



The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender Persons in The United Republic of TANZANIA

A Shadow Report

Submitted during the fourth periodic report to
the U.N. Human Rights Committee
(July, 2009)

Introduction

The United Republic of Tanzania acceded to the International Convention on Civil and Political Rights¹ (ICCPR) on 11 September, 1976. On 13 July, 2009 the country will present its fourth periodic report to the U.N. Human Rights Committee (UNHRC).

The United Republic of Tanzania actively targets private, consensual, adult same-sex relationships for public reprisal and discrimination. This discrimination persists in spite of the growing and consistent international jurisprudence upholding bans on violations of human rights—as guaranteed in the ICCPR—for individuals engaging in same-sex relations. By targeting men who have sex with men (MSM) and women who have sex with women (WSW), Tanzania encourages discrimination and violations of personal privacy in the lives of individuals with non normative sexuality or gender, and especially lesbian, gay, bisexual and transgender (LGBT) people.

This shadow report is a collaborative effort of the LGBTI Support Unit², International Gay and Lesbian Human Rights Commission (IGLHRC) and Global Rights.

We hope that the findings in this report will prove useful to the Human Rights committee in addition to serving as a catalyst for future advocacy efforts.

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¹ U.N. General Assembly, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March, 1976.

² LGBTI Support Unit is a unit of the Centre for Human Rights Promotion (CHRP)

Substantive Violations

Articles 2(1) and 26 (Non-discrimination)

Relevant Law and Jurisprudence

Articles 2(1) of the ICCPR ensure that the citizens of signatory countries are guaranteed the equal application of the rights within the covenant “without distinction of any kind, such as...sex”. Article 26 requires equal application of the law and prohibits discrimination “on any ground such as... sex”.

In *Toonen v. Australia*³, the Human Rights Committee held that protections afforded based on “sex” in articles 2(1) and 26 apply to sexual orientation, and that criminalization of consensual same-sex relations would violate the ICCPR.⁴ While a law against “unnatural” sex may not specify a specific group, such as gay men or lesbians, the application of these laws result in a discriminatory effect on men who have sex with men (MSM) and women who have sex with women (WSW).

The United Republic of Tanzania’s constitution declares the inherent equality of its people. Part III of the Constitution, “The Right to Equality”, establishes that the government is prohibited from discriminatory actions. Article 12 and 13 both specifically prohibit discrimination in effects or applications of the law:

12. – (1) All human beings are born free, and are all equal.
(2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.
13. – (1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.⁵

The Constitution also establishes the state is under a duty to ensure, “that human dignity and human rights are respected and cherished... that all forms of injustice, intimidation, discrimination, corruption, oppression or favoritism are eradicated”.⁶

Violations and Effects of Discrimination Based on Sexual Orientation

The Republic’s Penal Code, Cap. 16 R.E. 2002, section 154 is clearly in violation of Article 2(1) of the ICCPR. Based on the Convention, international jurisprudence, and the Republic’s own constitution the discriminatory laws punishing private adult sexual behavior should be repealed. *Toonen* ruled that criminalizing same-sex sexual behavior has a discriminatory, even if the literal text of the penal code does not target specific groups. According to the *Toonen* ruling, “Such

³ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

⁴ *Id* at ¶8.7, (“[T]he reference to ‘sex’... is to be taken as including sexual orientation.”).

⁵ “The Constitution of the United Republic of Tanzania”, Chapter One, Part III, Article 12, “Equality of Human Beings”; Article 13, “Equality Before the Law”. http://www.chr.up.ac.za/hr_docs/constitutions/docs/TanzaniaC.pdf

⁶ *Id*, Part II, Article 9, “The Pursuit of Ujama and Self-Reliance”.

laws thus are clearly *understood* by the community as being directed at male homosexuals as a group.”⁷

The United Republic of Tanzania, however, has blatantly stated that the penal code targets a specific sexual orientation. In its state report in anticipation of the Republic’s fourth periodic review by UNHRC, Tanzania explicitly states its intention to target and punish a particular sexual orientation and private adult sexual conduct;

Homosexuality is considered an unnatural act punishable under the Penal Code, Cap. 16 R.E. 2002, section 154 of which provides that any person who (1) has carnal knowledge of any person against the order of nature or... permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for 14 years.⁸

The report by Tanzania equates sexual orientation (a person’s sexual and emotional attraction to people of the same sex, another sex, or both sexes) with sexual activity (a man/woman having sex with a man/woman). Furthermore, Tanzania’s penal code reaches far beyond private, adult same-sex sexual activity. According to a report by Human Rights Watch, “a 1998 amendment to the Tanzanian Penal Code clarified that gross indecency included any act that ‘falls short of actual intercourse and may include masturbation and indecent behaviour without any physical contact.’ Thus two men kissing, holding hands, sleeping together, or conceivably even looking at one another with sexual intent, could break the law”⁹.

The *Toonen* ruling rejected two common arguments used to criminalize same-sex sexual: that it is necessary to prevent the spread of HIV/AIDS and that it is necessary for moral health. In *Toonen*, the Committee addressed the dire public health concern of HIV/AIDS treatment and prevention, finding that “statutes criminalizing homosexual activity tend to impede public health programmes by driving underground many of the people at risk of infection.”¹⁰ Instead of preventing the spread of HIV/AIDS, Tanzania’s “Offenses against Morality” section of the penal code create a situation in which a minority population is isolated from necessary medical care, treatment and support, In fact, an official report by the Tanzanian Commission for AIDS (approved by the Prime Minister) described strategies to reduce the risk of HIV infection to vulnerable populations and recommended for the United Republic, “[t]o acknowledge the vulnerability of sex workers and men who have sex with men and advocate for their access to HIV preventive information and services and for decriminalization of their activities.”¹¹

Toonen also rejected the principle that discriminatory legislation could be justified and based solely on “moral issues.” For example, if a state argues that legal punitive action against same-

⁷ *Toonen, surap* at ¶6.13. (Please note that emphasis has been added by the report authors to stress the implied nature of the discrimination inherent to such legislation).

⁸ “Fourth periodic reports of State parties: United Republic of Tanzania”, Human Rights Committee, U.N. Doc. CCPR/C/TZA/4 (17 December 2007).

⁹ Human Rights Watch, “This Alien Legacy: The Origins of ‘Sodomy’ Laws in British Colonialism”, p 48 (December 2008). (citations omitted)

¹⁰ *Toonen, supra* at ¶8.5. (internal quotation omitted).

¹¹ Tanzania Commission for AIDS (TACAIDS), “The Second National Multi-Sectoral Strategic Framework On HIV and AIDS: 2008 – 2012” (NMSF 2008-2012), p 57 (October 2007).
<http://www.tacaids.go.tz/documents/NMSF%20%202008%20-2012.pdf>

sex sexual activity is rarely enforced. According to *Toonen*, those laws must not be necessary to maintaining and upholding the moral fiber of the country. If a state does not use the law, then the state does not need the law. However, if a state regularly and vigilantly enforces prohibition of adult same-sex sexual activity then the state is consistently violating the personal autonomy and privacy of its citizens. These violations are based solely on a person's actual or suspected sexual orientation. This behavior by a state party to the ICCPR is a violation of articles 2(1), 26, and 17 (as discussed below) and is a failure of the duty and obligation of the government to protect its citizens with no partiality.

Discrimination by state actors coupled with legal persecution based on sexual orientation and gender identity ripple throughout society and lead to more grave human rights concerns. Amnesty International reported that even unenforced "sodomy laws", "create the conditions for discrimination in employment, stigmatization, vilification, threats of physical violence and other human rights abuses"¹² against LGBT people. Furthermore, abuses committed by private actors are compounded by the unwillingness of the state to protect the victims. LGBT people are deterred from seeking help because, "survivors may face potential criminal prosecution when reporting crimes to the police."¹³

Effects of Discrimination based on Gender Identity

A woman known widely as Aunt Vicky was reportedly the first transgender woman in Tanzania. She was brought to Muhimbili National Hospital exhibiting symptoms of possible poisoning and meningitis. Through email correspondence regarding this shadow report, local advocates in Tanzania cited to Aunt Vicky's story. The news site, *Behind the Mask*, reported the following on Aunt Vicky's experience in the hospital:

According to a doctor who is part of hospital alumni, professional doctors at the Muhimbili National Hospital were very unprofessional with their comments that he says echoed not only ignorance but also limited information about the transgender people or LGBTI issues... officials at the hospital allegedly took advantage of exposing her body to their colleagues and civilians as they had never seen someone who has undergone a sex reassignment before... pictures exposing Aunt Victoria's breasts were taken while she was still unconscious in hospital and these are being widely disseminated... It is difficult not to question whether the health care professionals were too caught up in amazement with their first encounter of a transgender patient to such an extent that they compromised a patient's well-being.¹⁴

Because of her non-conforming gender identity, Aunt Vicky received unacceptable and dehumanizing treatment from the state hospital when she most needed compassionate medical attention. Treatment like this violates ICCPR Articles 2(1) and 26, but also Article 3 (Equal Treatment of Men and Women) and the National Policy on Health.¹⁵ Widespread, state-sanctioned homophobic and transphobic practices result in mistreatment of LGBT people at every level of social rights, including the right to adequate healthcare.

¹² Amnesty International, "Love, Hate, and the Law: Decriminalizing Homosexuality", p 22 (July 2008).

¹³ *Id.*

¹⁴ Nomancotsho Phakade, "Could Ignorance Over Trans Issues have Cost Aunt Victoria Her Life?" *Behind the Mask*, (15 June, 2009). <http://www.mask.org.za/article.php?cat=Opinion&id=2163>

¹⁵ National Health Policy, Section 4.3, p 8-9 (June 2007).

Article 17 (Freedom from Arbitrary Interference with Privacy, Family, Home)

Relevant Law and Jurisprudence

Article 17(1) states that people should be free from “arbitrary or unlawful interference with his [or her] privacy, family, home or correspondence”. Article 17(2) additionally mandates that the law must protect all people from such interferences. The Constitution of the United Republic also provides for the guaranteed privacy of its people,

16. – (1) Every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.¹⁶

Additionally, over a decade has passed since the UNHRC last called upon Tanzania to repeal its sodomy laws, “to protect the freedom of an adult individual’s sexual conduct and to bring its laws in conformity with article 17 of the Covenant.”¹⁷ Despite treaty obligations and constitutional protections, the penal code has not been revised, and LGBT people in Tanzania must live in constant secrecy or face punishment from authorities.

Violations and Effects of Interference with Privacy

Tanzania’s Penal Code, Cap. 16 Revised Edition of 2002, Section 154 violates the protection promised in Article 17 of ICCPR. Human Rights Watch succinctly described the effects of laws like Tanzania’s this way:

These laws invade privacy and create inequality. They relegate people to inferior status because of how they look or who they love. They degrade people’s dignity by declaring their most intimate feelings “unnatural” or illegal. They can be used to discredit enemies and destroy careers and lives. They promote violence and give it impunity. They hand police and others the power to arrest, blackmail, and abuse. They drive people underground to live in invisibility and fear.¹⁸

Similar to the effects of discrimination, state-sanctioned invasions of privacy have pervasive effects on non-state actors. When the government mandates the targeting of MSM/WSW, such “[s]odomy laws encourage all of society to join in surveillance, in a way congenial to the ambitions of police and state authorities.”¹⁹ In *Toonen*, laws against same-sex relations “actually and currently affected” Mr. Toonen, and that their existence “continuously and directly interferes with [his] privacy.”²⁰

Currently, invasions of privacy are committed by both public and state actors. The LGBTI Support Unit documented an example of these types of violations that was widely publicized in

¹⁶ *Supra.*, Part III, Article 16, “Right to Privacy and Personal Security”.

¹⁷ “Concluding observations of the Human Rights Committee”, 63rd session, U.N. Doc CCPR/C/79/Add.97 (18 August 1998).

¹⁸ Human Rights Watch, *supra* at p 9.

¹⁹ *Id* at p 62.

²⁰ *Toonen*, *supra* at ¶8.2.

national media. On 19 May, 2009, a newspaper reporter for *Ijumaa* was accompanied by three police officers in the investigation of two men suspected of same-sex sexual activity. The reporter and police followed the men from the street to their private hotel room, invaded the room, and began photographing the men. The two men were then arrested and transported to the police station. In the following days, photographs of the two men appeared on the cover of *Ijumaa* newspaper featuring the headline, “Caught Live!”²¹ The related article included derogatory and discriminatory language commonly intended to create animus towards men who have sex with men and “all those that violate national ethics.”

Conclusion

Signs Escalating Human Rights Violations

The Government of the United Republic of Tanzania has demonstrated enmity toward LGBT people through both statements and actions, and the trend has yielded harsher criminalization of the private lives of MSM/WSW. According to a report by the LGBTI Support Unit, Tanzania has continued to strengthen the criminalization of same-sex relations.²² The Penal Code Cap. 16 of 1954 punished anyone who *attempted* same-sex relations as “guilty of a felony, and is liable to imprisonment for seven years.” The 1998 update to the Code²³ added, “[those guilty of attempted same-sex relations] shall on conviction be sentenced to imprisonment for a term not less than twenty years.” The Penal Code Cap 16 Revised Edition of 2002 escalates the punishment even further by holding a person attempting to engage in same-sex relations, “liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.”

Outside of mainland Tanzania, the island of Zanzibar maintains a semi-autonomous legal system heavily influenced by the local Muslim population. In August 2004, an amendment to the Zanzibar Penal Code of 1934²⁴ set the punishment for same-sex relations equal to that of murder. An LGBT news website reported on the passage of the punishment:

A law imposing a prison term of up to 25 years for anyone convicted of having gay sex has gone into effect in Zanzibar... gay men could be sentenced to a quarter century... lesbian sex is seven years. The gay sex sentence is the same as that for murder. The law went into effect this week after it was signed by president, Amani Karume. Zanzibar’s parliament, in a rare show of unity, passed the bill unanimously in April. “There is no difference between sodomy and murder,” said Sheikh Muhammed Said, a Zanzibar Islamic leader. “This is what we have been aspiring for,” he said of the penalties.²⁵

²¹ ISSN: 0856-7999, No. 619, *Ijumaa Mei*, (22 May, 2009).

²² LGBTI Support Unit, “Projects for Change: Mainstreaming MSM/WSW in the Fight Against HIV and AIDS and Decriminalizing LGB in Tanzania”, p 6 (2008).

²³ *Id.* (Citing *Sexual Offences Provision Act (SOSPA) 1998*, Section 17)

²⁴ International Lesbian and Gay Association, “State-Sponsored Homophobia”, (May 2008).
http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf

²⁵ 365Gay.com Newscenter Staff, “Zanzibar Gay Sex Ban Official”, (20 August, 2004).
<http://www.glapn.org/sodomylaws/world/tanzania/tznews011.htm>

Encouraging and Constructive Developments

LGBTI Support Unit would like to acknowledge optimistically that this is a “*kairos*” period in the history of Tanzania. The Support Unit attests that developments are impending, and rights for LGBT individuals in Tanzania will have changed in three to five years’ time. The Support Unit bases this prediction on several current indicators. To conclude, we quote from a variety of government policy documents:

- 10.1** Goals #6,7 Thematic area on Prevention includes MSM, “Vulnerable Population Groups – Commercial Workers, *Men who have sex with men*, Bar Maids, Prisoners, Police and Soldiers, Mobile Populations, Refugees and Drug Users”²⁶
- 10.2** Challenge: “While for some of these special vulnerable groups projects already exist in the country, for others new approaches have to be developed. For some of groups (e.g. *Men who have sex with men*) little or nothing at all is known about their situation and behaviors.”²⁷
- 10.3** “The Ministry of Community Development, Gender and Children (MoCDGC) has developed a strategic plan on protection of women and children, including Commercial Sex Workers, Mobile Population, Injecting Drug Users (IDUs), *Men having Sex with Men (MSM)*, and Single Mothers. The plan is currently being implemented”.²⁸
- 10.4** “To acknowledge the vulnerability of sex workers and *men who have sex with men* and advocate for their access to HIV prevention information and services and decriminalization of their activities”.²⁹

While ten years ago it would have been taboo for government policy documents to include such statements, the above quotes give us encouragement and we see constructive developments unfolding towards the change we envision. Change towards the realization of LGBT rights to be mainstreamed within the context of the fight against HIV and AIDS (access to HIV prevention information and services) and “decriminalization of their activities”.

Recommendations

- That the government of the United Republic of Tanzania should amend the Penal Code decriminalizing private, consensual, adult same-sex sexual activity.³⁰
- That the government should amend the HIV and AIDS (Prevention and Control) Act, 2008 to provide “access to HIV preventive information and services” to LGBT.³¹

²⁶ TACAIDS, “National Multi-Sectoral Strategic Framework On HIV and AIDS: 2003 – 2007” (NMSF 2003 – 2007), p 43 (January 2003). <http://www.tanzania.go.tz/pdf/tacaidsnmf.pdf>

²⁷ *Id* at p 35.

²⁸ NMSF: 2008 – 2012, *supra* at p 20.

²⁹ *Id* at p 54.

³⁰ *Id.*

³¹ *Id* at p xvii, 16 on “Mainstreaming HIV and AIDS”, and p 54, Point 10.

- That the party-state also enacts legislation protecting LGBT against all forms of discrimination (stigma, denial and discrimination) perpetrated against LGBT individuals by state and non-state actors.³²
- That deliberate efforts should be put in place to facilitate education, training and awareness, building on sexual orientation and gender identity “service providers engaged in administration of justice, such as judicial officers, prosecutors, police, social welfare and health officials.”³³
- As indicated by the first and second *National Multi-Sectoral Strategic Framework on HIV/AIDS*, public health programs should make an effort to acknowledge, reach out, and educate, and should access resources for LGBT programmes that serve to reduce the spread of HIV/AIDS and the subsequent deaths associated with the disease.³⁴

List of Proposed Questions for Government Delegation

1. What is the justification by the state for maintaining laws that criminalize private, adult, consensual same-sex relationships?³⁵
2. Why has the government not only refused to remove criminal penalties for same-sex relations, but also increased their severity?³⁶
3. What is the government’s plan to reduce widespread discrimination against individuals based on their real or perceived sexual orientation and gender identity in their country that is prohibited by Articles 2(1) and 26?³⁷
4. How does the government plan to increase the respect of privacy that is guaranteed under Article 17 for MSM/WSW in Tanzania?

³² “Constitution”, *supra*, Chapter 1, Part III (5) of the Constitution of the United Republic of Tanzania.

³³ Ministry of Community Development, Gender and Children, “A National Plan of Action for the Prevention and Eradication of Violence Against Women and Children 2001 – 2015”, p 7 (First printed in 2001).

³⁴ NMSF 2008 – 2012, *supra* at p 104.

³⁵ Penal Code Chapter XV Offences Against Morality).

³⁶ Sexual Offences Provision Act (SOSPA), *supra* ; Penal Code § 154-158.

³⁷ *Id.*