



MAKING LOVE A CRIME

CRIMINALIZATION OF SAME-SEX CONDUCT
IN SUB-SAHARAN AFRICA

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Cover photo: An activist holds a wrist band which reads "end homophobia" on World AIDS Day, Nairobi, Kenya, 2010.

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“Our old neighbours said to me, ‘Why are you still alive?’”

Frank, Uganda

EXECUTIVE SUMMARY

This report provides an analysis of the legal environment and wider context of human rights violations against lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals in sub-Saharan Africa. Recent years have seen increasing reports of people being harassed, marginalized, discriminated against and attacked because of their real or perceived sexual orientation or gender identity. This is occurring in countries whose legal systems still condone the criminalization of consensual same-sex behaviour, and in countries where the police and justice systems are failing to prevent these crimes from happening.

The continued criminalization of consensual same-sex conduct in 38 African countries is a serious cause for concern. The existence and implementation of these laws violates a raft of international and regional human rights norms, and serves to marginalize one group of Africans based on their sexual orientation and gender identity alone. The last decade has witnessed efforts in some sub-Saharan African countries to further criminalize LGBTI individuals by ostensibly targeting their behaviour, or to impose steeper penalties and broaden the scope of existing laws. Uganda has seen repeated attempts since 2009 to introduce the Anti-Homosexuality Bill – a bill which would seek to impose the death penalty for ‘aggravated’ homosexuality, and which would criminalize anyone in Uganda who does not report violations of the bill’s wide-ranging provisions within 24 hours to authorities. South Sudan, on becoming independent in 2008, criminalized consensual same-sex conduct for women and men with up to 10 years’ imprisonment. Burundi criminalized same-sex conduct for men and women in 2009 by revising the criminal code to outlaw ‘sexual relations with someone of the same sex’. In 2011 and 2012, Nigeria and Liberia respectively introduced bills to toughen penalties for same-sex conduct. And Mauritania, northern regions of Nigeria, the southern region of Somalia and Sudan, retain the death penalty for the same.

Laws criminalizing consensual same-sex conduct affect LGBTI Africans on a daily basis. In some countries, like Cameroon, individuals are regularly arrested after having been denounced to authorities as being gay or lesbian. Individuals are usually arrested, charged and sentenced without evidence of same-sex conduct, and sometimes invasive medical examinations are performed in an attempt to obtain ‘evidence’ of such. Even in countries where anti-homosexuality laws are not routinely implemented, the existence of the laws alone provide opportunities for abuse, including blackmail and extortion, both by police and by non-state actors. Furthermore, the existence of laws that criminalize one group of people based on who they are and who they (are presumed to) have consensual sex with, sends a message to the broader population that discrimination on the basis of sexual orientation and gender identity is acceptable, and that human rights do not apply to LGBTI people. This creates an environment in which harassment, intimidation and violence against LGBTI people can flourish, and people can perpetrate such acts with impunity.

The continued existence of punitive laws and policies targeting people on the basis of sexual orientation and gender identity is not the only human rights issue facing LGBTI individuals in sub-Saharan Africa. High levels of sexual and other violence targeting people because of their sexual orientation and gender identity are endemic in some areas. In South Africa for example, Amnesty International has documented 7 rapes and murders of LGBTI people since June 2012. The actual numbers are likely much higher, according to reports from various NGOs in the country. In the case of South Africa, it is the absence of an adequate police and government response to the proliferation of such crimes that is cause for ongoing concern, and a source of human rights violation in that the state is failing in its duty to protect one part of its population from violence.

However, there is reason to be optimistic. Many NGOs and grassroots LGBTI and community-based organizations throughout sub-Saharan Africa continue to push for the broader recognition and protection of the human rights of LGBTI individuals. This work goes on despite the great risks faced by human rights defenders working in this area. No doubt these individuals and organizations have contributed to the several positive developments that the last decade has seen in the fight for rights based on sexual orientation and gender identity.

In 2004, Cape Verde eliminated offences related to same-sex activity. In 2009, Mauritius committed to decriminalize homosexuality, and in 2011, Sao Tome and Principe, along with the Seychelles, committed to doing the same. The new Kenyan constitution came into force in August 2010, heralding positive developments for LGBTI rights in a number of important ways. Furthermore, a number of African countries have introduced legislation to explicitly outlaw discrimination on the basis of sexual orientation, or removed discriminatory provisions of existing employment legislation: the Seychelles in 2006, Mozambique in 2007, Cape Verde and Mauritius in 2008, and Botswana in 2010. South Africa has also seen a number of positive legal developments over the past decade, including allowing joint adoption by same-sex couples in 2002, introducing a law on legal gender recognition in 2004, and providing for same-sex marriage in 2006.

These positive developments need to be built upon, particularly at local and regional levels. Regionally, there are growing efforts amongst civil society to persuade the African Commission on Human and People's Rights to recognize sexual orientation and gender identity as grounds of discrimination in their work. Internationally, South Africa has taken a leadership role in calling for an inclusive human rights agenda at the UN. Slowly, more African governments are supporting South Africa in this work.

Amnesty International, in this report, recommends that: that States repeal all laws that criminalize or otherwise impose punitive sanctions on consensual same-sex sexual conduct, along with all discriminatory laws and policies that adversely affect or target LGBTI people; that allegations of human rights violations based on sexual orientation or gender identity are promptly and impartially investigated by competent authorities and perpetrators held accountable and brought to justice; and that States introduce ongoing training for health professionals and legal professionals, as well as the police, media and education workers, on diversity and the human rights of all as including the rights of LGBTI persons. It also calls on the African Commission on Human and Peoples' Rights to fulfil its mandate to protect the human rights of all Africans, including those of LGBTI people.

10. CONCLUSION

LGBTI people across sub-Saharan Africa are subject to a raft of human rights violations because of their sexual orientation or gender identity. Although some countries have witnessed positive developments over the past decade, numerous countries continue to breach their international human rights obligations by explicitly targeting and/or failing to protect LGBTI people from attacks by non-state actors. Whether it is arrests of suspected gay men in Cameroon, attempts to introduce even more draconian legislation to penalise LGBTI individuals in Uganda, or the South African government's failure to protect LGBTI persons from violent attacks, governments are failing in their human rights obligations under regional and international human rights law.

Laws that criminalize consensual same-sex conduct violate regional and international human rights law, including the rights to non-discrimination, equality before the law, and privacy. Depending on how they are applied, these laws can also violate the rights to freedom of expression, association and assembly; health; freedom from torture and other cruel, inhuman or degrading treatment or punishment; life; and bodily integrity. Such laws contribute to a climate in which LGBTI people are marginalized and kept in the closet, and often provide the broader society with a justification for the proliferation of prejudice, hatred and violence.

Penal code provisions that punish LGBTI people for who they are or what they are presumed to do make it difficult and sometimes impossible for LGBTI people to access vital health services, and provide government authorities and state security services with a ready means to harass, intimidate and sometimes blackmail LGBTI individuals. The laws can have a disproportionate effect on economically disempowered individuals, who are unable to avoid the laws' reach. LGBTI human rights defenders are at particular risk, both from governments and from members of the public due to their high profile advocacy work. Non-gender conforming individuals seem to be targeted more often by the authorities and by non-state actors for violence. The fact that their sexual orientation or gender identity is more visible, or just the fact that they do not conform to gender stereotypes, puts them at particular risk of violence or discrimination. States have an obligation to protect all members of society from violence by non-state actors, and in the majority of cases, they are failing in this duty.

In several countries, political leaders are fuelling prejudice and hatred against LGBTI people, often for political gain. This serves to reinforce discriminatory attitudes, contributes to a climate of fear for LGBTI persons, and can incite violence. And whilst freedom of the press is vital, some governments have allowed media outlets to endanger the lives of LGBTI individuals by publishing their personal details, encouraging violence and murder, reinforcing and exaggerating harmful stereotypes, and linking homosexuality to paedophilia and corruption.

Religious leaders too, sometimes influenced by US-based churches, have contributed to the climate of fear and loathing towards LGBTI individuals in many countries. They have gone beyond preaching that homosexuality is wrong, and have linked it with the 'recruitment' of children. In numerous instances they have incited hatred and encouraged violence towards LGBTI persons.

This has to change. Increasingly, it is becoming difficult for states to deny that sexual orientation and gender identity are fundamental parts of international human rights law, as the chorus for recognition grows stronger and stronger. South Africa is now leading a process at the UN level to give the right to non-discrimination on the basis of sexual orientation and gender identity a higher profile under international human rights law. In the last two years alone, there has been a resolution on sexual orientation and gender identity, a report on discrimination and violence against LGBTI persons published by the Office of the High Commissioner for Human Rights, the first ever UN panel on sexual orientation and gender identity, and an increasing number of states supporting the work.

African states will become increasingly isolated on the international stage if they do not begin to start complying with their international and regional human rights obligations, by respecting, protecting and fulfilling the rights of all members of society, regardless of sexual orientation or gender identity.

11. RECOMMENDATIONS

Amnesty International calls on African states to:

- Repeal all laws that criminalize or otherwise impose punitive sanctions on consensual same-sex sexual conduct.
- Abolish the death penalty.
- Establish an official moratorium on executions with a view to abolishing the death penalty.
- Remove from their laws any death penalty provisions which are in breach of international human rights law, such as for crimes which do not meet the threshold of 'most serious crimes' as stipulated in article 6(2) of ICCPR.
- Abolish flogging and all other corporal punishments.
- Put an end to torture and other cruel, inhuman or degrading treatment or punishment in law and in practice; and ensure that torture and other cruel, inhuman or degrading treatment or punishment is criminalized.
- Ensure that all allegations and reports of human rights violations based on sexual orientation or gender identity are promptly and impartially investigated by competent authorities and perpetrators held accountable and brought to justice.
- Take all necessary legislative, administrative and other measures to prohibit and eliminate discriminatory treatment on the basis of sexual orientation or gender identity at every stage of the administration of justice.
- Stop the harassment of human rights defenders and ensure the adequate protection of human rights defenders at risk because of their work on human rights and sexual orientation and gender identity.
- Review and amend or repeal public order legislation that is overly broad, vague, effectively criminalizes status and is easily abused, including as a pretext for prosecuting and punishing people for their sexual orientation or gender identity.
- Repeal laws that ban the "promotion" of homosexuality in order to ensure freedom of expression, association and peaceful assembly regarding issues relating to sexual orientation and gender identity.
- Repeal age-of-consent legislation that assigns a different age of responsibility depending on a person's sex, sexual orientation, gender identity, or for any other discriminatory reason.

- Repeal all laws which result in, or are likely to result in, the discrimination, prosecution and punishment of people solely for their sexual orientation or gender identity.
- Release, immediately and unconditionally, all who have been detained or convicted for actual or alleged consensual same-sex conduct.
- Respect the right of all people to exercise their freedom of expression, assembly and association without discrimination of any kind.
- Implement training for health professionals and administrators highlighting their obligation to treat all patients with respect, including LGBTI patients.
- Introduce ongoing training for all levels of police, prosecutors, magistrates, judges and court officials on human rights obligations in relation to sexual orientation and gender identity, and on efficient and impartial investigation and prosecution of violent attacks against LGBTI individuals.
- Introduce training for media and education professionals about diversity and about the human rights of all as including LGBTI individuals.
- Introduce into education curricula modules about diversity and about the human rights of all as including LGBTI individuals.
- Establish and implement accountability procedures so that LGBTI people who face discrimination or other mistreatment in health and justice systems have access to effective remedy.

Amnesty International calls on the African Commission on Human and Peoples' Rights to:

- Fulfil their mandate to protect the rights of all Africans, including LGBTI persons.
- Explicitly interpret the African Charter on Human and Peoples' Rights to include sexual orientation and gender identity as protected grounds of identity and as prohibited forms of discrimination.
- Call on African states to repeal all laws that criminalize consensual same-sex conduct.
- Call on African states to repeal all discriminatory laws and remove all discriminatory policies that adversely affect LGBTI persons.
- Grant Observer Status and stop the practice of denying such Observer Status to LGBTI organizations who seek observer status with the African Commission on Human and Peoples' Rights.

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CRIMINALIZATION OF SAME-SEX CONDUCT IN SUB-SAHARAN AFRICA

Thirty-eight countries in sub-Saharan Africa have laws criminalizing consensual same-sex sexual conduct. In four of these countries, anyone convicted of such conduct may face the death penalty. These laws are routinely used to harass individuals because of their real or perceived sexual orientation or gender identity, and to attack those working for the human rights of lesbian, gay, bisexual, transgender and intersex people. Underpinning these laws are deeply entrenched discriminatory social attitudes.

Discrimination on the basis of sexual orientation and gender identity, and the criminalization of consensual same-sex sexual conduct are violations of international human rights law. Nonetheless, discriminatory social attitudes remain widespread and criminalization laws remain active and enforced. In fact in recent years, a number have been strengthened.

This report, based on research carried out in four countries in sub-Saharan Africa, examines the effects of the criminalization laws on, and discriminatory social attitudes towards, lesbian, gay, bisexual, transgender and intersex people. Amnesty International is urging governments to repeal laws criminalizing consensual same-sex conduct and to enact and enforce laws protecting lesbian, gay, bisexual, transgender and intersex people from discrimination, harassment and violence, in accordance with their obligations under international law.

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