (see Thomas 2010; Smith 2010).

Related to precarity, Butler adds that certain lives are considered liveable and grievable, while others are considered as not worthy of grief. As with precarity, the grievability of an individual or group is contextually and historically bound. Butler (2011: 383) explains that “the liveability and grievability of lives are distributed differentially”, and as such some are deemed “destructible” and “ungrievable” within certain social orders (Butler 2011: 383). The grievability of individuals is, again, determined by the prevailing hegemonic social order, and, consequently, it is those who conform to deeply entrenched hegemonic norms, such as gender norms, who are considered most grievable. For example, within a capitalist, patriarchal social order, white, heterosexual men are generally grievable, while those who do not conform to the logic of heteronormative patriarchy, such as black lesbian women, are ungrievable. Those who are ungrievable are, according to Butler (2003: 22), unreal in that they are in a way not human. That is, “they fit no dominant frame for the human” and are consequently “not quite lives” (Butler 2003: 23-24).

Additionally, Butler asserts that violence against those deemed ungrievable does not matter because they are already considered abject and monstrous. Violence against those who are already positioned as unreal and dehumanised “fails to injure or negate those lives since those lives are *already* negated” (Butler 2003: 22; emphasis added). At the same time, however, those who are unreal continue to persist and remain animated (Butler 2003: 22). Therefore, they must be repeatedly negated, and violence acts as one of the primary ways through which this negation occurs. Butler (2003: 22) argues that the Other becomes derealised as it is neither dead nor alive. And, since the ungrievable are already unreal and derealised, the loss of their lives is not grievable because they were not considered lives to begin with (Butler 2003: 22).

However, the “physical violence that in some sense delivers the message of dehumanisation” (Butler 2004: 25) is rooted in the socio-political and cultural fabric of the society. That is to say that violence arises as a result of entrenched norms and ideologies that already position certain lives as ungrievable and unreal. The lingering effects of racist, sexist, and puritanical colonial impositions, combined with the heteronormative patriarchal foundation of contemporary South Africa, has led to LGB individuals being among those considered (most) ungrievable, and therefore (most) unworthy of rights, recognition, and protection. For example, based on the intersections of race, gender, and sexual orientation, it could be argued that black lesbian women are among those who are most exposed to precarity within South Africa based on their social and political situatedness, thereby making them ungrievable and their subjectivity even more vulnerable. Lesbo-phobic rape is an example of a violent means through which this precarity is cemented and this stripping away of subjectivity is carried

out. The violence is carried out on the body, but its effects are felt on multiple levels. In other words, while the physical effects of lesbo-phobic rape can be and often are, obviously, detrimental, this 'form' of rape is also used to symbolically reinforce the dehumanisation and ungrievability of lesbian women, and as a tool to communicate to the rest of the lesbian community that their defiance of heteropatriarchal norms will be punished. Through this, these hegemonic norms are reinforced and upheld, and the ungrievability of LGB individuals is cemented as they are pushed to the furthest margins of society.

In this way, violence is used as a form of 'self-defence'; however, not necessarily defence of individual selves, but rather in the service of the nation or hegemonic socio-political order as a 'self'. Butler (2020: 12) asserts that:

a 'self' can function as a kind of regime, including as part of its extended self all those who bear similitude to one's color, class, and privilege, thus expelling from the regime of the subject/self all those marked by difference within that economy.

Violence committed against LGB individuals can thus be understood as a form of self-defence used by the hetero-patriarchal regime in order to protect its ideologies and to ensure the derealisation and dehumanisation of those who do not conform to its logic. Violence is used to form the boundaries⁵ between those who are grievable and whose lives have value and meaning and those who are ungrievable⁶. Through violence, the ungrievable are pushed to the margins of society, while at the same time this expulsion serves to reinforce who falls within those margins, that is, who fits within the boundaries of legitimate society.

It can be understood, then, that violence against, and exclusion of, LGB individuals plays an important role in determining the borders of hegemonic patriarchal society and in the maintenance of a nation that is founded on hetero-patriarchal values and ideologies. Again, it can, therefore, be argued that this violence is systematically employed in the service of the self-defence of a particular national identity. Furthermore, it could be argued that positioning

-
- 5 See also Ahmed's (2000, 2005) discussions around the ways that violence functions to determine "skin of the community". That is, how violence constitutes who belongs within the community and who falls outside of the legitimate borders of the community, who must be repelled as abject from the boundaries of the body politic as "matter-out-of-place" (Ahmed 2005: 103) within a cultural discourse that privileges heterosexuality.
- 6 De Sousa Santos (2017: 251) similarly suggests that violence is used to separate those who are human from those who are not 'fully human'. He refers to the distinction between the 'fully human' and the 'not fully human' as the abyssal line. He further argues that the fully human can claim rights, while excluded groups on, what he calls the colonial side of the line, "cannot realistically claim rights because sometimes they are not even fully human" (De Sousa Santos 2017: 251).

LGB individuals as un-grievable plays an instrumental role in contemporary South Africa as it delineates who is and is not a legitimate member of the (fairly) new democratic socio-symbolic political order. However, we must remain cognisant of the fact that LGB individuals are in a state of precarity, and their lives considered un-grievable within contemporary South Africa because of the ways in which they were *already* positioned as such prior to democracy. In other words, LGB lives were already un-grievable as a result of the puritanical, racist, and heteronormative ideologies and values that were introduced into South Africa by colonial forces (and that may have existed prior to colonialism). Again, that is not to excuse the current dispensation for the upholding and reinforcing of such systems and ideologies, but rather to say that the un-grievability of LGB lives is based in deeply rooted historical and colonial foundations that need addressing if such individuals are to be considered grievable and worthy of rights, equality, and protection.

Drawing from this, the question becomes, if members of sexual minority communities are already marginalised, dehumanised, and considered un-grievable, and therefore not worthy of the same considerations granted to grievable/legitimate citizens, can there be any possibility of their rights being upheld or equality achieved even where these are enshrined constitutionally or through other legal instruments?

LGB rights and nationhood

As discussed, going into democratic South Africa, the sentiments towards LGB people were already largely negative. Such individuals were cast as monstrous, unruly, and unnatural. This is reminiscent of the kind of language used to refer to the black population under colonial and apartheid rule and which was used as justification for their subordination, enslavement, and persecution. While gay rights were ultimately included in the 1996 Constitution, the road to this inclusion was one that involved contestation and debate,⁷ which seemingly alluded to the sentiments held towards LGB individuals at the time, and which have arguably continued into the democratic nation. What is particularly telling is that most of the opposition to the inclusion of 'sexual orientation' arose from the Public Participation Programme, which formed part of the Constitution's drafting process. As Christiansen (2016: 583) explains, the majority of this opposition came from fundamentalist Christians and was based on their "notions of sexual morality" (Christiansen 2016: 583). Christiansen (2016: 583) adds that much of

7 I will not provide a detailed explanation of the contentious nature of the inclusion of LGB-specific rights here for the purposes of brevity. For a thorough analysis of the stages of drafting, and support and opposition see, for example, Christiansen (2016) and Barnard and De Vos (2007).

the content of petitions and individual opposition statements contained language that expressed vehemence towards LGB individuals. Such submissions referred to gay and lesbian individuals as unnatural, abnormal, immoral, disgusting, and likened same-sex relationships to bestiality (Christiansen 2016: 583). Thus, despite the general political support for the inclusion of 'sexual orientation' in the Constitution, there was a strong sentiment of anger towards and disapproval of same-sex relationships from the public. Therefore, despite the goal of equality and human dignity for all that the Constitution purports to aspire to, the social reality was that sexual minorities were already discriminated against, marginalised, and symbolically positioned as ungrievable going into the new political dispensation. These sentiments continue on in contemporary South Africa, where they are possibly even exacerbated by claims that homosexuality is unAfrican and a threat to traditional systems and values – thereby bringing together what could be considered the remnants of colonial puritanical Christian ideologies with so-called traditional African beliefs and values.

It is, however, important to note that despite the fact that there may have been debate around including LGB-specific rights in the Constitution, these rights were ultimately incorporated into the 1996 Constitution and have, at times and for some LGB individuals, been enforced and upheld within the Constitutional Court. Thus, in some ways the rights and lives of some LGB individuals are being protected and enhanced through such mechanisms, and they are important tools in the advancement of rights for sexual minorities. However, these Constitutional and legal instruments have not changed the lived realities for many, if not most, LGB individuals, particularly those who are from poorer communities or who are in heightened states of precarity. The concern is, therefore, not whether LGB people have rights or not as such; clearly rights are *technically and theoretically* granted to such persons within South Africa. The concern is more about whether those rights mean anything in the face of the prevailing socio-cultural and symbolic positioning of members of sexual minority groups as ungrievable, particularly when this ungrievability is further exacerbated by deeply entrenched racist ideologies and individuals' socio-economic situations.

In other words, the seemingly, progressive textual protections and jurisprudence of the Constitution remain in contrast to the experiences of violence and discrimination that sexual minority communities face daily. As such, it is evident that constitutional measures such as the Equality Clause are a "symbol of both the progressive aims of the post-apartheid constitution and the appalling gulf between those aspirations and reality" (Christiansen 2016: 568).

It should also be noted that the ability to access rights and protections is also often dependent upon one's socio-economic positioning. Appeals to the law or

the Constitution are generally expensive endeavours and are mostly undertaken by those who are already in positions of privilege. Economic, social, and racial difference, therefore, impact greatly upon the extent to which one is able to access rights and equality, and to be considered grievable. One example of where this economic and racial divide is obvious is in Cape Town, South Africa. Cape Town is considered to be an LGB-friendly city (De Greef 2019); however, the incidences of LGB-phobic violence are arguably among the highest in South Africa, and primarily occur within Cape Town's disadvantaged township communities. The disparity between the wealthy LGB communities who live in Cape Town's suburbs and the poor, black communities in the townships is startling. Due to the intersections of social, racial, and economic positions, wealthy, white, gay men, for example, are likely to have more opportunity to determine their sexuality and the expressions thereof, to have recourse to the law, and to experience some forms of equality, than are black lesbian women from disadvantaged communities. Consequently, the universal human rights expounded by the Constitution seemingly come to be not human rights for all, but rather human rights for some, and so arguably serve to (perhaps inadvertently) perpetuate and uphold inequality, much of which was already in place prior to democracy. This brings us back to Butler's claim that the ungrievable are "not quite human" (2013: 23 -24). If LGB people are not quite human, do not fit into the dominant categories of legitimate citizens, it is questionable whether they fall into the categories of those to whom human rights apply.

Ultimately, when LGB people are harassed, violated, raped, murdered, and discriminated against on a daily basis, it is clear that legal and constitutional instruments have limited ability to uphold and enforce rights and protections for such people. Related to women's rights more generally, Du Toit (58) argues that:

the impact of actual and threatened sexual violence severely violates women's sexual freedom as well as many other of their most basic freedoms guaranteed in our Bill of Rights such as freedom from violence, the right to bodily integrity, freedom of movement, and so on. Moreover, I would argue that these cruelties are not generally framed as grievable under our current dispensation.

This relates clearly to the plight that many LGB people experience. A 2016 survey of more than 2 000 LGBT people by Out, a South African rights organisation, found that within a two-year period, 39 percent had been verbally insulted, 20 percent had been threatened with harm, 17 percent chased or followed, and nearly 10 percent physically attacked. In addition, about half of all black respondents knew people who had been murdered because of their sexual orientation (De Greef 2019). The levels of discrimination and violence (actual or threatened)

that LGB individuals experience within South Africa violates the rights that are arguably afforded to them in democratic South Africa. Furthermore, because LGB individuals are cast as ungrievable, this violence and discrimination continue largely unchecked and without adequate response from state powers.

It could, in fact, be argued that the state and society are in a way complicit in the violence perpetrated against sexual minorities. As argued in Westman (2019), sexual violence, such as lesbo-phobic rape, can be seen as a systematic and strategic method through which the burgeoning hetero-patriarchal national identity within democratic South Africa is developed and upheld. As discussed in the previous section, violence is used to remind women and men of their 'place' and roles within the hegemonic hetero-patriarchal social order, or as Thomas et al. (2013: 528-529) state, "sexual violence is used to enforce gender norms about what constitutes masculinity and femininity". Sexual violence, thus, serves as an effective form of social control, and self-defence. Consequently, while violence is committed by individuals (or groups of individuals), the effects of such violence work effectively in the service of the nation-state and its ideological imperatives too.

Nationalism consequently plays an important role in the status of the members of a society. As mentioned previously, the prevailing hegemonic national identity determines who is and who is not considered a legitimate citizen of the nation-state. This arguably has an impact upon the extent to which rights can be claimed or equality can be sought. Stacey (2003: 133) argues that the South African Constitution aspires to create the conditions in which:

Every individual is assured the enjoyment of basic rights to the same degree as do all other individuals in society. The state therefore treats the people of the country equally insofar as each person is formally given the same space and opportunity as everyone else to make what she/he will of her life.

However, in this regard, the goals of national identity formation appear to be in tension with the apparent aspirations of the Constitution. Nationalism and the development of a national identity are problematic as they are always predicated on the exclusion of some of the nation's members (Visvanathan 2006; Mamdani 1996, 2001; Ahmed 2005). Therefore, as discussed previously, the exclusion – through marginalisation, discrimination, violence, and precarity – of LGB people is instrumental for the development of the hetero-patriarchal national identity of democratic South Africa. The comes to the fore in the lived, daily realities and experiences of marginalised groups particularly, and is very often focused on issues relating to sex and sexuality.

Violence, discrimination, and precarity clearly impact upon the extent to which a person is able to live and thrive within the nation. Butler (2020: 13) suggests:

Though it is true that each person should be treated equally, equal treatment is not possible outside of a social organization of life in which material resources, food distribution, housing, work, and infrastructure seek to achieve equal conditions of livability. Reference to such equal conditions of livability is therefore essential to the determination of 'equality' in any substantive sense of the term.

If we are to consider livability as an essential aspect of equality, then it is evident that LGB individuals, especially those who are in positions of increased precarity due to the intersection of race, gender, and socio-economic positioning, do not have equality in that many members of these communities have difficulty accessing adequate health and public resources (ActionAid, n.d.), live in poverty, and have their freedom of movement and expression denied, among others. In line with this notion of livability, it is also important that we understand the ways in which precarity and ungrievability impact upon LGB individuals' abilities to participate as agents within the democratic nation.

LGBTQI rights and personhood

The work of Cornell provides valuable insight into understanding the impacts that discrimination and marginalisation based on sex and sexuality can have on an individual's ability to function as a social and political agent and their recognition as a person worthy of rights and happiness. In line with Butler, Cornell (1995: 5) argues that "a person is not something 'there' [...] but a possibility, an aspiration which, because it is that, can never be fulfilled once and for all". In other words, the project of personhood is a continual process of becoming and re-becoming – "an endless process of working through personae" (Cornell 1995: 5). The possibility of becoming a person or achieving personhood depends on what Cornell (1995: 5) calls "minimum conditions of individuation". The three minimum conditions of individuation that Cornell (1995: 4) outlines are: "1) bodily integrity, 2) access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others, and 3) the protection of the imaginary domain." Without these minimum conditions of individuation, or the possibility of working towards personhood, we are not free and equal. Cornell further argues that sex and sexuality are fundamental to the project of personhood development because "sex and sexuality are unique and formative to who we are" (Cornell 1995: 6). When we imagine ourselves as persons in the future (what she calls the imaginary domain), sex and sexuality are always part of that imagining. Thus, for Cornell

(1995: 9) the ability to imagine oneself as a sexuate being, or what she terms the sexual imago, is fundamental in the “struggle to become a person” (1995: 9).

The symbolic positioning of LGB individuals as monstrous, ungrievable, and unnatural serves to impose humiliation upon their sex and sexuality. For Cornell (1995: 9), this “imposed sexual shame severely limits physic space for free play with one’s sexuality, if it does not cut it off altogether”. Cornell uses the word ‘shame’, but what she is describing could be understood as humiliation. Humiliation “marks one as that which does not belong, as that which must be expelled in order for the community to feel better” (Guenther 2012: 61). Guenther (2012: 61) adds:

The humiliated one is singled out as no one or nothing – but as a nothing which is visible, exposed for everyone to see, put on display as nothing of value – so that the humiliating subject can be someone. When humiliation is accomplished by marking someone’s body, clothing, or dwelling, it stamps one with a visible and more or less permanent sign of this isolated, expelled identity, leaving no avenues of escape or return, no possibilities for becoming otherwise.

This ties in clearly with Butler’s claims that those who are cast as ungrievable are symbolically and often violently cast out of society and through so doing, the borders of legitimate society are maintained and reinforced. The consequence of this humiliation is that LGB individuals are treated as unworthy of personhood and this “violates the postulation of each one of us as an equal person [that is] called for by a democratic and modern legal system” (Cornell 1995: 10). Consequently, Cornell insists that a “degradation prohibition” is necessary to ensure that, as sexuate beings, we are all treated as “worthy of the right to pursue sexual happiness” (Cornell 1995: 11) and not to have our sex or sexuality “defined, symbolised, and treated as antithetical to equal personhood and citizenship” (Cornell 1995: 10). Within South Africa’s current context, many people within sexual minority communities are not afforded the opportunity to imagine or define their sex or sexuality because of heteronormative ideologies and strictly defined gender roles. This is evident in situations, for example, where butch lesbian women are humiliated, harassed, and violated based on their defiance of feminine gender norms. Similarly, many LGB individuals are not able to live as their authentic selves in public (and often in private) due to fear of violence and discrimination. Such instances highlight the fact that despite legal recognition and protection, the minimum conditions of individuation are not met for LGB individuals and, therefore, they are not considered as worthy of personhood or equal citizenship.

In this regard, Cornell (1995: 235) argues that the law is limited within “the field of sexual politics and in political and ethical life more generally”, and thus in what it can achieve in terms of the protection of the minimum conditions of individuation and the degradation prohibition. The legal realm obviously plays an important role in ensuring that there are rights and measures in place that aim at creating equality or allowing for recourse in the face of inequality, violence, and discrimination. However, when people are not considered as worthy of personhood or citizenship, based on sex and sexuality as coded and positioned by sex and gender hierarchies, then their appeals to the law are limited and often ineffectual. In referring to women more generally, Cornell (1995: 235) asserts that:

Our sex is already placed before the law in its very devaluation.
We are stamped as unequal. The law to which I refer now is not simply the law we associate with the legal system, but the law of the gender hierarchy, with its implicit claim on reality.

Consequently, she calls for legal reforms that take these limits into account, as well as a rethinking of “the importance of protecting the symbolic, social, and legal conditions in which individuation can be achieved and maintained” (Cornell 1995: 38). In South Africa, because the Constitution affirms the rights and equality of all based on sexual difference, in terms of the law, it could *perhaps* be argued that the legal conditions necessary for individuation are met;⁸ however, the symbolic and social orders, clearly drenched in hetero-patriarchal ideologies that subordinate all those who do not conform to prevailing hegemonic ideals, do not allow for the symbolic or social protection of these conditions.

Ultimately, then, it is evident that even though South Africa’s Constitution and legal frameworks might, arguably, be progressive, aspirational, and exemplary (although not without contestation), they are limited in their capacity to ensure that LGB people are considered as worthy of personhood and citizenship, are considered grievable, have equal access to conditions of livability, and are ultimately able to access rights or be considered equal citizens.

Thinking beyond the law

While it is obvious that rights absolutely should and must be afforded to gay, lesbian, and bisexual individuals, these same rights, unfortunately, can also become a double-edged sword. The rights afforded to, and increasing visibility of, gay, lesbian, and bisexual individuals are often viewed as a threat to the

8 This is open to contestation particularly considering inadequate judicial and political response to queer-phobic violence and ongoing hate crimes. However, this will not be looked at here for the purposes of brevity.

hegemonic socio-political order and dominant ideologies. This is one of the reasons for an increase in nationalistic sentiments and violence against those who are seen as threatening the order. Consequently, where LGB communities are afforded increasing rights and protection there is often a corresponding backlash resulting in increased violence and discrimination against these communities. As Ahmed (2005: 98) asserts, the visible presence of LGB people is interpreted as challenging the image the nation has of itself. This is not only the case in South Africa but also throughout the globe,⁹ and is particularly evident recently within the United States of America where there has been a surge in right-wing, conservative fundamentalism under the guise of nationalism¹⁰ (see, for example, Jones and Doxsee 2021 and Haynes 2020). In such instances, the rights afforded to, and visibility of, LGB people is viewed as threatening (conservative) traditional family values and the national identity. So, while rights and visibility are essential for equality, they simultaneously seemingly also create conditions in which the prevailing precarity of LGB individuals is heightened and further cemented.

Clearly then, while the South Africa Constitution and legal system have important roles to play in the ways that LGB individuals are treated, it is also clear that the law can only function to ensure the rights and equality of these individuals to a certain extent. This is also particularly true when the judicial system inadequately protects the interests and lives of sexual minorities, often revictimises those who have been harmed, and does little to prevent violence against LGB communities. It is for this reason, that activism forms an integral part of resistance against violence and discrimination and recourse to the law for sexual minority groups. NGOs and NPOs such as OUT, Triangle Project, and Gender Dynamix work to ensure that sexual minorities and gender diverse individuals are provided with support and resources that should often be forthcoming from the State and yet are not. For example, such organisations provide health care, mental health support, and assist victims and survivors of hate crimes to report these crimes, and then support them throughout their trials, should they reach that point. Furthermore, these organisations work with communities in an attempt to decrease the stigma associated with homosexuality, and thus aid in decreasing discrimination and violence against members of sexual minority groups. While it is beyond the scope of this paper to provide a detailed discussion of how the

9 For example, in Hungary new legislation has been passed that bans schools from using materials that promote homosexuality (Baczynska and Emmott 2021). Similarly, approximately 100 towns and villages in Poland have "adopted the 'anti-LGBT' resolution, which some describe as a 'charter for family rights'" (Al Jazeera 2021).

10 There is also a growing number of right-wing parties in Europe that have similar traits, including "ferce hostility to immigration, particularly of Muslims; anti-elite rhetoric, shading into conspiracy theories; cultural conservatism, ultranationalism and dislike of the EU" (Rachman 2021).

State should better support LGB individuals and the ways in which the law should be extended in order to better ensure equality and livability for such individuals, it is clear that there is an urgent need for policies and programmes that address these matters, as well as increased support for organisations that actively pursue rights, equality, dignity, and liveability for gay, lesbian, and bisexual individuals.

Conclusion

To conclude, due to puritanical and racist colonial impositions, combined with the hetero-patriarchal foundation of contemporary South Africa, gay, lesbian, and bisexual individuals are cast as ungrievable. Therefore, despite legal recognition of rights for sexual minority groups, within their everyday lived experiences LGB individuals are treated as less than human and undeserving of rights. Furthermore, through the socio-economic positioning and the inordinate levels of violence that many LGB individuals, particularly black LGB individuals, experience, their positions of precarity within the democratic nation are cemented. While this might seem to go against the values of equality expounded within the democratic nation, this socio-symbolic positioning of sexual minorities is, instead, an integral component in the upholding of heteronormative ideologies and the development of the nation's patriarchal identity. Additionally, as Cornell suggests, because individuals are discriminated against and treated as unworthy of personhood based on their sexual orientation, they are not considered worthy of rights or equality. It is precisely this socio-symbolic positioning, that allows for violence and discrimination against LGB individuals to continue unabated and their human rights to continually be denied. Consequently, jurisprudence can only work to an extent to secure these rights, as when LGB individuals are considered ungrievable and less than human, their claims to rights cannot be fully realised.

References

- ACTIONAID. 2009. Hate crimes: The rise of corrective rape in South Africa. *ActionAid*. Available at: https://www.actionaid.org.uk/sites/default/.../correctiveraperep_final.pdf. [accessed on 31 March 2022].
- ACTIONAID. n.d. Campaigning for LGBTQI rights in South Africa. *ActionAid*. Available at: <https://www.actionaidusa.org/work/campaigning-lgbtqi-rights-south-africa/> [accessed on 31 March 2022].
- ADAMS R. 2018. South Africa's social contract: the Economic Freedom Fighters and the rise of a new constituent power? *Acta Academica* 50(3): 102-121. <https://doi.org/10.18820/24150479/aa50i3.5>
- AHMED S. 2000. *Strange encounters: embodied others in post-coloniality*. New York: Routledge.

- AHMED S. 2005. The skin of the community: affect and boundary formation. In: Charter T and Ziarek EP (eds). *Revolt, affect, collectivity: the unstable boundaries of Kristeva's Polis*. Albany: State University of New York Press.
- ALBERTYN C. 2019. (In)equality and the South African Constitution. *Development South Africa* 36(6): 751-766. <https://doi.org/10.1080/0376835X.2019.1660860>
- AL JAZEERA. 2021. EU takes legal action against Hungary, Poland over LGBTQ rights. *AL Jazeera*. 15 July. Available at: <https://www.aljazeera.com/news/2021/7/15/eu-takes-legal-action-against-hungary-poland-over-lgbtq-rights> [accessed on 31 March 2022].
- BACZYNSKA G AND EMMOTT R. 2021. Hungary rejects EU demand to ditch 'shameful' anti-LGBT law. *Reuters*. 7 July. Available at: <https://www.reuters.com/world/europe/a-disgrace-hungary-must-ditch-anti-lgbt-law-eu-executive-says-2021-07-07/> [accessed on 31 March 2022].
- BROWN R. 2012. Corrective rape in South Africa: a continual plight despite an international human rights response. *Annual Survey of International and Comparative Law* 18: 45-66.
- BUTLER J. 2003. Violence, mourning, politics. *Studies in Gender and Sexuality* 4(1): 9-37. <https://doi.org/10.1080/15240650409349213>
- BUTLER J. 2004. *Precarious lives: the powers of violence and mourning*. London and New York: Verso.
- BUTLER J. 2009. Performativity, precarity, and sexual politics. *AIBR: Revista de Antropología Iberoamericana* 4(3): i-xiii. <https://doi.org/10.11156/aibr.040303e>
- BUTLER J. 2011. Remarks on 'queer bonds'. *GLQ* 17(23): 381-387. <https://doi.org/10.1215/10642684-1163472>
- BUTLER J. 2012. Precarious life, vulnerability, and the ethics of cohabitation. *Journal of Speculative Philosophy* 26(2): 134-151. <https://doi.org/10.5325/jspecphil.26.2.0134>
- BUTLER J. 2020. *The force of non-violence*. London and New York: Verso.
- CHRISTIANSEN E. 2016. Substantive equality and sexual orientation: twenty years of gay and lesbian rights adjudication under the South African Constitution. *Cornell International Law Journal* 49: 565-615. <https://doi.org/10.2139/ssrn.3040966>
- COCK J. 2003. Engendering gay and lesbian rights: the equality clause in the South African Constitution. *Women's Studies International Forum* 26(1): 35-45. [https://doi.org/10.1016/S0277-5395\(02\)00353-9](https://doi.org/10.1016/S0277-5395(02)00353-9)
- CORNELL D. 1995. *The imaginary domain: abortion, pornography, and sexual harassment*. New York: Routledge.

- DE GREEF K. 2019. The unfulfilled promise of LGBTQ rights in South Africa. *The Atlantic*. 2 July. Available at: <https://www.theatlantic.com/international/archive/2019/07/southafrica-lgbtq-rights/593050/> [accessed on 31 March 2022].
- DE SOUSA SANTOS B. 2017. The resilience of abyssal exclusions in our societies: toward a post-abysal law. *Tilburg Law Review* 22: 237-258. <https://doi.org/10.1163/22112596-02201011>
- DU TOIT HL. 2016. The South African Constitution as memory and promise: an exploration of its implications for sexual violence. *Politikon: South African Journal of Political Studies* 43(1): 31-51. <https://doi.org/10.1080/02589346.2016.1155133>
- GUENTHER L. 2012. Resisting Agamben: the biopolitics of shame and humiliation. *Philosophy and Social Criticism* 38(1): 59-79. <https://doi.org/10.1177/0191453711421604>
- HARRISBERG K. 2021. LGBTQ+ South Africans resist 'war on queerness' as activists demand justice after killings. *Global Citizen*. 17 May. Available at: <https://www.globalcitizen.org/en/content/fear-lgbt-south-africans-war-on-queerness/> [accessed on 31 March 2022].
- HAYNES J. 2020. Right-wing populism and religion in Europe and the USA. *Religions* 11(10): 490-508. <https://doi.org/10.3390/rel11100490>
- ILGA WORLD. 2020. *State-sponsored homophobia 2020: global legislation overview update*. Geneva: ILGA.
- IZUGBARA C, BAKARE S, SEBANY M, USHIE B, WEKESAH F AND NJAGI J. 2020. Regional legal and policy instruments for addressing LGBT exclusion in Africa. *Sexual and Reproductive Health Matter* 28(1): 1-14. <https://doi.org/10.1080/26410397.2019.1698905>
- JONES SG AND DOXSEE C. 2021. The escalating terrorism problem in the United States. *Centre for Strategic and International Studies*. 17 June. Available at: <https://www.csis.org/analysis/escalating-terrorism-problem-united-states> [accessed on 31 March 2022].
- JUDGE M. 2018. *Blackwashing homophobia: violence and the politics of sexuality, gender and race*. Oxford and New York: Routledge. <https://doi.org/10.4324/9781315735368>
- MADLINGOZI T. 2017. Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution. *Stellenbosch Law Review* 1: 123-147.
- MAMDANI M. 1996. *Citizen and subject: contemporary Africa and the legacy of late colonialism*. New Jersey: Princeton University Press.

- MAMDANI M. 2001. Beyond settler and native as political identities: overcoming the political legacy of colonialism. *Comparative Studies in Society and History* 43(4): 651-664.
- MUHOZI Z. 2004. Thinking through lesbian rape. *Agenda: Empowering Women for Gender Equity* 61 (Religion and Spirituality): 116-125.
- RAMOSE M. 2007. In memoriam: sovereignty in the "new" South Africa. *Griffith Law Review* 16: 310-329. <https://doi.org/10.1080/10383441.2007.10854593>
- RATELE K. 2013. Masculinities without tradition. *Politikon: South African Journal of Political Studies* 40(1): 133-156. <https://doi.org/10.1080/02589346.2013.765680>
- SIMELANE BC. 2021. Hate crimes bill — 'the buck stops with parliament,' says Department of Justice. *The Daily Maverick*. 2 June. Available at: <https://www.dailymaverick.co.za/article/2021-06-02-hate-crimes-bill-the-buck-stops-with-parliament-says-department-of-justice/> [accessed on 31 March 2022].
- SMITH D. 2010. South African minister describes lesbian photos as immoral. *The Guardian*. 2 March. Available at: <https://www.theguardian.com/world/2010/mar/02/south-african-minister-lesbian-exhibition>. [accessed on 31 March 2022].
- STACEY R. 2003. 'We the people': the relationship between the South African Constitution and the ANC's transformation policies. *Politikon* 30(2): 133-148. <https://doi.org/10.1080/0258934032000147264>
- THE INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION. 2019. *World's 2019 Annual Report*. Available at: https://ilga.org/downloads/ILGA_World_Annual_Report_2019.pdf. [accessed on 31 March 2022].
- THOMAS K, MASINJILA M AND BERE E. 2013. Political transition and sexual and gender-based violence in South Africa, Kenya, and Zimbabwe: a comparative analysis. *Gender and Development* 21(3): 519-532. <https://doi.org/10.1080/13552074.2013.846617>
- VISVANATHAN S. 2006. Nation. *Theory, Culture and Society* 23(2-3): 533-549. <https://doi.org/10.1177/0263276406061702>
- WESTMAN CS. 2019. 'There's no such thing as gay': Black lesbians and nationhood in post-apartheid South Africa. PhD Thesis. Stellenbosch University. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/107314/westman_nationhood_2019.pdf?sequence=1&isAllowed=y [accessed on 15 February 2022].