

List of Issues Relating to the Violence and Discrimination against Lesbian, Bisexual, Transgender, Intersex and Queer Women in Kenya.

Submitted for the consideration of the 8th periodic report by Republic of Kenya for the 68th Session of the Committee on the Elimination of all forms of discrimination Against Women

This document is a compilation by Minority Women in Action, AFRA-Kenya, Kenya Campus Lasses Association and the National Gay and Lesbian Human Rights Commission.

Introduction

This document highlights the discrimination and violations that LGBTIQ women face in Kenya from both State actors and non-state actors. The Kenyan Penal Code criminalizes ‘carnal knowledge against the order of nature’. This legislation is perceived as criminalizing the identities of all sexual and gender minorities. It is relied on in prohibiting advocacy and programming on sexual orientation gender identity / expression issues in Kenya as well as justifying discrimination and violence.

The limiting legal framework increases the vulnerability of LGBTIQ persons as it lacks explicit legal protection for this population. This therefore acquiesces violence and perpetuates stigma and ignorance around LGBTIQ issues. Socio-economic challenges¹ are vast within the LGBTIQ community; according to the United Nations Universal Periodic Review (2012-2014) Report, 21 Kenyan youths were expelled from school due to their imputed or real sexual orientation, highlighting the discriminatory attitudes and practices encountered by LGBTIQ women/girls within their lived realities.

The effects of discrimination are evident ranging from mental health issues, drug and substance abuse and increased rates of intimate partner violence (IPV) within the LGBTIQ community.

This document will highlight four main issues with regard to LGBTIQ persons in Kenya.

1. The state of protection of LGBTIQ persons in Kenya
2. Identity, political participation and Association
3. Right to education
4. Right to family and succession
5. Freedom of Expression, Assembly and Right to Culture
6. Right to health

¹ <http://www.klrc.go.ke/index.php/constitution-of-kenya/112-chapter-four-the-bill-of-rights/part-2-rights-and-fundamental-freedoms/193-27-equality-and-freedom-from-discrimination>

The state of protection of LBTIQ Women in Kenya

Women who affirm lesbian, bisexual, transgender, intersex and other non-conforming sexual and gender identities are high targets of physical harassment discrimination and violence in Kenya. The National Gay and Lesbian Human Rights Commission, a Kenyan NGO working on SOGIE issues in Kenya received 116 reports of violations against LBQ women in Kenya in 2016 alone. These incidents include corrective rape, physical and verbal assault, denial of entry to recreational spaces, unlawful dismissals from employment, unlawful evictions, expulsion from schools as well as neglect and ostracization by family members and supportive structures.

These violations are exacerbated by the lack of access to justice, discriminatory laws, unequal protection by the state and lack of access to sexual reproductive and mental health for this vulnerable population. Pervasive state-sponsored homophobia and patriarchal social structures inform an expectation for all women to fit into cis-heteronormative constructions of womanhood with stipulated roles, responsibilities and identities of women fueled by both cultural and religious beliefs.

Lesbian, bisexual, intersex, transgender and queer persons who misperform or depart from these constructions of a 'proper woman' are depicted as cursed, deviant, child molesters, devil worshippers or victims of abuse within dominant discourse on LBQ women in Kenya.

Article 27[2] of the Kenyan Constitution provides for protection from discrimination by the state through taking legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. However, sexual and gender minorities are not explicitly mentioned in Art 27 (4)² with same sex practices criminalized under the Kenyan Penal code Section 162 [4]³ further catalyzing an already complacent system which creates an enabling environment for the above-mentioned violations.

Identity, Political Participation and Association

Intersex, transgender and gender nonconforming persons in Kenya are denied their right to an identity. Kenyan policy while allowing for change of names, makes it virtually impossible to change the gender marker on official documents. The lack of a legal third gender denies intersex and transgender persons proper documentation that portrays their correct gender. This disqualifies them from registering as voters, registering with political parties as well as running for political office.

While article 7 guarantees the right to participate in non-governmental organizations and associations concerned with the public and political life of the country, the Kenyan government has consistently violated this right as concerns lesbian, bisexual, intersex and transgender women in Kenya with impunity.

The NGO Board has rejected applications for registration organizations that work on SOGIE issues as evidenced in *Eric Gitari v Non- Governmental Organizations Co-ordination Board & 4 others* [2015] and *R v. NGO Coordination Board & another ex parte Transgender Education and Advocacy* (2014). In both cases the state through the NGO board is found in contravention of the applicant's freedom of association and ordered to register both

² <http://www.klrc.go.ke/index.php/constitution-of-kenya/112-chapter-four-the-bill-of-rights/part-2-rights-and-fundamental-freedoms/193-27-equality-and-freedom-from-discrimination>

³ <http://kenyalaw.org/Downloads/GreyBook/8.%20The%20Penal%20Code.pdf>

organizations. However the state has continued to defy the orders of the High court and is yet to register the National Gay & Lesbian Human Rights Commission.

Right to Education

The state has an obligation to ensure women have equal rights to men in the field of education.

In this regard it must strive to revise curriculum, teacher's training programmes and adapt teaching methods to eliminate any stereotyped concept of gender roles at all levels and in all forms of education. The state must encourage alternative types of education and build partnerships with relevant sectors to integrate comprehensive sex (and other areas of) education that encompass a holistic school system reform.

It is of vital importance to provide alternative methods for tackling the challenges to a girl child in the Kenyan education system. Teachers interact with students on a daily basis for a total of up to 8/9 months a year, hence making them crucial opinion shapers who within the most impressionable period of the student's life. Therefore, it is key to adequately endow students and teachers with comprehensive sexuality, sexual health and reproduction and life skills. A holistic and practical school system reform such as this holds the key to revolutionize pedagogical access to quality education and a transformative educational system that is useful to the society.

Right to Family and Succession

While article 16 of the CEDAW guarantees equality of genders within the family, the Law of Succession Act has been applied using customary law by some High Court judges to deny girls inheritance within the household. Further, the composition of land boards in counties across Kenya is dominated by men making land acquisition of land (especially communal and agricultural land) difficult for women.

Article 45 of the Kenyan constitution denies LGBTIQ women the right to marry the partner of their choice, if that partner is of the same sex⁴. This legal position is affirmed by the Marriage Act of 2014 which penalizes contracting such marriage. Discriminatory laws in the penal code criminalize private adult consensual same sex intimate expressions with punishment ranging from 5 to 14 years.

Freedom of Expression, Assembly and Right to Culture

The state is obligated under article 14 of CEDAW to ensure, on a basis of equality of men and women, that women benefit from rural development and, in particular, participate in all community activities. The Kenyan constitution also guarantees the right to participate in cultural life and to assemble.

The Kenyan government has allowed without consequence, its officers acting ultra vires to disrupt planned social activities by LBQ women. On 28th July 2016, the chairman of the Kenya Film Classification Board banned a party⁵ purported to be a 'lesbian' party in complete disregard of the constitutional guarantees of non-discrimination and the freedom of assembly.

⁴ <https://www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf>

⁵ http://www.the-star.co.ke/news/2016/07/28/ezekiel-mutua-bans-girls-only-party-terms-it-orgy-of-lesbians_c1394570

The Kenya Film Classification Board (KFCB) is a state corporation that operates under the Government of Kenya whose mandate is to "regulate the creation, broadcasting, possession, distribution and exhibition of films by rating them. In the period between 2014-2016, this entity censored and banned any artistic material that had positive messaging for Lesbian Bisexual, Queer and Trans women⁶.

Stories of Our Lives is a Kenyan film, released in 2014, created by the members of The Nest Collective, dramatizing true stories of LGBT life in Kenya. The film was banned from distribution and screening in Kenya by the Kenya Film Classification Board, on the grounds that the film "*promotes homosexuality, which is contrary to national norms and values*" of Kenya. Its executive producer, George Gachara was subsequently arrested on charges of violating the country's Films and Stage Plays Act⁷.

A video podcast speculated to have been scheduled to air on WGN TV Kenya, has been halted from airing by the Kenyan Film Classification Board for fear that it will promote lesbianism in the country.

Right to Health

The state has a constitutional mandate to ensure the highest attainable standard of health care services for all citizens including reproductive health care. This is however unavailable for non- heterosexual-cisgender women. LBQ women are discriminated against by health care providers or are refused services in government hospitals especially in rural settings. Female condoms, dental dams, lubricants and other items necessary for safe sex between women are not offered in these centers.

"We need health services. I used to go the VCT, and they would often ask if I had sex with a condom. If I told them that I have sex with women, the person interviewing me would go out and call their colleagues. I would get mad and walk out. If I can't protect myself then I can't protect my friend or partner." [Daisy, 3rd May 2015 Kisumu]⁸ [9]

Affirming health care intersex, transgender and gender nonconforming persons is unavailable within government programming. Sex reassignment therapy consisting of psychiatric, endocrine and surgical procedures is unavailable for ITGNC persons who seek them⁹. Intersex children still continue to be subjected to unnecessary genital mutilations in contravention of the best interests of the child.

HIV programming in the country while recognizing men who have sex with men as an 'at most risk' population, rarely considers the situation of ITGNC persons. The Kenya National Strategic Plan and the Kenya Action Plan which are national mechanisms for prevention and control of HIV do not consider this population.

⁶ <https://www.galck.org/galck-statement-to-ezekiel-mutua-and-the-kenya-film-classification-board/>

⁷ <http://america.aljazeera.com/blogs/scrutineer/2014/10/11/kenya-lgbt-film-banned.html>

⁸ https://issuu.com/galckkenya/docs/research_on_the_lived_experiences_o

⁹ http://www.the-star.co.ke/news/2012/11/27/gender-identity-the-other-sex_c709788