

HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN AFRICA: CHALLENGING THE SINGLE STORY

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“The single story creates stereotypes. The problem with stereotypes is not that they are untrue but that they are incomplete. They make one story become the only story.” Chimamanda Adichie, ‘The Danger of a Single Story’¹

INTRODUCTION

The dominant narrative about lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in Africa is one of passive victimhood: of a group that is actively persecuted by its governments and subject to all manner of discrimination, exclusion and human rights violations, based on a person’s sexual orientation and gender identity. This narrative, propagated by a powerful international media, often ignores other stories of African LGBTI persons: positive stories of resilience, strategic organising, advocacy for legal and policy change, and contributions to social change in other spheres of injustice.

This contribution to the 2016 CIVICUS State of Civil Society Report highlights several positive developments in the areas of human rights, sexual orientation and gender identity and civil society organising to advance the human rights of LGBTI persons in Africa.

CONTEXT

The human rights context for LGBTI persons in Africa could for the most part be described as severe, with consensual same sex activities illegal in around 34 countries.² While there is a lack of data on actual convictions, what can be said is that these laws are actively used to intimidate, persecute and deny access to a whole range of rights to LGBTI persons and organisations on issues of sexual orientation and gender identity. In recent times, a number of countries have moved to re-criminalise consensual same sex conduct and apply stiffer penalties, and in some cases, have gone beyond conduct to criminalise homosexual or bisexual identity, and organisations and associations that work to address exclusion and discrimination based on sexual orientation and gender identity.³

1 ‘The danger of a single story’, Chimamanda Ngozi Adichie, TED, July 2009, <http://bit.ly/1scUlt2>.

2 ‘State-Sponsored Homophobia. A World Survey of Laws: criminalisation, protection and recognition of same-sex love’, International Lesbian, Gay, Bisexual, Trans and Intersex Association, May 2015, <http://bit.ly/1Mstals>.

3 As well as new laws in Nigeria and Uganda, other countries that have moved to re-criminalise include the Democratic Republic of the Congo, The Gambia and Liberia.

Despite what has been described as an epidemic of homophobic legislation across the continent, there has also probably never been more public dialogue about, visibility of and policy changes relating to sexual orientation and gender identity in Africa as today. To paraphrase the words of Charles Dickens, it is the best of times and the worst of times, the spring of hope and the winter of despair.⁴ Despite the fact that almost two thirds of African countries still criminalise consensual same-sex conduct, and parliaments on the continent continue to debate and promulgate homophobic legislation that criminalises and severely limits rights, LGBTI persons and civil society organisations (CSOs) working on issues of human rights, sexual orientation and gender identity in Africa continue to record significant gains as they organise and advocate to address inequalities and exclusions. These gains can be assessed under four headings: stronger CSO organising at national and regional levels; engaging the African regional human rights system; rights adjudication using national courts; and engaging with faith and religious leaders.

STRONGER CSO ORGANISING AT NATIONAL AND REGIONAL LEVELS

The last few years have witnessed greater public organising by LGBTI groups and their allies. While many of these are national level groups, a few strong regional groups have also emerged that are engaging in human rights advocacy and service provision. Although many of these groups were established by LGBTI persons in response to imminent threats to their human rights, these groups quickly formed alliances with CSOs working on broader issues of human rights and social justice, thereby elevating the discourse to a level never seen before in many countries on the continent. Across Africa, organisations working to challenge discrimination and violence based on sexual orientation and gender identity are organising strategically and more visibly, including in countries where this had not been the case before, such as Algeria, Egypt, Mauritius, Morocco, Sierra Leone and Sudan.

Uganda is a good example of this. In response to the Anti-Homosexuality Bill, presented before Uganda's parliament in 2009, the Civil Society Coalition on Human Rights and Constitutional Law was established as a platform of 28 Ugandan CSOs working on a range of issues to advocate against the bill. Through sophisticated advocacy and engagement they managed to mobilise national, regional and international support for their campaign, culminating in a legal challenge that resulted in the Act being declared unconstitutional by the Ugandan Constitutional Court.

Regionally, coalitions such as African Men for Sexual Health and Rights (AMShEr), the Coalition of African Lesbians (CAL) and the Pan-African International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) are bringing together various national organisations to form common advocacy platforms at regional and global levels. These coalitions are articulating a different narrative and challenging the single story of African LGBTI persons. For instance, AMShEr espouses as two of its guiding philosophies "...the empowerment model: promoting partnerships and strategies that reinforce the autonomy and agency of African MSM [men who have sex with men] and LGBTI persons instead of charity models that perpetuate dependency" and "...positive narratives: portraying 'the other narrative' that celebrates the courage and success of African MSM/LGBTI persons and the rich diversity and humaneness of the African peoples."

4 'A Tale of Two Cities', Charles Dickens, 1859.

Regional coalitions, bringing a pan-African lens to advocacy on sexual orientation and gender identity, are supporting their broad network of members to inform and shape national, regional and global agendas, through the voices and experiences of those living the realities.

ENGAGING THE AFRICAN HUMAN RIGHTS SYSTEM

Through consistent interventions, by way of shadow reports, panel discussions, trainings, publications and lobbying, they brought visibility to the situation of LGBTI persons across Africa

Since 2006, a number of organisations and LGBTI activists have been engaging the African Commission on Human and Peoples' Rights (known as the African Commission), which is the human rights body of the African Union, tasked with promoting human and peoples' rights and ensuring their protection in Africa.⁵ The African Commission has distinguished itself as an independent institution which took its mandate to hold states to account for human rights violations seriously. Through its country review process and communications procedures, it articulated such progressive decisions, such as the Social and Economic Rights Action Centre (SERAC) v. Nigeria (2001), where the African Commission read into the African Charter on Human and Peoples' Rights (known as the African Charter) the rights to shelter and food, and held the Nigeria government liable for the violation of these rights, even though the rights were not explicitly provided for the African Charter.⁶

In the past, the only opportunity the Commission may have had to make a pronouncement on sexual orientation and gender identity was a communication filed before the African Commission in 1995 concerning the legal status of gay persons in Zimbabwe, which stated that the criminalisation of consensual sexual contact between gay men in private was a violation of several articles of the African Charter. The case was, however, withdrawn by the complainant before the Commission made a decision.⁷ Even so, this helped LGBTI activists to recognise the potential of this institution to promote and protect the rights of LGBTI persons.

At the time, there was great opposition and palpable hostility to sexual orientation and gender identity discourse by the African Commission, and against human rights defenders working within the human rights system. Over a period of around eight years, activists and organisations working on sexual orientation and gender identity embarked on a process to sensitise the Commission, CSOs and other human rights defenders working within the Africa human rights system. Through consistent interventions, by way of shadow reports, panel discussions, trainings, publications and lobbying, they brought visibility to the situation of LGBTI persons across Africa, and developed solidarity by co-campaigning on a host of intersectional rights issues, until the African Commission could no longer stay silent on the issue. In May 2014, the African Commission adopted the landmark Resolution 275 condemning discrimination, violence and other human rights violations against persons based on their real or perceived sexual orientation and gender identity in Africa.

⁵ African Charter on Human and Peoples' Rights, Article 30.

⁶ '155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria', African Human Rights Case Law Analyser, Institute for Human Rights and Development in Africa, 27 October 2001, <http://bit.ly/21W4WEW>.

⁷ '136/94 William A. Courson / Zimbabwe', African Human Rights Case Law Analyser, Institute for Human Rights and Development in Africa, 22 March 1995, <http://bit.ly/1ZEGyWx>.

This Resolution is significant for a number of reasons, chief of which is that, by pronouncing itself expressly on sexual orientation and gender identity based discrimination and violence, it opens a clear path to developing the jurisprudence of the African Commission and the African human rights system more broadly on these issues. Subsequent to the adoption of Resolution 275, the African Commission granted observer status to CAL, ending a seven year battle for recognition before the Commission. However, this remains contested at the time of writing. A number of CSOs have approached the African Court of Justice and Human Rights for an advisory opinion on the legality of the request by the African Union's Executive Council to the African Commission to withdraw the observer status granted to CAL.

In March 2016, the South African Human Rights Commission, together with a number of African CSOs, including those mentioned above, hosted a regional seminar on Resolution 275, with broad participation by CSOs, national human rights institutions and government officials from across the continent.

The above has offered a synopsis of around a decade of engagement by LGBTI persons, activists and rights organisations with the African human rights system. The real story is in their resilience and persistence, the solidarity built with CSOs working on other rights issues, the increasing capacity to frame the struggle for LGBTI equality through the lens of intersectionality, and the ability to mobilise an army of activists and CSOs at the country level to commit to a common campaign and see it to fruition. The fact that African LGBTI persons and organisations were the vanguard of this campaign as its faces and voices cannot be over-emphasised, especially to the degree that it has changed the rhetoric that claims that 'homosexuality is unAfrican'.

RIGHTS ADJUDICATION THROUGH NATIONAL COURTS

Across Africa, LGBTI persons and CSOs are using the courts to enforce their rights and challenge discrimination based on sexual orientation and gender identity. A few of these cases are mentioned below.

ERIC GITARI V. NGOS COORDINATION BOARD AND FOUR ORGANISATIONS (2015)⁸

The NGOs Coordination Board of Kenya denied the petitioners' application to register a CSO on the basis that the persons whose rights the CSO sought to protect were gay and lesbian persons, and homosexual conduct is criminalised in the Kenya Penal Code. The applicant approached the court seeking, among other matters, a decision that his right to the freedom of association had been infringed. The court held that the rights of the petitioner to the freedom of association and non-discrimination had been infringed by the NGOs Coordination Board's refusal to register his CSO. The Court also held that the rights to non-discrimination granted to "any person" under section 30 of the Kenyan Constitution referred to "...all persons living within the Republic of Kenya despite their sexual orientation."

⁸ 'Petition 440 of 2013', Kenya Law, <http://bit.ly/1FbYRtl>.

THUTO RAMMOGE AND 19 ORGANISATIONS V. ATTORNEY GENERAL OF BOTSWANA (2015)⁹

In February 2012, activists in Botswana applied to register their organisation, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), with the government. The registrar rejected their application on the grounds that Botswana's constitution does not recognise homosexuals and that the application would contravene the Societies Act, by operating for an "unlawful purpose or other purpose prejudicial to, or incompatible with, peace, welfare or good order in Botswana."

More than two years later, in November 2014, LEGABIBO's persistence paid off when the Botswanan High Court held that the refusal to register the group was a violation of the applicants' rights to equal protection by the law and the freedoms of association, assembly and expression. This decision was especially significant, as the court emphasised that the laws prohibiting same-sex sexual acts did not criminalise homosexuality per se. Nor did they criminalise advocacy for the reform of these laws.

REPUBLIC V. KENYA NATIONAL EXAMINATIONS COUNCIL AND ANOTHER EX-PARTE AUDREY MBUGUA ITHIBU (2014)¹⁰

The applicant, a transgender woman, sought an order of court to compel the Kenya National Examination Council (KNEC) to re-issue her Kenya Certificate of Secondary Education in her new name, and without any gender marker. The court found in favour of the applicant and ordered the KNEC to withdraw the previously issued certificate and issue a new one in the applicant's new name and without a gender marker.

PROFESSOR OLOKA-ONYANGO AND NINE ORGANISATIONS V. ATTORNEY GENERAL OF UGANDA (2014)¹¹

A number of LGBTI persons, human rights defenders and CSOs brought a petition before the Constitutional Court of Uganda, seeking a declaration that the Anti-Homosexuality Law 2013 was contrary to the Constitution of the Republic of Uganda, having been enacted without the quorum required by law; and that the Anti-Homosexuality Act was in contravention of the rights to equality before the law without discrimination and the right to privacy. The Constitutional Court granted the petition nullifying the Anti-Homosexuality Act, on the grounds that its enactment process contravened the Constitution.

The cases outlined above represent a growing trend of using the courts to seek equality and protection of the rights of LGBTI persons in Africa. A number of convictions based on penal provisions have been set aside on appeal, with the courts making a clear distinction that homosexual identity is not criminalised in law. A number of other cases are pending before courts in Botswana, Nigeria and Uganda, addressing a number of issues aimed at judicial pronouncement to advance respect and protection of the rights of LGBTI persons.

9 The Botswanan judgement is available at <http://bit.ly/1WoEaoC>.

10 'Judicial Review 147 of 2013', Kenya Law, <http://bit.ly/1TzS2X1>.

11 The Ugandan judgement is available at <http://bit.ly/1OhsFNi>.

These cases not only demonstrate the agency of LGBTI persons and CSOs working on issues of sexual orientation and gender identity to seek rights protection using state institutions, they also challenge another misconception of African judicial systems, that they are not independent and capable of being sympathetic to the rights of LGBTI persons. The author has participated in a number of sensitisation activities for judges and judicial officers in Africa. There is an increasing cadre of African judges and judicial officers with an appreciation of human rights and sexual orientation and gender identity issues.

Determined no longer to be passive targets for the perpetrators of this cultural war, LGBTI activists and CSOs working on issues of sexual orientation and gender identity are proactively engaging religious communities and faith leaders on the question of violence, exclusion and discrimination.

ENGAGING FAITH AND RELIGIOUS LEADERS

Africa is a visibly religious continent, and religion plays a very active role in social interaction across most Africa countries. A global survey by the Pew Research Centre showed a strong relationship between a country's religiosity and its attitudes towards homosexuality. It found that people were far less accepting in countries where religion was considered most central to peoples' lives.¹² A survey of gay and bisexual men in seven African countries, conducted by AMSHeR in 2013, identified homophobia inspired by religion and religious institutions as one of the top five barriers to accessing services for gay and bisexual men.¹³ Hate speech and incitement to homophobic and transphobic violence is characteristic of the messaging of a number of religious leaders in Africa and elsewhere.

Across the continent the role of religious institutions has also extended into legislation, with religious groups actively sponsoring homophobic bills before parliaments and promoting a state of moral panic aimed at persecuting LGBTI persons. It could be said that a global cultural war is raging, with religion its frontier and LGBTI persons the casualties.¹⁴

Determined no longer to be passive targets for the perpetrators of this cultural war, LGBTI activists and CSOs working on issues of sexual orientation and gender identity are proactively engaging religious communities and faith leaders on the question of violence, exclusion and discrimination. A number of national and regional initiatives are supporting dialogues between religious leaders and LGBTI constituencies. For three years AMSHeR and INERELA+, a global network of religious leaders, have been collaborating on a project to sensitise religious leaders on issues of sexuality and spirituality. Their latest joint project, Integrating Spirituality and Sexuality, brought together LGBTI persons and religious leaders from four African countries in a dialogue, after which country groups embarked on individual action plans. Processes such as this are reopening spaces for mutual understanding and acceptance.

Another initiative led by LGBTI persons and CSOs to address issues of discrimination and exclusion is the Global Interfaith Network for People of all Sexes, Sexual Orientation, Gender Identity and Expressions (GIN-SOGGIE). GIN-SOGGIE was born out of a necessity to provide LGBTI persons of faith with a safe space to heal the separation they experience between faith and

12 'The Global Divide on Homosexuality', Pew Research Center, updated 27 May 2014, <http://pewrsr.ch/1JD2VZk>.

13 AMSHeR's Utetezi Project worked with policy-makers and stakeholders in seven African countries to address a number of barriers to access to service identified by LGBTI persons through policy reform. For more on the Utetezi model see 'An Advocacy Guide for Policy Change Around MSM Health', AMSHeR, 2015, <http://bit.ly/1qduv6o>.

14 'Globalizing the culture wars: U.S. conservatives, African churches, and homophobia', Kapya Kaoma, Political Research Associates, 1 December 2009, <http://bit.ly/24KQpO6>.

their sexual orientation and gender identity, and strengthen the voices of LGBTI persons within their religious communities.¹⁵ The Inner Circle is a further organisation, working with LGBTI Muslims to reconcile their Islamic identity, sexual orientation and gender identity.¹⁶

In Africa, religion remains a very important frontier of contestation in the struggle for social injustice and equality, particularly for LGBTI persons. LGBTI activists and CSOs are aware that the struggle for full equality will not be won without engaging and building allies in the faith communities: hence this movement seeking to integrate spirituality and sexuality.

CONCLUSION

The aim of this article was not to paint the image of Africa as a pseudo paradise, a haven where LGBTI persons enjoy their rights and are respected as full and equal citizens of their countries; no such place exists in Africa, or elsewhere. While acknowledging the myriad of challenges facing LGBTI persons in Africa, this article has sought to challenge the dominant, often single, narrative of African LGBTI people as passive victims of oppression devoid of agency and beholden to a messiah, often from the global north, to free them of their shackles.

It is also important to acknowledge that a single narrative serves a number of purposes, one of which is to continue to fuel a global neo-liberal enterprise that uses catchy phrases such as ‘capacity building’ and ‘documentation of violations’ to perpetuate dependency and stifle agency. Freedom and solidarity should never be built on pity. Pity creates a power dynamic and a messiah complex, which very often merely replaces one oppression with another. CSO solidarity is central to the struggle for non-discrimination based on sexual orientation and gender identity, and true solidarity comes from giving voice to every narrative, and recognising the commonality of all human struggles for freedom, dignity and bodily autonomy.

“If you have come here to help me, you are wasting your time. But if you have come because your liberation is bound up with mine, then let us work together.”

- Lilla Watson, Murri visual artist and activist¹⁷

15 GIN-SOGGIE website, <http://bit.ly/1rFZABa>.

16 The Inner Circle website, <http://bit.ly/1YIAaDi>.

17 ‘About Lilla Watson’, Lilia: International Women’s Network, <http://bit.ly/1QJphX3>.