

*LGBTI in Africa*

**The battle for the recognition of LGBTI rights as human rights**

**Introduction**

Over the past couple of years, there has not been a shortage of examples of human rights violations of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons throughout the continent.<sup>i</sup> The violations have been perpetrated by both state and non-state actors. The violations vary from the denial of basic rights to, in some extreme cases, physical violence against LGBTI people and sometimes even death.<sup>ii</sup> Some states have taken efforts to strengthen criminal laws<sup>iii</sup> by increasing penalties or broadening the list of offences that LGBTI people can be charged under.

Current and former heads of state continue to make statements condemning same sex relations.<sup>iv</sup> Various religious formations have also taken the opportunity to oppose same sex relationships.<sup>v</sup> There are currently 38 countries on the continent that actively criminalise same sex intimacy and, while not expressly criminalised in other countries, other laws, like vagrancy or public nuisance laws, can be used to prosecute and persecute LGBTI individuals and groups. It is also accepted that the violations that are taking place implicate a range of human rights that are protected.<sup>vi</sup>

While all of this has been going on, a burgeoning movement of activists fighting for the struggle of legal recognition of rights of LGBTI people has emerged.<sup>vii</sup> Gradually, other mainstream civil society formations have also embraced the issue of the multiple violations of LGBTI peoples' rights as a human rights issue. In the fight for rights, like in any other struggle, there will be prioritisation of strategies, more preference given to some arguments than others and contestations over the choice of strategies that will be used to articulate the problems. This article seeks to provide an overview of what exists at the regional level focusing on the opportunities and challenges at the African Union and at the African Commission on Human and Peoples' Rights. It then highlights the key issues that will confront the nascent movement as it begins to organise at both the country and regional level.

### **The African Charter on Human and Peoples' Rights**

The African Commission on Human and Peoples' Rights (The Commission) has been, until the establishment of the African Court on Human and Peoples' Rights (The Court), the sole body granted the mandate to investigate the violations of rights and to protect against the violations of the rights guaranteed under the African Charter on Human and Peoples' Rights (The Charter). There is no suggestion, anywhere in the Charter, that there is any individual or group that is barred from the enjoyment of rights guaranteed under the Charter. Human rights simply attach to all human beings by virtue of being human. The provisions of the Charter guarantee rights to 'every individual'<sup>viii</sup> 'every human being'<sup>ix</sup> and 'every citizen'.<sup>x</sup> The non-discrimination article, Article 2, entitles every individual to the enjoyment of all the rights in the Charter without distinction of any kind. The Charter enumerates grounds upon which one cannot be discriminated against but the list is not exhaustive as it makes provision for 'other status'. In other comparable jurisdictions and domestic courts, 'other status' or 'other grounds' has been interpreted to include sexual orientation.

The African Charter, like all instruments providing for the protection of fundamental rights, provides a sufficient basis for the recognition of all rights without distinction, including those of LGBTI people. It makes provision for life and integrity of the person,<sup>xi</sup> respect for dignity inherent in a human being and the prohibition of torture, cruel, inhumane and degrading treatment, the right to liberty and to the security of his/ her person, among other rights which are essential for the protection of the violations that many LGBTI people are subjected to.<sup>xii</sup> Article 60<sup>xiii</sup> and 61<sup>xiv</sup> of the Charter enable the Commission to have reference to international law and norms generally accepted as such.

While the Charter does provide a basis for limiting a whole range of rights, the limitation is a balancing exercise that judicial bodies often undertake bearing in mind the facts and the rights in question. The Charter does not present a basis for a blanket exclusion of any group. The argument that the rights of LGBTI people do not find expression in international human rights law or that it detracts from universally accepted human rights norms is one that has been raging at the UN and may soon rear its head at the African Union<sup>xv</sup>.

It is for those who say that the Charter does not protect rights of LGBTI people to set out what the basis of the limitation will be. In asserting the rights, the violations that LGBTI people are subjected to have to be tested against the Charter or national human rights laws. Accepting that

the Charter provides protection to everyone requires engaging with those tasked to giving it content that enables the rights to be realised.

### **The African Commission on Human and Peoples' Rights**

The Commission has over the years pursued violations of LGBTI peoples' rights by member states. During member states' reports the Commission has out of its own accord and based on shadow reports, asked member states to respond to documented violations. It has also made the observation that discrimination on the basis of sexual orientation is incompatible with the African Charter, and asked states to consider whether subjecting suspects to invasive medical examinations did not contravene the Charter and expressed concern on the lack of tolerance on the grounds of people's sexual orientation.

What is less clear however is the reason why the Commission has been unable to reach a decision to grant observer status to the Coalition of African Lesbians (CAL), a regional human rights organisation working on the protection of human rights of lesbians. CAL meets the criteria for receiving observer status and all other organisations that applied with CAL for observer status in 2007 have been granted such status. During the November 2008 session, the Commission decided to refer the matter to its own private session in order to deliberate further whether the rights, which are human rights, that CAL seeks to protect are justiciable under the Charter. What makes the CAL application an interesting issue is that the usual arguments around discrimination on the basis of sexual orientation do not arise or have not yet arisen. CAL only seeks to get observer status in order to engage with the Commission on issues affecting lesbians. It is not challenging any laws, practice or conduct that discriminates on the basis of sexual orientation. The issues that CAL would like to bring to the attention of the Commission are not controversial. Violence perpetrated against lesbians and forced marriages, among other issues, have been dealt with by the Commission before. At present, there is no country on the continent that criminalises the identity of being a lesbian, this is common refrain by groups or bodies that do not want to be involved in work around sexual orientation. If the Commission grants observer status to CAL this might signal the readiness of the Commission to start looking at freedom of association issues, where state parties refuse to register organisations doing human rights advocacy on sexual orientation and gender identity. If the application is rejected however the Commission creates a stalemate because if the identity of being a lesbian is a barrier to being recognised for the purpose of receiving observer status, it remains unclear what the positions of the

Commission will be when rights have been violated on the basis of sexual orientation.

### **The African Union**

To date the African Union has not taken any overt position on sexual orientation. It is an issue that many governments are unhappy about. It is understandable that many activists have not seen it as an issue that should be pushed overtly, because chances are that consensus will be easy to reach and it will not be the one that is desired by the movement. There has not been a government that has provided leadership or even an indication that it may be willing to take this issue on. Engagement with various individual governments to enable them to either sponsor or support the issue is work that must still be undertaken. The African Union's other regional counterparts have taken decisive and concerted steps in outlawing discrimination against sexual minorities. In the European Union, membership requires repeal of anti-homosexuality legislation. The Treaty of Amsterdam also requires anti-discrimination legislation to be enacted by its member states. In as recent as 2008, the 34 countries of the Organisation of American States (OAS) approved a resolution titled Human Rights, Sexual Orientation and Gender Identity.<sup>xvi</sup> It soon followed this up with another resolution in June 2010.<sup>xvii</sup> The first resolution expressed concern about acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity, among other things. This resolution was passed despite the fact that some of the member states continue to still criminalise same sex intimacy. The second resolution asked member states to consider ways to combat discrimination against persons because of their sexual orientation and gender identity.

In the African Union, there are moves that suggests that the issue is approached with caution by governments. In a move interpreted as an attack on freedom of sexual orientation, Egypt sought and got a resolution at the 15th African Union Summit held in Kampala in July 2010<sup>xviii</sup>. The resolution calls on member states to reject the divisive nature of efforts at the UN seeking to impose controversial concepts, falling outside the internationally and regionally agreed legal framework on human rights, in particular regarding social and value systems and matters. The recent UN debates on sexual orientation appear to have created an impetus for the Egyptian backed resolution as the language used borrows heavily from the alternative statement at the UN. In 2008 France proposed the UN declaration on sexual orientation and gender identity. Only six African countries, all former French colonies, signed on to the statement. An alternative statement led by the Organisation of the Islamic Conference claimed that the declaration

threatened to undermine the international framework of human rights, “at the attempt to introduce to the United Nations some notions that have no legal foundations in any international human rights instrument.” Thirty one African countries signed on to that statement.

### **Key challenges for a nascent movement**

The idea that the violations that are faced by LGBTI people essentially constitute a human rights issue is nothing new<sup>xix</sup>. The pervasive arguments include the charge that the movement has not had enough time to develop its language and strategies that will work on the continent. While there is merit in borrowing the human rights strategies that have worked in other parts of the world, there is a need to look at the factors that may serve to limit the effectiveness of those strategies.

**Why the focus on decriminalisation?** Most of the criminal laws do not target identity but they focus on conduct, same sexual conduct. In the LGBTI initialism, the “G” has received considerable attention because it has mainly been gay men who have been targeted by the law through arrests. Although prosecution under the statutes that prohibit consensual same sex intimacy has largely been unsuccessful because of the burden of proof, the existence of the laws continue to legitimise violence, harassment and many forms of discrimination because of their sexual orientation. Decriminalisation may not end homophobia but taking the laws away will make a difference to people whose daily lives are interrupted and live in fear of being outed and blackmailed. For individuals and organisations operating in a legally sanctioned homophobic space, living without the stigma and clout of illegality makes a world of difference. The unabated violence directed at black lesbians in South Africa has led to a creation of a false dichotomy. Some argue that decriminalisation may not be a priority for the rest of the continent because violence continues in South Africa despite decriminalisation. The violence is not an argument against decriminalisation but the key lesson is that rights cannot be won in parliament and in courts alone. A sole focus on legal regimes that prevent discrimination in a context where the state is the main violator by maintaining discriminatory laws in its statute books does little to target the inequality, indignity and stigma produced by criminalising identities and sexual acts.

There are other violations such as lack of access to basic rights, the fear of being outed, discrimination in employment or in accessing health care that will not be addressed by decriminalisation. Decriminalisation and the prevention of discrimination are complementary in the fights against stigma and discrimination on the basis of sexual orientation.

**When is it going to be LGBTI time?** The late emergence of the LGBTI movement as a movement for rights on the continent made it easier to coopt the LGBTI initialism. LGBTI activism started at a time when LGBTI gained prominence and a large degree of acceptance in many Western and English speaking countries. Viewed in a positive light, LGBTI has come to represent inclusivity and to place an emphasis of variant sexual orientations and gender identities. The issues and priorities have received unequal consideration, with mainly the LGBTI receiving token attention and the G receiving a bigger share of the focus. In the battle for legal recognition of rights the invisibility and marginalisation of the issues confronting other groups may be damaging to unity of the movement if not addressed. In mainstream LGBTI work, challenges confronting transgender and transsexual persons in changing official documents, the availability of facilities for people seeking gender re-assignment surgery or the invisibility of lesbians receive scant attention. The recent Muasya<sup>xx</sup> case in Kenya is an exception to the silence and invisibility of the violations of rights of people who are intersex.

**Is litigation the right strategy?** Many activists have sought different strategies to advance LGBTI rights. These strategies have varied from documenting human rights violations, civic education work through theatre and exhibitions, working with religious leaders and looking for strategic entry points in law reform processes. There are currently no pro-active legislative efforts to repeal laws that are discriminatory on the basis of sexual orientation and this is understandable as there are few members of parliament who would be willing to support such an initiative. Engagement with the law reform process has been reactive, mainly in the form of opposing legislation aimed at criminalising same sex relationships. If the law has to change litigation has been identified as one of the tools that can bring about reform in this area. Litigation as a strategy for change in a context where homophobia has no respect for the rule of law, constitutional promises and international human rights standards requires more work outside of the courtrooms than inside. It takes more than legal arguments to make a successful constitutional challenge. The existence of a movement that focuses on rights, the establishment of strategic partnerships with other civil society formations, doing work with the judiciary, and the acceptance by key actors that the continued harassment and persecution of gay and lesbian people are human rights issues are increasingly seen as pre-requisites if one wants to use the courts as a site for legal advocacy.

What will be crucial will be how the rights are framed and asserted.

Asserting the right to be free from cruel and degrading treatment as asserted in the Oyo and Mukasa case<sup>xxi</sup> seems much easier than a direct challenge to the constitutionality of laws that criminalises same sex sexual conduct. An incremental development in the courts by asking the courts to develop the content of rights such as privacy and equality may serve the purpose of laying a solid foundation that courts will sue when later confronted with the bigger questions.

Where the battles have been successful, it was not only due to the legal arguments. In the National Coalition on Gay and Lesbian Equality case,<sup>xxii</sup> the South African law was struck down in court but the battle was won during the constitution making process. The inclusion of sexual orientation as a ground upon which one may not be discriminated against clinched the deal. A vibrant civil society movement, a positive image of the LGBTI community in American popular culture, is credited for making it happen in Texas v Lawrence in the United States.

The Voices of Tolerance campaign, the multi-faceted nature of the movement and the ability to mobilise key and strategic allies was instrumental to the Naz Foundation challenge in India.

**The movement needs to know its partners:** It is easy to know what the judiciary thinks because they have to give reasons for their decisions. It will be a mistake however to believe that other key legal actors are not just as conflicted, have concerns or do not have reservations about the protection of sexual minorities. In other contexts, the traditional allies of the LGBTI movement have been the women's human rights movement. Competition for space, scarcity of resources, and the argument that taking on LGBTI work may adversely impact on their main constituency has meant that many women's rights groups are not readily associated with the LGBTI movement. Linked to this is the criticism of the narrow framing of issues when presented as LGBTI.

The complaint is that the sexual rights approach is more inclusive and it captures the African dilemma that starts at a place where human sexuality in general is a taboo subject. In a context where people can be subjected to a death penalty for committing adultery or where laws that exempt men who are married from prosecution when they rape their wives continue to exist, it is argued that the emphasis on discrimination on the basis of sexual orientation borrows too heavily from the West and neglects the social context. Some feminist groups<sup>xxiii</sup> have begun to fill this void by expressly including sexual orientation and gender identity in their work. Mainstream human rights organisations have come on board but for many this is a very recent development. Reasons for refusing to engage range from: "but homosexuality is against the

law in my country” to “my board is very homophobic, they won’t let us do this work”. Many lawyers, including human rights lawyers, who ordinarily uphold the right of every accused person to legal representation, refuse to represent LGBTI people in court. Lawyers who take on these cases do so at great risks to their personal and professional integrity. Even some of those lawyers who take on the cases sometimes cannot wait for the opportune moment to declare that they are not gay, but just helping. These strategic partnerships remain crucial and there remains a need to continue engaging with these groups as convincing them of the legitimacy of the claim is part of the work that leads to decriminalisation.

**HIV/AIDS is an entry point but it may not necessarily lead to rights:** Public health strategies that focus on men who have sex with men (MSM) and identifying them as a group that is vulnerable to HIV/AIDS has been a useful entry point. In official policy it has led many states to acknowledge that the community exists and that resources needed to be allocated to cater to their health needs. The limits of this approach has been that when states provide treatment, fulfilling their public health obligation, it does not always translate to decriminalisation even when the criminal laws are identified as enhancing vulnerability. While it is understandable that the entry point has not been aggressively pushed because there are benefits in engaging with the state, even at a minimal level, this relationship has to evolve to encompass human rights in their entirety as opposed to treating the symptoms of the problem. Providing access to treatment to MSM is a progressive step but it does not take the issue any further if the very same man who can receive treatment can be arrested and prosecuted because of his sexual conduct.

It is early days, visibility remains a challenge. The movement still operates underground in many countries. Human rights of LGBTI people are a contested claim or continue to be made invisible. What is without doubt, there is a struggle throughout the continent and the community is out and active. There may be disagreements over priorities and strategies but LGBTI is firmly on the agenda. It would be naïve for anyone to believe that this battle will be won through rights by only arguing that privacy, equality, access to health or any other rights are infringed by laws that criminalise same sex sexual conduct. Building a movement is the greatest challenge for now.



<sup>i</sup> See: <http://www.mg.co.za/article/2010-06-04-homosexualityand-the-battle-for-africas-soul> , <http://www.mask.org.za/homophobia-increasing-in-kenya/> and <http://www.awid.org/eng/Women-in-Action/Announcements2/Rights-to-Redressand-State-Accountability-Responding-to-Violence-against-Sexual-Minorities-in-Africa>. For more detailed reports see: [www.iglhrc.org](http://www.iglhrc.org), [www.hrw.org](http://www.hrw.org), [www.mask.org.za](http://www.mask.org.za).

<sup>ii</sup> South African lesbians targeted for murder: <http://www.afrol.com/articles/263841>; Murder of Sierra Leone's lesbian activist condemned: <http://www.afrol.com/articles/14448>

<sup>iii</sup> *Uganda Anti homosexuality bill*: [http://en.wikipedia.org/wiki/Uganda\\_Anti-Homosexuality\\_Bill](http://en.wikipedia.org/wiki/Uganda_Anti-Homosexuality_Bill); *Burundi repeal laws criminalising homosexual conduct*: <http://www.hrw.org/en/news/2009/04/24/burundi-repeal-law-criminalizinghomosexual-conduct>; *The love that dare not speak its name*: <http://www.independent.co.uk/news/world/africa/the-lovethat-still-dare-not-speak-its-name-1863913.html>; *Burundi Government Moves to Criminalize Homosexuality: Activist Groups Express Outrage*: <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/750.html>; *Nigeria's anti-gay bill causes protests*: <http://www.afrol.com/articles/24541>.

<sup>iv</sup> *Mutharika criticises gay movement*: <http://www.mask.org.za/another-latest-post-with-the-same-id-number-by-date/>; *Malawi president: We need children rights, not gay rights*: <http://www.digitaljournal.com/article/293558>; *African statesman condemns homosexuality as an 'abomination'*: <http://www.guardian.co.uk/world/2010/may/25/gay-rights-africa-malawi>; *Zimbabwe: President, PM Speak On Gays*: <http://allafrica.com/stories/201003260002.html>; *Namibian president announces purges against gays*: [http://www.afrol.com/News2001/nam008\\_gay\\_purges.html](http://www.afrol.com/News2001/nam008_gay_purges.html); *Museveni Warns On Dangers of Sodomy*: <http://allafrica.com/stories/201006040260.html>; *Gambia News: President Jammeh Gives Ultimatum for Homosexuals to Leave*: <http://www.gambianow.com/news/News/Gambia-News-President-Jammeh-Gives-Ultimatum-for-Homosexuals-to-.html>.

<sup>v</sup> *Zambia Church Condemns Gay Activists*: <http://allafrica.com/stories/201005050727.html>; *Zambia: Channel funds to projects, not gay rights, donors urged*: <http://www.lusakatimes.com/?p=25974>; *Ugandan Church attacks gay community*: <http://www.afrol.com/articles/10483>; *African bishops unite to denounce homosexuality*:

<http://www.monitor.co.ug/News/National/-/688334/998598/-/x4kdc/-/>; *Position of the Church of Nigeria (Anglican Communion) on the bill for an act to prohibit marriage between persons of the same gender, solemnization of same and for the other matters related therewith*: <http://thinkinganglicans.org.uk/uploads/CoNposition.pdf>, *Thousands Attend First Anti-gay Protests In Ghana*: <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=183484>.

<sup>vi</sup> *The right to non-discrimination and to be free from violence and harassment is usually denied by omitting sexualorientation in anti-discrimination laws, constitutional provisions or their enforcement, the right to life is violated in states where the death penalty is applicable for sodomy.*

<sup>vii</sup> *The right to be free from torture or cruel, inhuman or degrading treatment is infringed upon by police practices, in investigations or in the case of lesbians, gays and bisexuals in detention. Arbitrary arrest occurs in a number of countries with individuals suspected of having a homo/ bisexual identity. The freedom of movement is denied to bi-national couples by not recognizing their same sex relation. The right to a fair trial is often affected by the prejudices of judges and other law enforcement officials. The right to privacy is denied by the existence of 'sodomy laws' applicable to lesbians, gays and bisexuals, even if the relation is in private between consenting adults. The rights to free expression and free association may either be denied explicitly by law, or lesbians, gays and bisexuals may not enjoy them because of the homophobic climate in which they live. The practice of religion is usually restricted in the case of lesbians, gays and bisexuals, especially in the case of churches advocating against them. The right to work is the most affected among the economic rights, many lesbians, gays and bisexuals being fired because of their sexual orientation or discriminated in employment policies and practices*: [http://www.hrea.org/index.php?doc\\_id=432](http://www.hrea.org/index.php?doc_id=432).

*The Coalition of African Lesbians (CAL), Centre for Popular Education and Human Rights (CEPEHRG) in Ghana, Centre for the Development of People (CEDEP) in Malawi, Friends of Rainka in Zambia, Gay and Lesbian Coalition of Kenya (GALCK), Gays and Lesbians of Zimbabwe (GALZ), Out – LGBT Wellbeing, Forum for the Empowerment of Women (FEW), International Center for Advocacy on Right to Health (ICARH) in Nigeria, Lesbian and Gay Equality Project, the Mozambican Association for sexual minority rights, Sexual Minorities of Uganda (SMUG).*

<sup>viii</sup> Article 2, 3, 5, 6, 7, 9, 10, 11, 12, 15, 16 and 17.

<sup>ix</sup> Article 2.

<sup>x</sup> Article 13

<sup>xi</sup> Article 4.

<sup>xii</sup> For an analysis of the normative framework for the protection of LGBTI rights provided by the Charter and how it can be used by those seeking to make claims before the Commission rights see Murray, R., Viljoen, F.: *Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union*, *Human Rights Quarterly - Volume 29, Number 1, February 2007*, pp. 86-111.

<sup>xiii</sup> The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.

<sup>xiv</sup> The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.

<sup>xv</sup> See section on African Union.

<sup>xvi</sup> AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity (Adopted at the fourth plenary session, held on June 3, 2008).

<sup>xvii</sup> AG/RES. 2600 (XL-O/10), Human Rights, Sexual Orientation, and Gender Identity (Adopted at the fourth plenary session, held on June 8, 2010).

<sup>xviii</sup> Decision on the promotion of cooperation, dialogue and respect for the diversity in the field of human rights, Doc. Assembly/AU/17(XV) Add.9.

<sup>xix</sup> <http://www.declarationofmontreal.org/declaration/DeclarationofMontreal.pdf>;

<http://www.yogyakartaprinciples.org/>; Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles: O'Flaherty and John Fisher, *Human Rights Law Review*, 8:2(2008). The judicial annotations to the Yogyakarta Principles provide additional information about the international instruments and jurisprudence upon which each Principle is based: <http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf>.

<sup>xx</sup> <http://www.mg.co.za/article/2009-09-22-kenyan-challengesstate-over-prison-facilities>.

<sup>xxi</sup> In *Victor Juliet Mukasa and Yvonne Oyo v. Attorney General* (Misc. Cause No.247 of 2006) the Court held that two individuals who were identified as lesbian had been subjected to arbitrary arrest, detention, and physical mistreatment by law enforcement officers. The High Court found that the police had violated a number of human rights instruments, including the Universal Declaration of Human Rights.

<sup>xxii</sup> *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, CCT 11/98 (1998).

<sup>xxiii</sup> *Charter of Feminist Principles for African Feminists:*

[http://www.africanfeministforum.org/v3/files/Charter\\_of\\_Feminist\\_Principles\\_for\\_African\\_Feminists.pdf](http://www.africanfeministforum.org/v3/files/Charter_of_Feminist_Principles_for_African_Feminists.pdf).