

Impacts of Decriminalizing Homosexuality in South Africa on Citizens and Country

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Abstract

South Africa remains the only country in South Africa to legalize same-sex marriage and to have sexual orientation equality in its national constitution. The country still faces human rights concerns relating to the treatment of LGBT+ citizens in part due to the history of criminalizing homosexuality in South Africa during colonization and apartheid. This paper will examine how decriminalizing homosexuality has impacted the LGBT+ citizens living within present-day South Africa, specifically within health care, education, the criminal justice system, and their everyday communities.

Keywords: LGBT+, homosexuality, gay, South Africa, health care, education, criminal justice, societal norms

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Around the world, countries are facing the wrath of human rights advocates as atrocities are brought forward and into the light of the media and the world. Some violations are relating to employment rights, women's rights, and children's rights occurring within the everyday society of a country, while others are based on war-time human rights violations. One area of human rights discussions that has been brought to light in recent years has been the topic of lesbian, gay, bisexual, and transgender rights, or otherwise known as LGBT+ rights, and gender expression due to the movement for same-sex marriage and equality. It is important to note that LGBT+ rights focus on sexual orientation-based issues and gender identity-based issues such as homophobia, transphobia, corrective rape, and discrimination.

Worldwide, seventy-one countries criminalize consensual same-sex activity, or homosexuality, with 11 of these countries criminalizing homosexuality with the punishment of death (Human Dignity Trust, 2021). Most laws relate to sex between men; however, forty-three countries include laws that criminalize sexual activity between women, often referred to as "lesbianism" (Human Dignity Trust, 2021). In the last three months of 2021 (October to December), when looking at the Human Rights Watch page dedicated to LGBT Rights, readers can find 11 articles relating to negative treatment or violence against LGBT+ individuals globally (Human Rights Watch, 2021).

In South Africa, citizens have experienced constitutional equality since 1998 when the country enacted its new national Constitution, replacing the one present from colonization through apartheid. This new Constitution stated that there was equality for all citizens, no matter their age, race, sexual orientation, gender identity, ethnicity, religion, ability, and more. Currently, South Africa holds the ability to boast of being the only African country to legalize gay marriage, however, they still face prominent homophobic crimes and discrimination throughout their country (Hagopian et al., 2017; Hussain, 2020).

The decriminalization of same-sex activity and the continued negativity surrounding LGBT+ human rights issues and topics raises the question of *how has decriminalizing homosexuality in South Africa affected the treatment of LGBT+ citizens?* It is hypothesized that LGBT+ citizens still face adverse and disproportionate care within healthcare, education, and the criminal justice system due to the continued misunderstanding that being a part of the LGBT+ community is “un-African” or sinful (Wells & Polders, 2011).

Literature Review

National Background

Until 1998, homosexuality was illegal in South Africa and punishable of up to two years imprisonment, a fine of up to R4000 (rand), or both (Equaldex, n.d.). From 1998 to 2006, multiple court cases were heard to provide equal rights to LGBT+ citizens after the constitution had been rewritten. These cases provided LGBT+ citizens the right to equal health care, abolished the crime of sodomy, allowed long-term same-sex partners to be seen the same as a spouse in the medical field, allowed same-sex couples to adopt children and register as the parent

for the child born to one of them, and legalized same-sex marriage (Equaldex, n.d.; Reddy, 2006). Other cases heard by the courts in South Africa have noted the constitutionality of allowing prisoners to follow their chosen names, pronouns, and gender expressions; declaring corrective rape illegal; and updating inheritance rights to include same-sex life partners in receiving estate inheritance (Venter, n.d.)

Based on current Equaldex data, the health care field, specifically that of blood donations, has begun to allow men who have sex with men to donate so long as they have been in a monogamous relationship for the past six months or celibate and has begun to ask about an individual's sexual history rather than their sexual orientation (Equaldex, n.d.). In addition, LGBT+ citizens are now provided with protections against discrimination in housing, marriage, adoption, employment, education, and can join the military (Equaldex, n.d.).

Health Care for LGBT+ Citizens

Due to the association of LGBT+ individuals, most notably gay men, and HIV/AIDS, some articles found focused on discussing LGBT+ individuals and the healthcare system, specifically with a focus on HIV and AIDS screening, treatment, and prevention. The first study chosen was one that focused HIV research on the risk within the lesbian communities of rural South Africa (Mampane, 2020). This research found that lesbian women are most at risk for HIV because of gender based violence that occurs both directly, via physical, sexual, and emotional gender-based violence, and indirectly, via community and institutional gender-based violence (Mampane, 2020). Physical gender-based violence often is perpetrated by a male individual from the individual's family, a relative, or a member of the community; sexual based gender violence

often occurs through “corrective rape;” and emotional gender-based violence often leads to increased risky behaviors in those participating (Mampane, 2020). On a direct basis, gender-based violence can quickly lead to the contraction of HIV. Within the community, gender-based violence occurs through harassment, discrimination, and exposure to sexual violence. On an institutional level, those who identify as lesbian and seek medical care for HIV are often ridiculed because “lesbians cannot get HIV” (Mampane, 2020).

One article that focused away from HIV and AIDS screening, treatment and prevention was that of Müller (2017) which instead focused on overall health care for LGBT+ patients and assessed barriers to care through the United Nations International Covenant on Economic, Social and Cultural Rights General Comment 14. This provided the framework of analyzing the health care system’s availability, accessibility, acceptability, and quality of care and in all four areas, South Africa was failing to meet expectations (Müller, 2017). Within availability, there was a lack of facilities that provided public health services and fewer that provided care for LGBT-specific health care concerns (Müller, 2017). Accessibility was a major problem for individual in part due to healthcare providers refusing care to LGBT+ patients, but also due to the long wait time for gender affirming health care or surgeries (Müller, 2017). Unfortunately, many patients did not feel accepted as they faced articulation of disapproval and judgment of their identities and many experienced forced religious practices (Müller, 2017). Quality of care diminished for LGBT+ patients when many healthcare providers did not have knowledge of LGB+ identities and health needs (Müller, 2017).

Education – Experiences and Sexual Health Education

Experience

Queer youth in South Africa report that they wish they felt their teachers and professors being more tolerant, non-judgmental, and inclusive when discussing and facing conversations around LGBT+ topics (Francis, 2018). By being more open and honest, many more positive experiences can come from discussing LGBT+ topics while in the classroom (Francis, 2018). However, these positive experiences have not yet occurred for many students.

Within one rural South African university, a study found that lesbian and gay students experience negative challenges throughout their education including discrimination, physical and psychological assault, and harassment from classmates (Letsoalo, Nel, Govender, & Vawda, 2020). In most cases, students experienced bullying from their peers and advisors, causing them to feel higher rates of suicidality, thoughts of isolation, dropping out of university, depression, hopelessness, low self-esteem, and alienation (Letsoalo et al., 2020).

Prior to this research, another study was completed focusing on the experiences of lesbian and gay youth in a South African Secondary Education school (Butler, Alpaslan, Strümpher, Astbury, 2003). Research found that students experienced homophobia within the categories of school environment (example – environment does not foster nor accept non-heteronormative students), peer harassment (example – psychological and physical harassment from peers), teachers and administration (example – students overhearing faculty and staff saying derogatory remarks about the LGBT+ community or a LGBT+ student, or staff purposefully outing a student to other students or parents), school counselors (example – counselors in place are not

thoroughly trained to address LGBT+ issues), and an overall lack of information and curriculum content (Butler et al., 2003).

Sexual Health and Sexuality Education

It is estimated that in 2016, only 5% of South African schools provided a comprehensive sexual health education to student. The major problem with this data is that the following year, 10.9% of childbirths occurred among girls between ten and nineteen years old (Koopman, 2020). There are many reasons for poor sexual health education within the country. One reason that Koopman presents is that there is a gap due to focusing on HIV-prevention without including information on sexually transmitted infections (STIs) or non-heterosexual safe sex. There is also a discomfort around teachers speaking with students about safe sex, partially due to a poor curriculum (Koopman, 2020).

However, it must be noted that the country is trying to make the proper changes. In 2019, Govender noted how in the upcoming school year, students fourth through twelfth grade would be receiving a new textbook for their sexual health education courses which would include lessons on masturbation, incorporation of sexuality and gender identity into the curriculum, and provide better conversations and lessons around consent, which would focus on friendships with younger students and sexual consent with older students (Govender, 2019). A local article from The South African by Head (2021) explained the new topics that will be discussed in grades four, five, and six for children within the country. In fourth grade, students will focus on learning about respect for self and other bodies, emotions, dealing with conflict, bullying, and the basics of HIV and AIDS, including transmission (Head, 2021). In fifth grade, students will learn about

child abuse and violent situations, more discussions on HIV and AIDS, and about consent. Sixth grade students will begin to understand more about their body image, peer pressure, masturbation, gender stereotypes and sexism, and gender equality (Head, 2021).

Criminal Justice System

While the country may constitutionally say that discrimination based on sexual orientation is illegal, many still fear reporting hate crimes to police (Wells & Polders, 2011). Wells and Polders survey of 487 self-identified LGB citizens provided insight on the types of hate crime that are most prevalent, the places that hate crimes occurred, the number that have been reported to police, and the reasoning behind not reporting a crime. Based on the findings, the most usual form of hate crimes against LGBT citizens across gender, sexual orientation, and race was hate speech followed by physical abuse or assault (Wells & Polders, 2011). These incidents happened most often at work for white lesbian women, in the home for white gay men, and on roads and shopping malls for black lesbian women and gay men (Wells & Polders, 2011). Hate speech recorded 18% of incidents reported to police, and when probed for why there was under-reporting, many in the LGBT+ community shared that it was because they felt their report would not be taken seriously by law enforcement (78% black; 67% white), that law enforcement would not understand the problem (67% black, 71% white), that the police could not do anything to help them (66% black, 75% white), and because a friend had a poor previous experience with the police (50% black, 48% white) (Wells & Polders, 2011).

Wells and Polders study showed that while there were disparities in the criminal justice system due to the community belief that homosexuality is un-African (Wells & Polders, 2011),

many still felt a distrust within their own communities, especially those who came from predominantly African American communities (Wells & Polders, 2011), but also due to the former criminalization of homosexuality making distrust with the police still relevant. Further research done by Wells and Polders (2004) showed that only 41.2% of corrective rape and sexual assault cases against lesbian and gay people were reported to the police, while the remainder went unreported. In addition, 76% of LGBT+ citizens believe the criminal justice system does not uphold the LGBT rights and 61% felt that their constitutional rights had not been met, though this was not explained in more detail as to what specific rights were not being met (Polders & Wells, 2004).

Societal Opinions

Throughout research in former sections, it is apparent that public opinions still hold that being a part of the LGBT+ community deems you to be “un-African” (Butler et al., 2003; Letsoalo et al., 2020; Mampane, 2020; Mhaka, 2021; Müller, 2017; Wells & Polders, 2004; Wells & Polders, 2011). Throughout the continent, there is widespread discrimination in employment against LGBT+ individuals and those who identify as gender nonconforming, gay, or bisexual men earn approximately 30% less than that of gender confirming heterosexual men (Mhaka, 2021). According to Pew Research in 2019, 54% of those living within South Africa currently say homosexuality should be accepted by society, which has increased from 33% from 2002 (Poushter & Kent, 2020). With regards to transgender rights in South Africa, UCLA’s School of Law’s research reports that 58% of participants agreed that transgender citizens should be allowed to have gender-affirming surgery, 43% felt that they should be protected from discrimination, 34.4% should be allowed to adopt children, and 24% felt that they should be

allowed to use the restroom of the sex that they identify with (Luhr, Mokgoroane, & Shaw, 2021).

Methodology

The qualitative and quantitative data were collected to answer the research question, how has decriminalizing homosexuality in South Africa affected the treatment of LGBT+ individuals within the country? To answer this question, materials will be reviewed in the fields of health care, education, criminal justice, and within the general society. For information on experiences within the health care, education, and criminal justice fields, research will be gathered from peer-reviewed journal articles, international and state NGOs, and government reports. For information on the country's general response to homosexuality and the LGBT+ community, research will focus more on secondary sources of climate surveys within the country through formal research and the media.

Within each of the sub-categories for research, it is important to also understand what is included in each sub-section. Within the field of health care, research will include data relating to hospitals, doctors, HIV treatment and prevention services, mental health, and gender affirming care. To understand how care is received, the author will use Müller's (2017) method of analyzing health care and LGBT+ treatment through the lens of the United Nations International Covenant on Economic, Social and Cultural Rights General Comment 14 which requires health care be available, accessible, acceptable, and with fair quality of care.

To better analyze the treatment of LGBT+ youth within the education field, the author will use research gathered from schools within the country to better understand the treatment of

youth. This will include research on school counselors and psychologists, sex education, and general acceptance within the school district. Education is being included in this paper because treatment varies based on if a LGBT+ youth is growing up within Soweto, a township in Johannesburg; Cape Town, the second largest city in South Africa and a port city; or Soshanguve, a township north of Pretoria. Furthermore, education continues to affect LGBT+ youth if they should choose to pursue higher education and the treatment within their schools could affect the health of LGBT+ youth.

Criminal justice is being included in this paper to better understand police misconduct, if any, towards LGBT+ citizens within the country. When looking at human rights issues, one of the many fields that must be investigated is that of law enforcement, corrections, and the courts to validate that any human rights violations are not occurring in the one place where justice is to be served and equality is to be respected.

Finally, public perceptions will be reviewed and researched to better understand how the general society feels about LGBT+ rights and issues. This information will be used to better explain why there are disparities in the treatment of LGBT+ individuals even while there are rights in place to provide equal treatment from youth to adulthood. Due to public perception being something most often gathered for local media and national climate survey's, these will be the main sources used for research in this area.

Ethical Considerations

When considering reasons for individuals to not participate in a research study on LGBT+ issues, three ethical considerations come to mind. First, anonymity is especially

important within the LGBT+ community because not many people are out to their friends, families, and employers to help protect their status and, frankly, their body from harm. Due to mistrust in the medical and criminal justice system, there may be a high potential for participants to not participate or to not provide the full story, such as leaving out individuals, locations, or times that harassment or violence may have occurred. Second, confidentiality comes to play again with keeping the identities of those participating confidential and anonymous. This is again especially important in not outing an individual, which falls into the third ethical consideration – potential for harm. By participating in these studies, citizens potentially faced harm by being associated with the study, or by having their stories connected back to them. As a researcher, it is important to always keep these three principles in mind, however, when working with an at-risk population, it is especially important to keep them in mind and to follow through all safety measures to protect the identities of those involved.

Limitations in Research

One limitation in research focused on the health care field due to the vast research on the LGBT+ community and their risk factors related to HIV and AIDS treatment, prevention, and screening. To provide a broader understanding of the experiences of LGBT+ individuals within the health care system, sources were focused on quality of care received within the health care system versus specific LGBT+ health related issues. This eventually provided information on broader LGBT+ health related issues that otherwise may not have been included in research, including accessibility, acceptability, transportation, gender-affirming surgeries, and care for lesbian women.

A second limitation focused in research in the education field. Due to many children having similar responses to trauma, such as bullying, it is assumed and found in research that many students within South Africa experience similar mental health trends when also in the LGBT+ community and experiencing bullying. This can then be compared to the LGBT+ youth in America and other countries, which allows researchers to generalize the experience without formally talking to youth. While this may provide a benefit for researchers, it provides the limitation of fewer voices and opinions being heard when discussing their lived experiences and outcomes.

Findings

Within all three systems, discrimination and disparities were found when comparing treatment of LGBT+ individuals to that of heteronormative individuals. The health care system found disparities in research, which often did not cover all areas of LGBT+ health topics, and vast problems with accessibility, availability, acceptability, and quality of care. Today South Africa is taking steps to be more inclusive in their sexual health education courses, however, many students still face discrimination from peers and faculty, increasing their chances for mental health related issues and absenteeism. Young females within the education system face double discrimination from their peers and educators if they also identify as lesbian or bisexual because of both deep seeded sexism and homophobia, which can further lead to gender-based violence within their local communities and homes. The criminal justice system has still yet to make LGBT+ citizens feel safe and protected within their communities, and while the general community provides support for the LGBT+ communities and their rights, many still believe the issues are “un-African.” So, while the society has helped to create more environments for equal

treatment for LGBT+ citizens, there are still many who believe the stereotypes and have their own biases regarding LGBT+ citizens.

Conclusion

South Africa is leading the change for LGBT+ rights in Africa as a whole, being the first country to openly provide equal protections under the law and protection against discrimination based on sexual orientation within their constitution. South Africa is also a country still trying to find themselves post-Apartheid, dealing with the impacts of the corruption scandal against President Mbeki's deputy president Zuma, and the death of Nelson Mandela. As a result, the country has provided the legal pathways for filing complaints when LGBT+ individuals face discrimination, however, they have not fixed the environment that makes LGBT+ individuals feel safe, both within their communities, families, health care system, criminal justice system, and education system.

As country's globally have begun to change their legal protections of the LGBT+ communities, including decriminalization of homosexuality, legalization of gay marriage and adoption rights, and the development of further protections of self. South Africa can show the world what is the correct path and incorrect path when decriminalizing homosexuality. Has their path helped or hindered those living within the communities? While protections may be present in the legal system and when finding employment, there has not yet been the continuation of training within these fields on inclusion, equity, understanding, and legal repercussions, and said legal repercussions do not have a known and visible punishment. Once South Africa has provided reinforcements in training requirements for those working within the field, especially

those within the medical and educational fields, as well as a more public deterrence for hate crimes, then there will be more positive impacts found relating to the decriminalization of homosexuality.

Resources

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