

Eudy Simelane Memorial Lecture

Pietermaritzburg

Thursday 7 April 2016 17h30

Inaugural lecture on behalf of The Other Foundation and The Ujamaa Centre, University of KwaZulu-Natal

by

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* I am grateful to my law clerk Merrow Golden for insightfully excerpting the Human Dignity Trust report in para 17, and, in addition to other help, finding the Triangle Project reports also mentioned there.

1. It is nearly eight years since Eudy Simelane's death. Tonight we gather to mark cruelty, hatred and injustice. We mark the cruelty of a world that denied this beautiful, talented person her life, a world whose hatred suppressed her voice and extinguished her capacity for love and vigour and energy: a world that hated and despised her because she was herself – an openly, proud lesbian.
2. But we also gather with a positive purpose – to pay tribute to extraordinary courage and a beautiful life. We gather to celebrate Eudy's life as someone who embraced her own sexual orientation; who lived openly in her own township, KwaThema, as a lesbian, who played a beautiful, brave game of soccer – and whose courage made it easier for those who followed her to live their lives as themselves.
3. My theme tonight is not the destruction of Eudy's life – but the hope her life engendered.
4. So the evening, and this lecture, have both bitter and sweet in them. We hang our heads in grief at an unspeakable act of cruelty and violent destruction, and the terrible loss it inflicted – not only on

Eudy's friends and family, but on all of us. But we also raise our heads in pride at Eudy's courage and her truthfulness, to herself and to humankind. And we honour her life of achievement and integrity.

5. In the eight years since Eudy's tragic death, much has changed – the debate about lesbians, gays, bisexuals, transgender, intersex and queer (LGBTIQ) people has come electrically alive in Africa. One is almost tempted to say: her death and her suffering were not in vain.
6. This is in large part because attacks on people like Eudy have drawn attention to an inescapable truth: that sexual and gender diversity exists in Africa – and that it is an ineradicable part of the beauty of this continent.
7. And increasingly, African LGBTIQs are standing up. They are speaking out. They are becoming visible.
8. The revolution started shortly after Eudy's death, with an act of astonishing courage on the part of two Malawian men. In late December 2009, Steven Monjeza and Tiwonge Chimbalanga declared their intention to get married. The response was heartless, and extreme. They were arrested, imprisoned, paraded in front of a jeering public, and held without bail. Eventually, to rousing cheers, they were given the maximum sentence of *14 years* in prison.
9. All this for love – on a continent that has suffered famine, flood, malgovernance, dictatorships, military coups, corruption, genocide and civil wars. As Archbishop Tutu has said, amidst these pressing problems, the least of Africa's concerns should be same-sex love.
10. But that is to move forward too fast. Let us first pause, and retrace history. For, if we do not know our history, we risk not knowing ourselves.
11. Our oppression as LGBTIQ people has deep roots. And regrettably the hatred shown toward us remains strong and rife.

History

12. We have been accused of –

- Embodying an abomination
- Practising sin (in June 2015, after the US Supreme Court granted equal marriage to same-sex couples, in *Obergefell*,¹ Ms Zizipho Pae, a University of Cape Town students' council member, protested: "We are institutionalising and normalising sin! Sin. May God have mercy on us")
- Being immoral
- Acting as criminals
- Being mentally sick.

13. In reality, same-sex orientation is a simple variant – between 5% and 10% of every race, every continent, every culture, every language, every religion has some measure of same-sex orientation.² All classes and sectors; every school, community, congregation, neighbourhood; every family has LGBTI members.

- Every family with ten or more members probably has at least one person who is partly or wholly same sex-oriented – they just don't know it.

14. Why then has the struggle for justice for LGBTIs been so painful, so grievous? Why has there been so much misunderstanding, ignorance, hatred, violence, persecution and destruction?

15. There are two principal reasons –

¹ Available at http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.

² See Academy of Sciences of SA *Diversity in Human Sexuality – implications for policy in Africa* (May 2015).

- The first is that our difference resides in our sex and sexuality – in our sexual functioning. And sex and sexuality have always been profound sources of reproach, inhibition, fear and condemnation.
 - The second is that LGBTIs are invisible. Despite stereotypes, it is impossible to tell who is same-sex oriented just by looking at a person’s appearance or behaviour.
16. But in Africa, and elsewhere, open debate about sexual functioning is starting to dispel many myths. And people like Eudy Simelane, Steven Monjeza, Chiwonge Chimbalanga and thousands of others in Africa have been asserting who they are and why they are entitled to live their lives without indignity and fear.
17. *Our narrative must pause to understand why lesbian women are particularly vulnerable* (with gratitude to the work of the Human Dignity Trust in London):³
- (a) LGBTIs are not a homogenous group. Lesbians, as a sub-group, experience distinct and additional human rights violations compared to gay men. For lesbians, the “intersectionality” between discrimination against women and against gays and lesbians “creates a particularly lethal combination”.⁴
 - (b) As I will note later, homophobic and transphobic violence are forms of patriarchal social control – and are directed with particular anger and force at same-sex oriented woman who dare challenge patriarchy.⁵

³ Human Dignity Trust, *Briefing Note: Breaking the Silence - Impacts of Criminalisation of Homosexuality on Lesbians* (London, March 2015) (Human Dignity Trust Briefing Note) – quoted with the kind permission of Mr Jonathan Cooper.

⁴ Id page 17.

⁵ See Triangle Project, Lee, Lynch and Clayton, *Your Hate Won’t Change Us - Resisting homophobic and transphobic violence as forms of patriarchal social control* (2013) page 28, quoting Moffett, H. (2006). “These women, they force us to rape them”: Rape as narrative of social control in post-Apartheid South Africa. *Journal of Southern African Studies*, 32(1) 129- 144.):

- (c) Homosexuality is often seen as “an assault on both the gendered structuring of society and the institution of the traditional family”.⁶ But lesbians in particular are “a threat to men’s position in society; choosing to have sex with other women can be seen as a rejection of male ownership of their bodies, as well as disconnecting sex from reproduction.”⁷
- (d) Economic disempowerment further exacerbates lesbian vulnerabilities. When women lack the economic means to lead independent lives they depend for their survival on family members and communities. Lesbians who are open about their sexual orientation face greater risks from stigma and ostracism – for how can they survive economically without the support of their family? These pressures mean lesbians may not be able to leave violent or threatening domestic environments.
- (e) Both gay men and women may feel constrained to marry someone of the opposite sex. But, precisely because of economic dependence, women may experience greater pressure. Once inside a constrained opposite-sex marriage, women are more at risk of human rights abuses because of male/female power imbalances. In addition, lesbians who give birth to children within marriages experience further pressure not to reveal their

“Men use rape to inscribe subordinate status on the intimately known ‘Other’ – women [...] such activities draw on apartheid practices of control that have permeated all sectors of society.”

See too the unpublished report Triangle quotes on page 29, Hewat, H., & Arndt, M. (2001), *The experiences of stress and trauma: Black lesbians in South Africa*:

“It is argued in general that the brutality of apartheid bred brutality in its victims; and in particular that apartheid emasculated men, who tried to re-establish their manhood by making women submissive and beating those who resisted.”

⁶ Human Dignity Trust Briefing Note, page 18.

⁷ This is a quote from Amnesty International, *Making love a crime: Criminalization of Same-Sex conduct in Sub-Saharan Africa*, 25 June 2013, AFR 01/001/2013, available at <https://www.amnesty.org/en/documents/AFR01/012/2013/en/>, page 47.

homosexuality. They may be terrified – all too realistically – that they might lose access to their children.⁸

- (f) And, interestingly, there is a “significant correlation between the criminalisation of homosexuality and gender inequality.”⁹
- (g) Lesbians often find themselves uncertain about laws that criminalise homosexuality (or have been used to criminalise homosexuality). It may not be clear whether they apply to lesbians.¹⁰ This is a cause of further vulnerability.
- (h) Lesbians are subjected, horrifically, to rape that is supposedly designed to “cure” them.¹¹ The rapist may be a family member. Researchers report that the practice is seen as a “disciplining project”.¹² Even though South Africa has some of the world’s most powerful laws protecting sexual orientation, we are also the country with the highest level of “corrective rape”.¹³ Amidst our glory, this is our profound shame. We must each do much more to implement the laws and to extend actual State protection for lesbians.
- (i) A particular vulnerability for women sports players is that many assume that women playing sports must be lesbians. So there may be more scrutiny of and hate-acts towards women sports players – sometimes resulting in summary dismissal from sports teams, even at the national level.¹⁴

18. More even than gay men, these are the grim realities that Eudy Simelane faced in KwaThema, where she lived – a terrible fleshly

⁸ Human Dignity Trust Briefing Note, page 30.

⁹ Id, page 19.

¹⁰ Id, page 13.

¹¹ Id, page 26.

¹² Id, page 27.

¹³ Id, page 28, citing the Amnesty International report, above note 8, pages 49-51.

¹⁴ Id, page 34, citing the Amnesty International report, above note 8, pages 48 and 51

vulnerability, a terrible exposure to hatred and brutality and ignorance and violence. And like Eudy, many lesbian women continue to face these fears.

19. Yet there is hope. There is no doubt that change is coming to our continent and the world.
20. The growing consciousness of LGBTIQ in Africa is in part due to the fact that, in 1994, South Africa became the first country anywhere in the world to provide express protection on the ground of sexual orientation.

South Africa and LGBTI equality

21. South Africa's history offers an inspiring tale of unique engagement with sexual orientation.
22. In the 1980s, after coming out, I combined activism for LGBTI equality with my work as a human rights lawyer.
23. In our country's struggle for constitutionalism, including LGBTI equality, the most inspiring and important figure was Simon Tseko Nkoli
24. He was from a township. He was poor. He was black. He was gay. *He was all these things together.* And his fight for justice encompassed all these things together.
25. Simon inspired popular struggle in the 1980s for justice for poor blacks under apartheid – and for all gays and lesbians in our country.
26. In 1990, after the convulsions of internal protests and uprisings that rocked the country in the 1980s, the apartheid government was eventually forced to turn to negotiation.
27. In the constitutional negotiations that followed, on behalf of the LGBTI community we argued that bigotry comes in many different forms – under apartheid, black people suffered invasions of privacy

and dignity, enforcement of pass laws, laws barring sex and marriage across the colour line.

28. We could argue, and did, that oppression of LGBTI people was a further form of officially enforced hatred and ignorance. It should be rejected equally with race, gender and other noxious forms of discrimination. Many South Africans readily understood the arguments we made, and the constitutional negotiators accepted them.
29. The 1993 interim Constitution took effect on 27 April 1994. It reflected an historic world first – the equality clause contained the two words “sexual orientation”.
30. The 1996 final Constitution was the product of the first democratically elected Parliament of South Africa, sitting as a Constitutional Assembly. It drafted the final Constitution. That Constitution, under which we still struggle to create a just society, preserved protection from unfair discrimination on the ground of sexual orientation.
31. This evidenced the breadth, generosity and ambit of our constitutional negotiators’ commitment to equality and human dignity.
32. But the hard work lay ahead – only part of it was legal. In fact, the legal work was the *easier* part.
33. The Constitutional Court, in a ringing series of decisions, laid the groundwork for LGBTI equality. The importance of its decisions lies not merely in what they decided, but in the far-reaching doctrines of dignity, equality and inclusive moral citizenship¹⁵ they articulated. The Court laid down the following:

¹⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 107 and 127, per Sachs J.

- (a) Gays and lesbians are a permanent minority in society who in the past have suffered from patterns of disadvantage. Because they are a minority unable on their own to use political power to secure legislative advantages, they are exclusively reliant on the Bill of Rights for their protection.¹⁶
- (b) The impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels.¹⁷
- (c) ‘The sting of past and continuing discrimination against both gays and lesbians’ lies in the message it conveys. This is that, viewed as individuals or in their same-sex relationships, they ‘do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships’. This denies to gays and lesbians what is ‘foundational to our Constitution and the concepts of equality and dignity’, namely that ‘all persons have the same inherent worth and dignity’, whatever their other differences.¹⁸
- (d) Continuing discrimination against gays and lesbians must be assessed on the basis that marriage and the family are vital social institutions. The legal obligations arising from them perform important social functions.¹⁹ They provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children.²⁰

¹⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 25.

¹⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 26(a).

¹⁸ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 42, per Ackermann J.

¹⁹ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 31, per O’Regan J for the Court, applied in *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para 13.

²⁰ *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) para 19.

- (e) Family life as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family and what constitutes family life should change as social practices and traditions change.²¹
- (f) Permanent same-sex life partners are entitled to found their relationships in a manner that accords with their sexual orientation: such relationships should not be subject to unfair discrimination.²²
- (g) Gays and lesbians in same-sex life partnerships are ‘as capable as heterosexual spouses of expressing and sharing love in its manifold forms’. They are likewise ‘as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household’. They ‘are individually able to adopt children and in the case of lesbians to bear them’. They have in short ‘the same ability to establish a *consortium omnis vitae*’. Finally, they are ‘capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life’ in a way that is ‘not distinguishable in any significant respect from that of heterosexual spouses’.²³
- (h) The decisions of the courts regarding gays and lesbians should be seen as part of the growing acceptance of difference in an

²¹ *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) para 19.

²² *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para 15. See too *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 82.

²³ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 53(iv)-(viii), per Ackermann J.

increasingly open and pluralistic South Africa that is vital to the society the Constitution contemplates.²⁴

- (i) Same-sex marriage is not unknown to certain African traditional societies²⁵ – and ultimately, at the end of 2005, the Court required Parliament, within one year, to provide marriage equality.²⁶

34. It is often said that constitutionalism has not secured equality – or safety – for LGBTI persons. This is true.

35. Yet constitutionalism has given us some marked and incontestable achievements. They show what the Constitution has achieved:

(a) *First*, our rights as LGBTI people have received concrete embodiment in not only court decisions, but a wide swathe of legislation passed by the national and provincial legislatures.

(b) *Second*, and perhaps even more significantly, constitutionalism has created a widely disseminated internalisation of constitutional rights. This means that LGBTI young people regard themselves as bearers of rights. They feel *entitled* to equality, and to claim it. This is so throughout our country, urban and rural, townships and suburbs. This in itself is a hugely beneficial change from just a decade or two ago. It is one of the greatest achievement of constitutionalism. I defy those who say that the Constitution has achieved *nothing* for gays and lesbians. Has it achieved enough? No. Certainly not. But we do wrong if we under-estimate the beneficial impact of constitutional

²⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 138 and para 107, per Sachs J.

²⁵ *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para 12, per Madala J.

²⁶ *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC).

equality on LGBTI self-esteem, self-regard, inner dignity, social assertiveness and constitutional agency.

(c) *Third*, South Africa has served as a beacon to the rest of the world, including Africa, on LGBTI rights. Again, we would do wrong to under-estimate the effect on the rest of Africa of our attainment of constitutional equality. Our rights have been a significant catalyst for other African LGBTI communities.

36. Still, there remains a huge continuing disjunct – between what is promised and what has been attained. This is true of all our constitutional rights. It is not different from gender equality, racial subordination and lack of socio-economic rights. After 22 years, our Constitution’s promises have not been adequately fulfilled.

37. For LGBTIs, there remains widespread homophobia and prejudice. This finds expression in trivial condonations of horror – as when, in one of the *Spud* movies, the John Cleese character jokes smugly that he would like to give all lesbians “a thorough rogering”. This has its counterpart in enacted hatred, violence and murder against lesbians. The two are connected. Spoken hatred too often leads to its enactment in terrible deeds of destruction.

38. For us in the LGBTIQ community, three large challenges remain:

- Silence and invisibility remain the great suppressants of progress. Unlike race and gender, our defining condition is generally invisible.
- Second, we continue to be inhibited by shame, because the very nature of our differentiation lies in sexual desire and sexual functioning – and so much shame still attends the subject of sex.
- Third, the strength and depth of the history of our repression, often impelled by biblical teaching, remain enormous. It is particularly important to emphasise tonight, on an occasion hosted by the

Ujamaa Centre, to note the disgraceful and destructive role that those who call themselves men and women of the spirit, and of God, have played in persecuting lesbians and gays.

39. Despite these continuing obstacles, the manifestation of particularly black LGBTIQ self-identification throughout Africa heralds irreversible change across our continent.

What we still have to do – South Africa

40. For South Africans, there remains a huge shortfall in practice. Between our high constitutional ideals and the harsh reality, for many, of continuing discrimination, fear and disguised lives there is a glaring gap.
41. For transgender persons, phobia and violence remain high.
42. And for lesbians, like Eudy, phobic rapes and murders remain a heartstoppingly fearsome reality.

What we still have to do – Africa

43. Africa still has 38 countries that hound, persecute, assault, imprison and charge LGBTI people.
- All our neighbours (Lesotho, Botswana, Namibia, Zimbabwe, Swaziland), *except* Mozambique – continue to criminalise adult same-sex love.
44. For some, the horror of continuing persecution, imprisonment, violence and murder has actually increased with recent moves towards same-sex equality.
45. Why is this? There are two main reasons:
- ❖ The first is fear of change in circumstances of unstable transition (in Strijdom Square in Pretoria on 15 November 1988, a racist murdered seven people, and injured fifteen others – who could

have believed that, just thirteen months later, SA would set out on the path to constitutionalism and democracy?

- ❖ The second I mentioned earlier. It is that LGBTI identity and practices challenge traditional gender roles and authority. Our lives and our loves defy received concepts of sexuality. This means we also challenge gender-based hierarchies. We defy the patriarchy that lies like a heavy hand across much of our world and our continent. The result is rage, insecurity and violence.

46. These are the battles we continue to face as LGBTIs in Africa. But we have cause to end on a properly affirming note. Even in Africa's most hate-filled spots, there have been irreversible gains.

- On 22 May 2014, the African Commission on Human and People's Rights did something wholly unprecedented. It committed an emphatically gay- and lesbian-friendly act. It adopted Resolution 275. This condemned violence and other human rights violations against persons on the basis of real or imputed sexual orientation or gender identity.²⁷ The historic importance of this resolution cannot be overstated. It is the first time that an Africa-wide body has taken a stand for LGBTI rights and protection.
- Then there have been heartening court decisions across the continent. Both a Kenyan court, in April 2015,²⁸ and the Botswana Court of Appeal, just last month have given recognition to LGBTI rights. They delivered judgments requiring that their governments must register NGOs supporting lesbian and gay rights.²⁹

²⁷ See <http://www.ishr.ch/news/african-commission-adopts-landmark-resolution-lgbt-rights#sthash.9jmGG6IL.dpuf>.

²⁸ *Gitari v NGO Coordination Board*, decision of 24 April 2015 (Lenaola J, Ngugi J, Odunga J), available at <http://kenyalaw.org/caselaw/cases/view/108412/>.

²⁹ On 16 March, in *Attorney General of Botswana v Rammoge and others* (available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2016/03/LEGBIBO-CoA-judgment.pdf>), the Botswana Court of Appeal unanimously dismissed an appeal by the Botswana government against a high court decision (Rannowane J) that required registration of LEGABIBO (Lesbians, Gays and Bisexuals Organisation of Botswana). The Botswana court cited the Kenya case (para 58).

47. The genie of African LGBTI pride can never be put back in the bottle. Eudy Simelane's life was not in vain. Though we mourn the senselessness of the violence that took her young life, we know that what she believed in, what her life entailed and represented, will triumph in our continent and in our time.

As GroundUp noted, "The case is a victory for the advancement and recognition of fundamental, universal human rights for gay, lesbian, bisexual and transgender persons, both in Botswana, and throughout Africa. In February 2012, activists sought to have their organisation, LEGABIBO, registered. The Director of the Department of Civil and National Registration and the Minister of Labour and Home Affairs refused the application for registration on the basis, amongst other things, that same-sex practices are criminalised in Botswana, and therefore lesbian, gay and bisexual individuals were not recognised as persons protected by the rights provisions in the Constitution of Botswana.

But the High Court of Gaborone rejected the State's argument as irrational and ordered that LEGABIBO be registered as an organisation.

The Court of Appeal has now reaffirmed the decision of the Gaborone High Court, by holding that the refusal to register LEGABIBO was not only unlawful, but a violation of the right of LGBTI activists to freely assemble and associate."