

Pumla Dineo Gqola speaks with Wendy Isaack



Wendy Isaack is an activist, human rights lawyer, writer and public intellectual who previously worked as the Legal Advisor at the Lesbian and Gay Equality Project in Yeoville, Johannesburg. She has worked tirelessly to fulfil the mandate of the Equality Project to bring South African legislation in line with the Constitutional protection of full rights to lesbian, gay, bisexual, transgender and intersex (LGBTi) communities and individuals. At the same time, she has contributed to coalition-building and campaigns with activists from other African countries and beyond, in an effort to bring about greater legal protection and politico-social recognition of LGBTi individuals and communities.

Pumla Dineo Gqola: Not every feminist lesbian directs her activist and professional efforts so pointedly towards a more equitable country for people in same-sex relationships, and for a genuinely LGBTi-friendly society. Take me through your process.

Wendy Isaack: Precisely because I am a feminist lesbian and a black working-class woman, my life has taken this course; there was no other alternative. When one grows up and lives in a society where being black and female arouses such hatred, there is no option but to take a position, especially when one does not have the economic resources to fit into some protected society or subculture. Growing up in rural KwaZulu-Natal, I constantly sensed that my sexuality offended many people, if not the entire community in which I lived. I was young at the time, so I could not understand why this was so. I spent a lot of time wondering why I was treated differently in public and educational spaces, why my attempts to access the legal profession through the normal route were unsuccessful, and why I was consistently intimidated into conforming to feminine gender roles and standards that were alien to me.

PDG: What were your initial responses to that?

WI: First, it was terrifying; second, it did a lot of damage to my self-confidence and self-esteem. Yet at the same time, it gave me courage and strength, something I can appreciate only in retrospect. I reckoned there had to be

objective standards by which to measure and judge established norms that were not biased with regard to class/socio-economic status, gender, race or sexual orientation. So I decided to study law because I believed the law to be the mechanism for change, and in that regard I had to be the agent for change.

PDG: How did law help you in your activism?

WI: I was fortunate in that by the time I got involved in lesbian and gay activism in 2000, much of the foundational work had already been done. The powerful language of rights, particularly human rights law, and the legal developments in the South Africa since 1994 were empowering tools, both for the work that I did and on a personal level. While the acquisition and language of rights were not the only solutions for ending the oppression of working-class lesbian and gay people, it was an important tactic in the legal arena because it offered a recognised vocabulary to frame political and social wrongs. Applying a human rights approach to sexuality showed that incorporating sexual minority issues into human rights practice was a revolutionary and evolutionary process, which itself would provide new ideas and identify unsuspected obstacles at each step.



My multiple and intersecting identities ensured that the focus of my work would be to promote access to justice for black working-class sexual minorities. In the course of this work, I was able to engage with the broader struggle for gender equality by grounding the oppression of black lesbian and transgender women within the gender-based violence discourse. Inevitably, the approach was multi-faceted because everywhere I looked there were multiple forms of identity-based oppression. As a person who experienced discrimination at almost every turn, I was acutely aware that I could not argue for the rights for lesbian and gay people without challenging the persistent legal discrimination, social inequality and socio-economic conditions in our African communities and the racialised society within which we live. Although the focus was on legal reform for lesbian and gay people, the idea was and continues to be an endeavour to contribute to a just South African society.

PDG: Some feminists have noted – you and Mary Hames most vocally in South Africa, Sylvia Tamale in Uganda – that you're struck by the silence among feminists when it comes to issues of lesbian, or same-sex sexuality. How do you make sense of that?

WI: There is no logic here, yet feminists are not immune to social prejudices. It seems to me that many feminists' preoccupation with heterosexual sexuality, the binaries of sex and gender, their political project linked with viewing

women as an already established and constituted entity and men (or patriarchy) as the problem is one cause for the silence. These are issues of particular concern to some feminists – others take it a step further and consider the relationships between gender, race, class, ethnicity and religion – yet are reluctant to deal with sexual differences between women. The pervasive nature of homophobia and prejudice against anyone who does not conform to the idea of what a woman/feminist should be, remains present in feminist discourses and analyses.

PDG: Are you saying that such feminists remain quiet because heterosexual privilege is the only status they have?

WI: Homophobia, like patriarchy and many other social evils and exclusions, is supported and justified in the name of religion, culture and tradition. Homophobia is also institutionalised in the economic system of capitalism. I can only speculate on the root cause of this prejudice and homophobia; people generally seem to have difficulties with concepts and ideas which are fundamentally different from their own – or which challenge heterosexist hegemony.



In our black communities, homosexuality is still seen as a white phenomenon, un-African, an aberration, contrary to dominant religious beliefs and systems. I am not suggesting that only black people are homophobic, because this is not true – in any society or community where there are strong religious or traditional beliefs, you will find some elements of homophobic prejudice. In many communities of all races, lesbian and gay people are seen as threatening the social order: women because they seek to exercise autonomy over their bodies, while men are seen as traitors to masculine privilege because they are perceived to be adopting “feminine roles”. And transgender people call into question the traditional assumption that all humankind must fall irrevocably into one of two gender categories. Defiance of the “heterosexual norm” provokes moral condemnation, exclusion and violence.

PDG: That *does* make sense. In an incredibly powerful article on the danger that black lesbians (especially) live under in South Africa, you’ve spoken of a current state of emergency. Can you explain your thinking in this regard?

WI: I am aware that it might seem surprising to speak of a state of emergency, especially considering South Africa’s apartheid past. However, the high incidence of hate crimes against black lesbians and transgender women in South Africa warranted a “positive” declaration of a state of emergency, a recognition by the state that things were out of control, and that democracy and freedom had very little value for a certain group of people. I argued that what black

lesbian and transgender women were experiencing amounted to torture as envisaged in international law. What is more, this victimisation has not been confined to private actors; some members of the police, who are mandated to protect the vulnerable in society, have been perpetrators of secondary victimisation. In some cases where the human rights of black lesbian and transgender people have been blatantly violated, the state response has been silence and omission. Reports of sexual violence weren't investigated, dockets miraculously disappeared, known suspects were not arrested, and accused persons who had been released on bail intimidated and in some instances re-victimised the complainants.

So in spite of the rights guaranteed in the Constitution, particularly section 12(1) – which provides that everyone has the right to freedom and security of the person, including the right to be free from all forms of violence, and the guarantee of bodily and psychological integrity – black lesbian and transgender women continue to be systematically violated and abused; and the state, through its actors or by omission, continues to sponsor homophobic attacks. At the time of writing that article, I was dealing with numerous cases where lesbians and transgender women were regularly harassed, repeatedly sexually violated, intimidated and abused, simply because of their real or perceived sexual orientation and/or gender identity. There were other responses.

PDG: Such as?

WI: The Forum for the Empowerment of Women (FEW) initiated a campaign, the Rose has Thorns Campaign, which was intended to deal with this issue of hate crimes against black lesbian and transgender women. “Curative rape” of black lesbian and transgender women is a term used to describe the sexual violence perpetrated against this group of people for the purpose of “curing them” of their real or perceived homosexual orientation and/or gender identity.

Black lesbian and transgender women face violence at home, in schools, communities and various social spaces. For many, this violence has become a way of life. This systematic and institutionalised violence hurts bodies, minds and families because it is kept invisible. Many South Africans are homophobic, and this leads to a perpetuation of myths and stereotypes about lesbian and gay people. More importantly, it leads to the creation of an environment in which we, as black lesbian and transgender women, feel unsafe.

PDG: Compounding the situation in a country where women of different sexual orientations feel besieged, lesbian and transgender women are multiply-vulnerable.



WI: Such an environment has devastating consequences. Many young lesbian and transgender people are kicked out of their homes and schools, and are sexually violated by men in their communities and families. Worse still, many survivors become infected with HIV/Aids. In considering access to treatment, the gender, race and socio-economic status of this group, coupled with homophobia within the service provision sector, make this group of people particularly vulnerable.

Now it could be argued that these events do not pose a nationwide threat. However, I suggest that these violent attacks on black lesbians and transgender women, together with the high incidence of rape generally in South Africa (and considering that the Sexual Offences Bill has still not been promulgated), threatens the society envisaged by the Constitution – a society based on values of human dignity, equality and freedom, where no-one need live in constant fear for their lives, a non-sexist and non-racist society.

PDG: South Africa has these paradoxes. On the one hand, we have this progressive Constitution that we take enormous pride in. But on the other, homophobia is openly expressed in newspapers, radio, work contexts, and other settings. What is going on?

WI: This is interesting – what you basically are asking is, what is the value of a Bill of Rights in a Constitution? How can these guarantees of equality and non-discrimination be translated into reality for people whose rights may be violated? The Constitution sets norms and values – but cannot achieve an egalitarian society on its own.

If we are to implement the Constitution, civil society and human rights groups, specifically lesbian and gay organisations, must conduct public education, engage in advocacy initiatives, and consistently work within communities to challenge homophobic prejudices. In respect of private corporations or any entity controlled by the state, we can always rely on the equality clause in the Constitution read together with the Promotion of Equality and Prevention of Unfair Discrimination Act, to seek relief from our courts.

PDG: You believe in the ability of the law to transform and enable, and yet society lags behind the legal machinery. You were part of the team that basically transformed the remaining discriminatory legislation against same-sex partnerships. How does it feel to have chosen to be part of that?

WI: The work of the Lesbian and Gay Equality Project, particularly the people I worked with, meant that this was probably the most rewarding time in life. Being a part of a team initiating and advocating for change in so many arenas



was a learning curve for me, as well as an opportunity to do what I had set out to do many years ago. We acknowledged the capacity of the law as a catalyst for change as well as its limitations. As a result, the work of the organisation constituted law and policy reform coupled with public education and awareness. It was very challenging, but also rewarding.

PDG: As someone who has worked with LGBTi organisations and communities regionally, continentally and beyond, what do you think are our biggest challenges for the future?

WI: In South Africa our legal rights are guaranteed by the Constitution and other progressive legislation, yet few lesbian and gay people can access these rights. Socio-economic status hinders access to justice in a fundamental way. Also, within the lesbian and gay community, we have not fully recognised that different forms of oppression are linked and inter-related. Racism and class oppression are frighteningly prevalent. We're preoccupied with dealing with sexual orientation and gender identity issues, and so fail to appreciate the links we can create with other broader struggles for equality in the country, regionally and continentally – be they around HIV/Aids, poverty, or the Western imperialist attitudes of lesbian and gay organisations in Europe and America. When we do convene as a region or continent, we are wrapped up in our sexuality and fail to be strategic in the work that we do.

PDG: Some of your work, and Fikile Vilakazi's, at the Equality Project, provided a home-space for varied isolated lesbian and gay people, as well as trans and bisexuals. This is obviously important and highly needed. Do you have concerns about the fact that the Equality Project has closed down, or are there similar spaces?

WI: Although the Equality Project was the only organisation with a mandate to ensure the legal and social equality of LGBTi people, it was certainly not the only organisation in the country working on sexual minority issues. There are other groups that may provide this space. Yet the closure has left a huge vacuum in that the Equality Project, and formerly the National Coalition for Gay and Lesbian Equality, was the only legal, advocacy and political voice for lesbian and gay people in the country. Failure of this sector to recognise that the aims and objectives of the organisation have not yet been fulfilled may have devastating consequences. The law reform success must be accompanied by access to justice and substantive equality, and this is the area in which the continued existence of the Equality Project would have been crucial.

PDG: How has the closure affected you personally?



WI: It has left me with more questions than answers. I do not believe that we provided this much-needed space adequately; I must interrogate my work and myself in this regard. In doing this, I must ask myself some really hard questions.

PDG: Such as?

WI: Well, to begin with, how much responsibility must I assume for the silence and inaction in respect of the events that led to the closure? Did I fulfil the mandate of ensuring social equality for lesbian and gay people, or was the focus so legalistic that many members of this constituency fell through the cracks?

As far as the future goes, is there still a need for the Equality Project? If so, what shape and form should it take? How can we mobilise our energies to create an environment that allows for engaging with the very issues that crippled the organisation – the underlying racism and racist policies, the class distinctions, and most importantly, the consistent discrimination against lesbian and transgender women? Finally, and most importantly, how do we ensure transparency, democratic governance and local ownership of the projects of the organisation?

PDG: All of those are really difficult questions. To move on, why is same-sex marriage so contentious across such diverse political constituencies? I am thinking that a lot of people will acknowledge LGBTi, partake in Pride events, defend some same-sex partnership rights, and yet come unstuck on marriage. What are your thoughts?

WI: There are various arguments against same-sex marriage coming from different sectors of the state and civil society. What they have in common is the prejudice and homophobia on which they are based.

Procreation is the most commonly used argument; that marriage is created for the purposes of procreation, and since lesbian and gay people have no prospect of producing offspring through sexual relations with one another, they cannot be allowed to marry. This is obviously neither true nor logical – South African law recognises marriages between heterosexual people even if the partners are unable or unwilling to procreate. In addition, lesbian and gay people have children all the time, through adoption and/or artificial insemination.

Once opponents of same-sex marriage realise this, they shift to the issue of welfare of the children. Statements such as “lesbian and gay people cannot be allowed to marry and raise children because children need a mother and a father, they need the nurturing of a mother and discipline of a father and they need gender role models” are common. This is also untrue; among African people, women-headed or single-parent households are a majority. The



most important parenting needs of children are love, adequate care, nutrition, shelter, clothing and emotional support. Besides, the Constitutional Court has stated that the only consideration in respect of children is what is in the best interest of the child, not the sexual orientation of the parents.

An additional argument is “that to allow same-sex marriage would lead to the loss of traditional family values and the disintegration of the moral fibre in society”. In Southern Africa, the notion of “a family based on a husband, his wife and two children” is the exception rather than the rule. Families have taken on different forms and continue to develop. South African family law, derived from Roman-Dutch law, accepted marriage laws as defined by the secular courts, but was influenced by the Reformed Churches. Along with African, Muslim and Hindu families, the family life of lesbian and gay people was deemed to offend the morals of the Dutch Reformed Church. Furthermore, the destruction of black family life, marriages and relationships was central to apartheid rule.



PDG: Exactly. These arguments are quite ridiculous, but they obviously hold a lot of power, legally invalid as they are. Are there more legally slippery arguments?

WI: Yes, it has also been argued before the Constitutional Court that to change the definition of marriage to include same-sex life partners would amount both to unfair discrimination against persons who regard their marriage vows as sacred and of divine origin.

But the Court found that public opinion alone could not determine the constitutionality of legislation. In any event, the issue is not whether society or the lesbian and gay community is in favour of the legal recognition of same-sex marriages, but rather whether the Constitution permits the legal prohibition of those marriages, given that this prohibition cannot be reconciled with the guarantee of inter-related rights to equality, dignity and privacy.

Few are aware that at its 50th Annual Congress, the ruling African National Congress recognised that lesbian and gay people should be afforded the full legal right to marry. In addition, the Bill of Rights in our Constitution prohibits unfair discrimination on the basis of sexual orientation. The arguments based on religion and culture must be measured against the non-discrimination clause in the Bill of Rights. Very simply, there is deliberate confusion supported by homophobic and prejudiced sentiments in arguing against same-sex marriages.

PDG: My next question is a bit unfair since you were out of the country at the time of the latest ruling (December 2005) on marriage by the Constitutional Court, stating that the decision should be placed on hold for a year while

Parliament scrutinised the implications. My sense was that the responses were mixed. Some LGBTi commentators felt that the ruling should be celebrated. At the same time, others were unimpressed by the non-decision this ruling entailed. Perhaps I was drawn to this latter argument because it reflects my own irritation and disappointment. I cannot understand why Parliament needs a year to make a decision on how to proceed.

WI: On World Aids Day, the Constitutional Court delivered its judgment on the legal right of lesbian and gay people to marry. In my opinion, this was timed to coincide with a day on which the media and the majority of South Africans (lesbian and gay people included) would be occupied elsewhere. Or maybe that is just my paranoia.

In any event, noting the public significance of the matter, the sensitivities involved, and the importance of establishing a firm foundation for the achievement of equality in the area of family law, the Court felt that there was no reason to fear that Parliament would not be able to make a decision within a year. In the event that Parliament fails to cure the legal defect within 12 months, the words “or spouse” will automatically be read into the Marriage Act and in this way, the heterosexual marriage institution will become accessible to lesbian and gay couples. However, Parliament has the power to pass Civil Unions or Registered Partnerships legislation that will accommodate same-sex couples, but maintain the problematic principle of separate but equal.

In any case, it must be noted that the Court was unanimous on the merits of the case, stating that the exclusion of same-sex couples from the benefits and responsibilities of marriage was not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice. It represented a harsh, if oblique, statement that same-sex couples are seen as outsiders, and that their need for their intimate relations to be affirmed and protected is somehow valued as less than that of heterosexual couples. The intangible damage to same-sex couples is as severe as material deprivation. They are not entitled to celebrate their commitment to each other in a joyous public event recognised by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture.

In a separate and impressive judgment, Justice O’Regan agreed with the findings on the merits, but dissented on the remedy. She stated that the Constitutional Court should develop the common-law rule, and at the same time read into section 30 of the Act words that would with immediate effect



permit gays and lesbians to be married by civil marriage officers (and religious marriage officers who did not consider such marriages to fall outside the tenets of their religion). Such an order would simply mean that there would be gay and lesbian married couples at common law, and these marriages would have to be regulated by any new marital regime the legislature chooses to adopt. Justice O'Regan concluded that the power and duty to protect Constitutional rights is conferred upon the courts, and courts should not shrink from that duty. The legitimacy of the Court's order does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution. Permitting those who have been excluded from marrying to marry can only foster a society based on respect for human dignity and human difference.



Interestingly enough, I believe that Justice O'Regan was not present in court on the day the judgment was delivered. In any event, more than a decade after democracy, lesbian and gay people still have to wait another 12 months to be informed, most likely, that regardless of what the Constitution says about equality and human dignity, they will never be equal (socially) to heterosexual people. The implications of this are profound – legally equal but separate; the law will recognise our relationships, but in the eyes of our families and communities, we will never be equal members of society. On the other hand, Parliament may just surprise us all and draft an inclusive Marriage Act.

PDG: I know that the importance of your work is not always acknowledged or affirmed. What strategies have you developed to deal with more hostile, dismissive, or superficial responses? How do you cope with burnout?

WI: It was never my intention to be acknowledged for the work I was doing – it had to be done and I was committed to doing it. But yes, there have been moments in the past five years when I just wanted to pack it all in, to go to a dark place and hide. So I suppose I have burnt out – that is why I am in Northern Ireland getting some rest.

PDQ: Thank you very much, Wendy. I hope you get some well-deserved rest, as busy as your schedule in Northern Ireland is, and come back home re-energised.