

Sexual orientation, gender identity, medicine and the law in South Africa 1948-1994

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Today, South African legislation is amongst the most progressive in the world and provides lesbian, gay and transgender people protection from discrimination, as well as equal access to public services and citizenship. This, however, similar to non-discrimination based on race, is a relatively new phenomenon in the country. Until 1994, sexual orientations and gender identities that did not conform to heterosexual norms (based on the idea that romantic and sexual relationship should only occur between men and women, and is based on a rigorous gender binary), were criminalised, including under laws that originated before the advent of apartheid in 1948. Before 1948, South Africa's common law, derived from British colonial laws, included the prohibition of male homosexual sodomy (Jivan, 2007). However, under apartheid the common law crime of 'sodomy' was expanded by the 1969 *Immorality Amendment Act*¹, which amended the existing Immorality Act (well known for prohibiting sex between people classified as white and anybody classified as 'non-white'). It made it a statutory crime for a man to have sex with another man under the age of nineteen, and also prohibited 'any sexual activity' between men 'at a party' (a 'party' was defined as any occasion where more than two people were present). Gender non-conformity was equally strictly legislated (Swarr, 2012): The *Population Registration Act*² classified all South Africans according to race and gender, and the *Prohibition of Disguises Act*³ made 'cross-dressing' illegal. Cameron and Gevisser (1995), who during the transition period of the early 1990s collected the life stories of gay and lesbian South Africans, document that these laws resulted in police harassment, blackmail, numerous arrests and prosecutions of gay and lesbian people throughout apartheid.

Other researchers have shown that the multitude of laws passed by the apartheid National Party (NP) were aimed at preserving the Calvinist Christian values that the NP, together with the NG Kerk, saw as central to their ideological vision of a 'pure' Afrikaner nation. For example, historian Susanne Klausen shows how anxieties around the purity of white women, coupled with the imperative of white reproduction to allay fears of the 'swart gevaar' (black danger/threat), and prevent 'swamping' of whites by the black majority, formed the basis of NP legislation that severely restricted women's access to abortion (Klausen, 2016). Apartheid legislation, therefore, not only regulated and controlled daily life in relation to race, but also in relation to gender, and, as the legislation around consensual same-sex activity, described above, and a small body of research shows, also in relation to sexuality (see Swarr, 2012; Cameron and Gevisser, 1995, du Pisani, 2012). Indeed, academics have pointed out that sexuality is a key issue of concern for totalitarian and authoritarian regimes, as it can be directly linked to 'deviance' as well as reproduction for the growth of the imagined nation (Herzog, 2005). What has been observed in Nazi Germany can be extended to Apartheid South Africa: "Sexuality, the site where private and public realm of politics, morality, and social order converged, in turn became a critical arena for the deployment of the regime's racial ideology and a focus of particularly intense regulation and control." (Szobar, 2002: 133, quoted in Klausen, 2016). Further, South African academics who have started to investigate the connections between early 1900s 'racial science' in South Africa and Namibia and the racial ideologies of Nazism (Robins, 2016), show the links between German scientific justifications for racial 'purity' and colonial science conducted in Southern Africa. This inter-continental travel of scientific, often medical knowledge poses the question to what extend

¹ Immorality Amendment Act, 1969 (Act No. 57 of 1969)

² Population Registration Act, 1950

³ Prohibition of Disguises Act, 1969

scientific opinions about non-conforming sexuality and gender identity travelled between Europe and Southern Africa in the years leading up to the election of the NP in 1948, and how these influenced apartheid morality and law.

In the late 1960s and early 1970s, during the same time that apartheid South Africa tightened social and legal control of homosexuality and non-conforming gender identities, the perception of, and the treatment associated with, homosexuality and non-conforming gender identity underwent drastic changes in medicine internationally, in particular in the discipline of psychiatry. The perception that sexual orientations and gender identities that deviate from the narrow heterosexual norms are pathological had for many years been supported by medicine: Until 1973, homosexuality was a defined diagnosis in the American Psychiatry Association's (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM), indicating the consensus of psychiatry at the time: that sexual and romantic attraction to somebody of the same sex was unnatural, pathological, and could be cured through psychotherapy or electro shock aversion therapy (Smith, 2004). There was considerable debate around the diagnosis within the medical literature from the time (Carlston, 1997), and in 1973, the APA voted, by show of hands, to de-pathologise homosexuality. Simultaneously, from 1960 onwards, an increasing number of surgeons started performing 'sex change operations'⁴ on 'transsexuals', starting in the United States and Europe, but also in South Africa (see anecdotal evidence in Swarr, 2012 and Klausen, 2016). As a result of the increased demand, and the need to regulate 'sex change operations', the APA introduced a diagnosis related to gender identity ('transvestitism' in the DSM, and 'transsexualism' in the ICD; Drescher, 2010; Drescher et al., 2012).

Documented life stories from South African gay, lesbian, and transgender people (collected in Cameron and Gevisser, 1995; Morgan, Marais and Wellbeloved, 2009; Swarr, 2012) show that medicine played an important role in being complicit with apartheid legislation on sexual orientation and gender identity. For example, the Aversion project, a research project sparked by the healthcare professions hearings during the Truth and Reconciliation Commission, documented that many young gay conscripts in the South African Defence Force were forcibly treated with psychoanalysis and electroshock therapy to 'cure' their homosexuality (Van Zyl et al., 1999). There is evidence that such treatment even included forced 'sex change operations', with the reasoning that if a gay conscript (a young man who is attracted to men) changes his gender to be female, he would then be heterosexual (because he would be a woman who is attracted to men) (Kaplan, 2001; Venter, 2001).

At the same time, medicine also helped some people bypass apartheid legislation, such as the *Prohibition of Disguises Act*. Anecdotal research evidence suggests that at the same time that 'sex change' operations were forcibly conducted on military conscripts, they were also available in South African public hospitals between the 1960s and 1990s – albeit 'under the radar' and without a clear legal or policy framework. For example, a well-known Durban gynaecologist was reported to have performed 58 'sex change operations' (reported in Klausen, 2016), and a transgender woman recalls her publicly funded gender-affirming surgeries at Groote Schuur in the late 1980s (in Morgan, Marais and Wellbeloved, 2009). However, until today, there is little to no evidence about these surgeries beyond individual narratives, and it remains unclear how South Africa doctors learned the surgical

⁴ Terminology, especially when used to categorise and describe sexuality and gender identity, is always contextual and contested, and keeps shifting and evolving. Currently accepted and used terms foreground self-determination and aim to redress the pathologisation and stigmatisation of non-conforming sexual and gender identities of the past. I am well aware of this. In this project, I use the terminology used at the time when this is a methodological concern or linked to historiography, for example as reported in newspaper articles of the time. In order to indicate the contestations and changes in these terminologies, I use such historical terms in inverted commas.

procedures, which eligibility criteria they applied, whether these surgeries were legal according to national laws and professional regulatory bodies, and to what extent these surgeries were performed across the country.

Until today, very little is known about the positions and perception of homosexuality and non-conforming gender identity by South Africa healthcare professionals – we do not know how South African psychiatrists, for example, responded to de-pathologisation of the APA diagnoses related to homosexuality in the 1970s. We also do not know how South African psychiatrists, and mental healthcare providers more generally, understood and framed homosexuality. We do not know if and how medical discourses influenced the legislation at the time, for example whether or not SA healthcare professionals were consulted in the re-drafting of the Immorality Act in 1969, which further criminalised male homosexuality. Given that homosexuality was considered a mental illness at the time, there would be ample reason for the consultation of the medical profession in this process.

My research project aims to investigate these and other questions in order to develop a more nuanced understanding of the relationship between sexuality, gender identity, medicine and the law in apartheid South Africa. The primary questions of this project are:

1. How was female and male homosexuality, as well as gender non-conformity constructed by medical professionals between 1948 and 1994? Did this differ for people classified as white, coloured, Indian and black? How and why? What ‘treatment’ did medical professionals provide based on their understanding of female and male homosexuality, and gender non-conformity?
2. How were these constructions of female and male homosexuality, as well as gender non-conformity, influenced by, and in turn how did they influence apartheid morality and legislation, and the enforcement thereof?
3. How was the apartheid state’s relation to homosexuality and gender non-conformity different from, or similar to, other totalitarian/ authoritarian regimes? To what extent were medical professionals complicit in, or resistant to such constructions of homosexuality and gender non-conformity?

These questions are explored by analysing data derived from historical, publicly available documents, such as media reports, transcripts of parliamentary debates and criminal trials, medical textbooks and academic publications, and proceedings for healthcare professionals’ meetings and conferences. Additionally, I review medical records from patients who received medical attention for issues related to homosexuality or non-conforming gender identity (including records of ‘sex change’ operations at public hospitals, if they exist). I also interview key informants who are still alive (healthcare professionals, gay, lesbian and transgender South Africans, and others who were involved or interested in controlling and policing sexuality and gender identity).

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