“WHY MUST I CRY? SADNESS AND LAUGHTER OF THE LGBTI COMMUNITY IN EAST AFRICA”
UHAI EASHRI Report on the
Human Rights Status of LGBTI Persons in East Africa
2010 – 2013
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Glossary

- Bisexual: A person attracted to people of both sexes.
- Female to Male Transsexual: A person who has undergone sexual reassignment surgery to transition from a biological female to a biological male.
- Gay: Generally used to describe men who are attracted primarily to other men. Sometimes used as a synonym for homosexual.
- Gender identity: A person’s conception of oneself as male or female or both or neither. Gender identity may or may not correspond with the sex assigned at birth.
- Heterosexual: A person attracted primarily to people of the opposite sex.
- Homosexual: A person attracted primarily to people of the same sex.
- Intersex: A condition in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male or a person may be born with genitals that seem to be in between male and female.
- Lesbian: A woman attracted primarily to other women.
- LGBTI: Used to designate the wider sexual and gender minority community namely lesbian, gay, bisexual, transgender and intersex.
- Male to Female Transsexual: A person who has undergone sexual reassignment surgery to transition from a biological male to a biological female.
- MsM: Men who engage in sexual behaviour with other men, but who do not necessarily identify as “gay,” “homosexual” or “bisexual.”
- Outing: The act of disclosing a gay, lesbian, bisexual or transgender (LGBT) person’s true sexual orientation or gender identity without that person’s consent.
- Queer: An umbrella term for sexual orientations and gender identities that are not heterosexual or which do not conform to the male/female gender binary.
- Sexual Minority: A group whose sexual identity, orientation or practice differ from the majority of the surrounding society.
• Sexual orientation: A person’s romantic and sexual attractions to individuals of a different gender or the same gender or more than one gender.
• Transgender person: Someone whose deeply held sense of gender is different from their biological sex assigned at birth.
• WsW: Women who engage in sexual behaviour with other women, but who do not necessarily identify as “gay,” “homosexual,” “lesbian” or “bisexual.”
Methodology

This is a report of a baseline survey conducted during the months of October 2012 to February 2013. Detailed questionnaires were distributed to LGBTI organisations in five East African states: Burundi, Kenya, Rwanda, Tanzania and Uganda. Respondents were drawn from the LGBTI and human rights communities. Drawing on information provided by the respondents, this report summarises the current human rights situation of LGBTI people in East Africa and gauges how the terrain has changed since the 2010 report. In addition to providing a snapshot of the current situation for each group, it also identifies key trends in the region on issues affecting the LGBTI community. Using a qualitative analysis approach on key indicators, the report allows LGBTI people from one country to compare their own status with those of others.

The report also made use of existing research and literature on the subject as well as official documents including national and international legal and policy documents and case law. Information obtained was as far as possible verified from official sources and other published works. The respondents in this study represent only a small fraction of the number of the LGBTI persons and human rights activists in all the countries involved. A major challenge to the study was the lack of availability and accessibility of relevant information and documents. This is due in part to the failure by the majority of the East African states to maintain a reliable documentation infrastructure of national laws and court cases.

Since LGBTI organisations are mainly based in the capital cities of the five countries, they tend to have an urban bias and do not adequately reflect the concerns of LGBTI individuals in rural areas. In addition, the study covers only a few of a wide range human rights issues affecting LGBTI persons in East Africa. The names of some of the respondents have been changed in order to protect their privacy. Where real names have been changed, an asterisk indicates this change thus*.
1.0 Introduction

1.1 Introduction to LGBTI Life in East Africa

All too often, the lives of LGBTI people in East Africa are characterised by isolation, the burden of stigma, discrimination and violation. But they are very much normal human lives with every day joys and happiness snatched from a hostile environment. The simplistic view, which reduces LGBTI persons to their sexuality alone, has resulted in their ostracisation by family members, school authorities, government officials, religious formations and the society at large. But even in the midst of hardship, they are able to create some normalcy and live meaningful, fulfilling lives.

Hate speech against LGBTI persons is rampant despite legislation prohibiting discriminatory or inciting language. For instance, the Kenya Information and Communications Act provides a framework for bringing legal action against perpetrators of hate speech. However, this law was enacted and is used largely to curb ethnic based hate speech while incendiary speech

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1. Peter Tosh ‘Why must I cry?’ from the album Legalise It (1976).
against sexual minorities is widely tolerated. In spite of the proliferation of hate speech against sexual and gender minorities especially on social media, the body charged with enforcement of the law has remained silent on the matter.

Currently Burundi, Kenya, Tanzania and Uganda expressly criminalise same-sex conduct. While Rwanda has no unambiguous anti-sodomy law, an individual can be prosecuted for “offences against public morals and sensitivities” which carries a maximum penalty of five years. Other laws such as vagrancy laws, public nuisance laws and local authority by-laws continue to be used to prosecute and persecute LGBTI persons in East Africa. As a result, a wide range of human rights that are otherwise protected by the individual states’ Constitutions are compromised.

With respect to access to health care, discrimination keeps LGBTI persons away from both prevention and treatment programmes, especially for HIV. While efforts by many East African states to include MSM individuals in their national HIV programmes is commendable, other LGBTI groups have been given minimal attention. Further, stigma and discrimination by health care providers has limited the effectiveness of preventive strategies targeting MSM, compromising universal access to treatment.

In most East African states, the Constitution makes few provisions for social and economic rights. As a result, it is difficult for LGBTI persons to try to secure these rights through the judicial system. The Kenyan Constitution however does expressly provide for equality and a wide range of political, social and economic rights. In practice, this has had little impact on the number of violations suffered by LGBTI individuals in the civil sphere. The limited number of lawyers willing to take up LGBTI matters and the lack of national legal aid clinics in any of the East African states complicates access to justice in and out of court.
2.0 Discrimination

“"It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.””^2

The study conducted for this report reveals extremely high levels of homophobia and transphobia across the region. Misinformation, social, cultural and religious mores against gender and sexual minorities largely contribute to this discrimination. In an earlier study^3, many straight East Africans asserted that they found homosexuality dangerous to the continuity of the society, that they viewed it as a disease and an abomination which needed to be eliminated and supported state suppression of the LGBTI community.

This study also found widespread discrimination in educational institutions perpetuated by both teachers and fellow students. LGBTI students are often subjected to punishment, suspension and in some cases expulsion from the educational institutions. As a result, many LGBTI youth have their education compromised or terminated altogether, reducing access to formal employment.

32.1% of LGBTI respondents reported having been denied access to an educational institution or expelled altogether on the basis of their sexual orientation or gender identity.

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^3 Please insert a footnote citing the study: A People

Discrimination based on sexual orientation leads, with 38% of the respondents reporting having been punished or harassed in educational institutions.

Worse still, this societal discrimination is perpetrated even by those constitutional bodies specifically charged with the promotion of fundamental rights. For instance, the Commission for the Administration of Justice (formerly Ombudsman) was established for the sole purpose of assisting Kenyan people gain access to public institutions. In 2012, a transgender woman filed a complaint with the commission against a public hospital for denial of medical services. The commission staff, while accepting her complaint, strung her along

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4 See Chapter 15 of the Kenyan Constitution
without providing any help before finally telling her that the commission could not handle her case because she is a ‘hermaphrodite.’ She lamented that:

“I was very happy when the new Constitution came into force and especially the commission for the administration of justice which replaced the ineffective ombudsman which I had tried to engage in vain. However my joy was quashed when the commission declined to assist me.”

Discrimination against the LGBTI community was thoroughly canvassed in the South African case of the National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others. South African immigration law provides immigration benefits to opposite-sex couples that were not available to same-sex couples, prompting the filing of a case by the National Coalition for Gay and Lesbian Equality (NGCLE), six same-sex couples and the Commission for Gender Equality. The applicants asked the Court to declare the law unconstitutional because it discriminated on the basis of sexual orientation. The government of South Africa advanced the argument that the discrimination was legitimate because it served the public purpose of protecting the institution of marriage. The court did not agree. Declaring the law invalid, the court ruled that there was no rational connection between denying benefits to same-sex couples and the protection of marriage. Justice Ackermann expressed himself thus:

“The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.”

5 National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others 1999 (3) BCLR 280 (C); 1999 (3) SA 173 (C).

6 NGCLE case above, Pg. 53
2.1 Criminalisation of Same-Sex Intimacy

“………………..sodomy laws, even when unenforced express contempt for certain classes of citizens. The injustice of this message supplies a much more urgent reason to oppose the persistence of these rarely enforced laws than does their supposed impingement on anyone’s liberty to engage in particular sexual practices.”

The Penal Codes of Kenya, Tanzania and Uganda criminalise carnal knowledge of any person against the order of nature, punishing contravention with imprisonment for fourteen years to life. In 2009, Burundi amended its Penal Code to criminalise same-sex intimacy for the first time. In the same year Rwanda attempted to amend its penal law to criminalise “engaging in and inciting homosexual acts.” The proposal was tabled before the Rwandese parliament but was removed from the draft Penal Code after intense lobbying by civil society. Uganda’s infamous Anti-Homosexuality Bill (often referred to as the Bahati Bill) sought to broaden the criminalisation of same-sex practice to include sexual orientation, to criminalise the “promotion of homosexuality” and to introduce the death penalty for “aggravated homosexuality.” Aggravated homosexuality was defined as occurring when among other things: the person against whom the offence is committed is below the age of 18, the offender is HIV positive, the offender is a serial offender and the offender is a person of authority over the person against whom the offence is committed. The bill included provisions for Ugandans engaging in same-sex sexual relations outside of Uganda, making them liable for extradition and for punitive actions taken against individuals or entities supporting LGBTI rights. The Bill, though allowed to lapse in the previous parliament, has been recently revived.

7 Dan M. Kahan, “The Secret Ambition of Deterrence, 113 Harv.L.Rev.413, 42
8 See, Sections 162, 163 and 165 Kenya Penal Code, Article 145 Uganda’s Penal Code, Article 5 Sections 154 and 155 of the Tanzania mainland Penal code and Sections 145 and 157 of Zanzibar’s Penal code.

9 The Bahati Bill is the name given to a private member’s bill submitted by MP David Bahati in Uganda on 13 October 2009.
In Botswana, the case of Kanane vs The State defined unnatural carnal knowledge as non-vaginal sexual penetration, between either a man and a woman or two men. In Tanzania and Uganda, the lower courts have interpreted unnatural offences more widely to include a range of offences, which have lowered the evidentiary threshold for bringing charges under the Penal Code. In spite of this, the private nature of sexual acts and the difficulty of satisfying the burden of proof required mean that no successful prosecutions have brought under these laws. This has led a section of LGBTI sympathisers and opponents to argue that the difficulty of enforcement has rendered decriminalisation irrelevant and that the focus for LGBTI activism should rather be directed at changing social perceptions. Critics also point out that decriminalisation in South Africa has not eliminated violence against sexual and gender minorities. While this is true to some extent, discriminatory laws serve to legitimise violence, harassment and many forms of violations against LGBTI persons. For this reason, maintaining discriminatory laws serves to reinforce social perceptions against the LGBTI community.

Furthermore, in a region like East Africa where state agents are the main human rights violators of LGBTI persons, maintaining discriminatory laws undermines efforts to reduce inequality, whether by legal or other means. Discriminatory laws and the homophobia they perpetuate can manifest in a variety of ways. For instance, while research has shown that providing condoms in prisons is vital to curbing the spread of HIV, no East African state does so for fear of charges of encouraging homosexuality in prisons.

10 Kanane vs State 1995 BLR 94.
3.0 Societal Abuses and Violations

Throughout East Africa, LGBTI persons continue to face various kinds of harassment and violence from the greater society. 77% of the respondents reported having been victims of societal violence and abuse.

Percentage of Respondents Reporting Human Rights Violations & Abuses

While the majority of the respondents had suffered 5 or fewer incidences of harassment, more than 25% reported more than 10 such incidences. The study also found that violence and harassment varies by geographical region and how open people were about their sexual orientation or gender identity. People involved in LGBTI activism record more incidences of harassment, particularly in Uganda, Kenya and Burundi.

Blackmail and torture is the most encountered form of violence. Verbal harassment and threats of eviction by the landlords, physical attacks by local vigilante groups, forced exorcism and sexual violence are also widespread.
Sexual minorities—62%—experience more instances of discrimination than gender minorities—34%—likely reflecting the larger number of respondents within the groups of lesbian, gay and bisexual compared to trans and intersex individuals.

Societal prejudice against LGBTI persons is deeply rooted even in what would be expected to be progressive quarters, including the courts. In the Kenyan case of *RM vs Attorney General & 4 others*¹¹ the court ruled:

"We [the court] can issue orders and make declarations, but this will be of little effect considering that the stigma is connected with the public perception which is based on the public’s limited knowledge of intersex status. Few seem to appreciate the fact that the issue of gender definition for an intersex person unlike a transsexual or a homosexual, is a matter of necessity and not choice………………the Kenyan society is predominantly a traditional African society in terms of social, moral and religious values….we have not reached the stage where such values involving matters of sexuality can be rationalised or compromised through science."

This decision is the very embodiment of societal prejudice by a Constitutional court, which is rather expected to be the custodian of the fundamental rights of minorities and the

¹¹ *RM vs Attorney General & 4 others, [EKLR 2010]*
oppressed. In it’s ruling, the court displayed ignorance of even the most basic facts of LGBTI life and identity. Further, it not only failed to speak out against public stigma and discrimination against LGBTI persons, but rather capitulated to it. As one transgender woman asked, “What is to stop members of the public from beating, raping, torturing and maiming transsexual and homosexual people if they have deemed them un-african or they don’t pass the ‘traditional value test’ administered by the court?”
4.0 Police Harassment

While police forces have improved their handling of LGBTI persons in some East African states such as Rwanda and Kenya, the study found that LGBTI individuals still face disproportionate levels of police harassment and other violations, directly contravening Article 7 of the ICCPR and Constitutions. Of the respondents, 46% had faced harassment from police officers on the basis of sexual orientation and gender identity.

Some respondents reported having been arrested by police and labelled guerrillas or members of Al Shabaab, while others said their neighbours bribed the police to arrest them. One LGBTI activist recounted how their offices were closed and their members arrested, detained, tortured and threatened with death and poisoning in social places. When he reported this harassment, the police said they were unable to help him, and that any ensuing violence would be his own fault. In another instance, a lesbian was taunted with homophobic slurs by police officers and thrown out of the station when she attempted to report a violation. Despite reporting the complaint to senior police authorities, this matter remains unresolved and the offending officers have not been punished.

In yet another case, police raided a private house party and demanded identification from the attendees. The attendees were then arrested and charged with various offences. On 13 September 2012, the police arrested David Cecil,

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12 Article 7 of the ICCPR prohibits to torture or to cruel, inhuman or degrading treatment or punishment.
a theatre producer in Kampala and detained him for three days for performing a play deemed to promote homosexuality. The play tells the story of a successful gay businessman whom his employees murder when he comes out. David was charged with “disobeying lawful orders” after refusing to let the authorities suspend and review his play\textsuperscript{13}. He was acquitted for lack of evidence in January 2013.

When arrested, trans people are often charged with impersonation, importuning for immoral purposes and ‘homosexuality’. LGBTI people in police custody are often subjected to physical, sexual and verbal violence both from the police and fellow inmates. In May 2011, a Kenyan transsexual woman was arrested by the police and undressed before a crowd of people and the media. The police indecently touched her private parts as they taunted her. The incident was aired on all major television stations and published in the print media with no adverse consequences for her tormentors. With the assistance of the Transgender Education and Advocacy organisation, she sued the government for violation of her fundamental rights. The case is currently pending before the Constitutional court.

While the arbitrary arrest of LGBTI persons is widespread throughout East Africa, in the end they are charged only with misdemeanours or detained for days without trial in the hope of extorting money from colleagues or relatives. Local authority by-laws against loitering and vagrancy are used to persecute LGBTI individuals\textsuperscript{14}. These experiences illustrate that harmful and discriminative attitudes present in the police force are rife in all East African states. State response to this violence has been ambivalent.

\textsuperscript{13} The play is called “The ‘River and the Mountain’”

\textsuperscript{14} See for instance, Kenyan By-law 19 of 2007 “importuning for purposes of prostitution”
5.0 Access To Justice

In the case of RM discussed above, the court had an opportunity to extend the meaning of the word “sex” to include transgender and transsexual people. The court however declined to do so. Citing socio-cultural grounds, the judges ruled that:

“To include intersex in the category of “other status” would be contrary to the specific intention of the Legislature in Kenya. It would also result in recognition of a third category of gender which our society may not be ready for at this point in time. We therefore reject the argument that we should adopt the criterion of “other status” included in the international instruments.”

Article 20 of the ICCPR provides that a court should adopt the interpretation that most favours the enforcement of a right or fundamental freedom. The attitude demonstrated by the court in that case goes contrary to this principle. It also suggests a hierarchy in the enjoyment of rights in which trans individuals and homosexuals enjoy less protection from the law. While parliament is the principle arm of government charged with making laws, in a common law system like Kenya, courts can also make laws where there is a gap in the law. As such there was no justification for the court’s refusal to find for the need of a third gender to cater for intersex persons. An example of a court making a progressive reading of the law is the South African case of National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others. The Constitutional Court held that, in cases where a law is unconstitutional because of an omission, the courts might apply the technique of “reading in” to insert words to extend the law. The court laid down certain conditions, requiring that the words to be “read in” can be precisely defined and that it should not interfere too greatly with the intent of Parliament. In this case the

15  RM vs Attorney General & 4 others, [eKLR 2010]

words “or partner, in a permanent same-sex life partnership,” were inserted after the word “spouse” to make the law inclusive of same sex partners.

The Constitutional court of Uganda has in a number of cases upheld the rights of LGBTI individuals to enjoy their Constitutional rights and freedoms without interference from the state or private persons. In Victor Mukasa and Yvonne Oyo vs Attorney General of Uganda, the Court held that gays and lesbians – like anyone else – could challenge the unlawful conduct of the authorities. The Court awarded damages to Oyo for the violation of their right to protection from torture, cruel, inhuman and degrading treatment under Article 24 of the Ugandan Constitution. The Court also awarded damages to Mukasa for the violation of his right to privacy of person, home and property guaranteed by Article 27 of the Constitution.

In all East African states, few lawyers are willing to take up LGBTI related cases. Reasons given for refusing to engage range from: “but homosexuality is against the law” to “my colleagues are very homophobic, they won’t let me take on this case.” This is the case even with human rights lawyers who ordinarily uphold non-discrimination and the right of every accused person to legal presentation. However, a few committed lawyers do take up these cases at great personal and professional risk.
5.1 My Identity Dilemma: Denial of Identification Documents

Although in Kenya trans people like any other person can change their names, there is no legal or policy framework to regulate the process. As a result, they usually encounter obstacles intentionally erected by government officials charged with facilitating the process. In April 2010, a transsexual woman who had legally changed her name was not allowed to reflect the changes on her national identification card. After being tossed from one office to another for one year, the Registrar of Persons told her that her application could not be approved, as she had not attached a medical report from a doctor confirming a change of gender from male to female. This was despite the fact that she had not applied for a change of gender. She filed a complaint with the Constitutional Court of Kenya. The petition has been heard and judgment is pending. In other East African states, it is impossible to change one’s name and identity documents to reflect a change in gender.

This tenuous legal position of intersex people and transsexuals in East Africa implicates several Constitutional provisions and Articles 16 and 17 of the ICCPR. The European Court of Human Rights (ECHR) in L. vs Lithuania established that the failure of the state to allow the change of legal name and sex as a consequence of lack of domestic legal framework constituted a violation of article 8 of the European Convention of Human Rights (ECHR).

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17 Article 16 “Everyone shall have the right to recognition everywhere as a person before the law. Article 17 “No one shall be subjected to arbitrary unlawful interference with his privacy, family, or correspondence, or to unlawful attacks on his honour and reputation.”

18 Article 8 “Everyone has the right to respect for his private and family life, his home and his correspondence.”
5.2 I would also Love to Have My Own Family and Children: Right to Marry and Adopt

“There are two predominant narratives that circulate within society that help to explain the difficulty that lesbians and gays face in adopting children and establishing families. First, there is the story of lesbians and gays that centres on their sexuality. Whether because of disgust, confusion, or ignorance about homosexuality, lesbian and gay sexuality dominates the discourse of not only same-sex adoption, but all lesbian and gay issues. The classification of lesbians and gays as ‘exclusively sexual beings’ stands in stark contrast to the perception of heterosexual parents as ‘people who, along with many other activities in their lives, occasionally engage in sex.’ Through this narrative, lesbians and gays are reduced to one-dimensional creatures, defined by their sex and sexuality.”

Although the adoption laws in all the East African states make no explicit mention of LGBTI persons, the processes are strict and involve a high degree of scrutiny of the applicant’s personal life. Given the levels of legal and social discrimination against sexual and gender minorities, it is virtually impossible that an LGBTI individual could successfully attempt to adopt a child.

Despite being rights progressive, the Kenyan Constitution explicitly defines marriage as between a man and a woman. This reflects the position of other East African states on same-sex marriage. Due to this discriminative and restrictive legal environment, same-sex couples cannot be beneficiaries of benefits such as insurance, pension and property in the event of a partner’s death. LGBTI couples with either biological or ‘adopted’ children find it hard to

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19 Timothy E Lin “Social Norms and Judicial Decision making: Examining the Role of Narratives in Same-

20 Article 45 “Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.”
make provisions for their partner’s children for fear that their own family members would victimise them on their demise. This insensitive treatment of same-sex families persists in East Africa despite the fact that all East African states have ratified the ICCPR, which obligates them to treat everyone equally before the law. In *Young vs Australia* for example, the Human Rights Committee held that a state party’s failure to extend benefits to same-sex couples which are granted to unmarried opposite-sex couples violates Article 26 of the Convention. The Human Rights Committee also affirmed this decision in *X v. Colombia*, holding that Article 26 was violated when the state party denied pension rights to a same-sex life partner when the benefits were extended to *de facto* opposite-sex couples.

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21 See CCPR – Australia – Young vs Australia, Communications 941/2000.


23 See CCPR – Colombia – X vs Colombia, Communication 1361/2005.
6.0 Access to Healthcare

The right to health contains a number of freedoms such as the control of one’s health and body, including sexual and reproductive freedom and entitlements. Owing to the significance of this right to human survival and enjoyment of the other human rights, the right to health is found in virtually all important human rights instruments, most of which all East African states have ratified. They include the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the African Charter on Human and Peoples’ Rights (the African Charter).

The law requires that health services must be available to everybody, that they must be physically and economically accessible and that they are consistent with the cultural values of the respective society. The International Guidelines on HIV/AIDS and Human Rights recommends that the right to health can be best attained by promoting and protecting the rights and dignity of everyone, with special emphasis on those who are discriminated against or whose rights are otherwise interfered with, such as homosexuals and sex workers. This is contrary to the treatment of LGBTI persons by health care providers in East Africa where almost half of the respondents in the study had been denied health care services in public institutions.

For gays and bisexuals, the prejudice of health care providers is the main challenge to accessing health care. Sex change surgery for transsexuals is often viewed as a form of extreme plastic surgery, one that goes against moral and religious values. Intersex persons and children are viewed as taboo, with parents and caregivers unable or unwilling to seek medical attention. In Kenya, a transgender woman called Luci* sought gender reassignment treatment from Kenyatta National Hospital, the largest government referral hospital. She attended the clinic for 2 years and was booked for surgery. A few days to the surgery, hospital authorities cancelled the procedure without any explanation. Despite several requests, the hospital has not provided an explanation nor has her surgery been rescheduled. This kind of treatment leads LGBTI persons to avoid professional healthcare and resort to self-treatment or no treatment at all, leaving them more vulnerable than other people.
7.0 Way Forward

There is need for a considered and targeted use of the regional and international legal forums and systems to agitate for LGBTI rights. Some of the forums include The African Commission on Human and Peoples’ Rights, the East African Court of Justice and committees under international human rights covenant such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.

The East African Court of Justice

The East African Court of Justice (EACJ) is established under article 23 of the Treaty for the Establishment of the East African Community. Article 6(d) of the treaty requires the Partner States as well as East African Community (EAC) organs, institutions and officers to observe good governance, which includes adherence to principles of democracy, rule of law, accountability, transparency, social justice, equal opportunities and gender equality. Further, the treaty obliges the same parties to recognise, promote and protect human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.

There is a debate about the human rights jurisdiction of the East African Court of Justice. One school of thought opines that the EACJ currently has no human rights jurisdiction as the necessary protocol is yet to be finalised in accordance with the East African Community (EAC) Treaty. The other school of thought contends that the EACJ has jurisdiction to pronounce judgement on any breach of the Treaty provisions, including the human rights related. However, the EACJ has been entertaining human rights matters from private citizens of its member states as evidenced in the East African Law Society and others—v—The Attorney General of Kenya and others,28 and Calista Mwatela and Two others vs The East African Community.29

28 Reference no. 3 of 2007 available at http://www.eac.int/eacj.html
29 Application no. 1 of 2005 available at http://www.eac.int/eacj.html
As such, this confirms EACJ is a good forum for the East African LGBTI community to present their grievances more so because of its regional jurisdiction.

The African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights (The Commission) was established by the African Charter on Human and People’s rights (The Charter). The Commission is mandated to investigate violations of rights and to protect against the violations of the rights guaranteed under the Charter. The Charter guarantee rights to ‘every individual’ ‘every human being’ and ‘every citizen’. Article 2 entitles every individual to the enjoyment of all the rights in the Charter without distinction of any kind including ‘other status’ as grounds upon which one cannot be discriminated against. Other status or ‘other grounds’ has been interpreted to include sexual orientation in other regional and international jurisdictions and domestic courts.

The Commission has over the years handled cases on 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. However, the Commission declined to grant observer status to Coalition of African Lesbians (CAL), a regional human rights organisation working on the protection of human rights of lesbians.

30 There is also established the African Court on Human and Peoples’ Rights (the Court) under the African charter. However, the Court does deals with complaints by states against states.

31 The African Charter also provides for a wide range of fundamental rights relevant to the LGBTI people i.e. life and integrity of the person, 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. Article 60 and 61 of the Charter enable the Commission to have reference to international law.

Human Rights Council Complaint Procedure

The Human Rights Council Complaint Procedure addresses communications submitted by individuals, groups, and non-governmental organisations. The individuals or organisation submitting a complaint should be victims of human rights violations complained of or have direct and reliable knowledge of such violations. The human rights violations must have a consistent pattern of gross and reliably attested violations.

A Complaint is presented to the Complaint Procedure Unit of the Human Rights Council Branch through a Complaint Procedure Form. Once a communication has been presented, the Working Group on Communications, together with the Secretariat; undertake an initial screening of communications based on the admissibility criteria. Communications that do not meet the admission criteria are rejected. The Communications that pass this stage are transmitted to the state concerned to obtain its views on the allegations of violations. Thereafter, the Human Rights Council Working Group on Situations follows up on the Complaint to its conclusion. Both the author of a communication and the State concerned are informed of the proceedings at each stage.

Shadow Reporting to the Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (ESCR Committee) is responsible for supervising the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under article 17 of the ICESCR, countries that have ratified ICESCR

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33 The Human Rights Council Complaints Procedure established under resolution 5/1 entitled “Institution-Building of the United Nations Human Rights Council” On 18 June 2007,

34 An admissibility criterion is set in paragraphs 85 to 88 of resolution 5/1. For instance, politically motivated and its object is consistent with the Charter of the United Nations, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law; not exclusively based on reports disseminated by mass media; Domestic remedies have been exhausted.
are required to submit a report detailing the status of economic, social, and cultural rights in their country within two years of ratifying ICESCR (the ‘Initial Report’), and subsequently every five years (the ‘Periodic Report’). In addition to receiving information from states parties, the Committee also considers information and reports provided by non-governmental organisations (NGOs) that are referred to as Shadow Reports. Through shadow reports, LGBTI persons can critically engage with the committee by providing statistical data and case-studies on the achievement of the rights and gaps in implementation of the obligations under ICESCR. This can include data on: the real situation of LGBTI people in the country, the impact and progress made by the state in implementing the human rights of LGBTI persons, violations of the human rights of LGBTI persons, inadequacies and gaps in laws and policies and their implementation and information about obstacles to the realisation of the human rights of LGBTI persons.

After receiving the states report and shadow reports, the ESCR Committee conducts an interactive dialogue with the state under review during which the Committee will pose questions to the state based on the information it has received. On concluding the dialogue with the state party, the ESCR Committee can request the state party to accept 1-2 members of the Committee to visit the state for the purposes of collecting the necessary information and providing technical assistance and support. At the conclusion of the process, the ESCR Committee will issue concluding observations that are forwarded to the state party concerned. The concluding observations help the state to identify key target areas to improve the rights of LGBTI persons. It will also enable LGBTI organisations to identify areas for intervention. In East Africa, Tanzanian and Rwandan LGBTI organisations have presented shadow reports to the Committee on Economic Social and Cultural Rights in the past.

**Other Initiatives**

**Legal and Policy Advocacy**

Laws and policy regulate conduct between the state and individuals and therefore they can either support or undermine the observance of human rights. As such, LGBTI
organisations must prioritise the repeal of laws that criminalise same-sex intimacy and those that generally discriminate against sexual and gender minorities. LGBTI organisations in each country should explore and exploit available opportunities for pushing a law reform agenda. The ultimate aim should be to effect changes at the policy level such as changes in medical school curricula to include the health concerns of LGBTI persons, as a critical issue. For instance, Article 118 of the Constitution of Kenya provides for public participation so that all proposed laws are subjected to scrutiny and discussion by stakeholders before they are passed. Transgender Education and Advocacy has used this platform to influence relevant laws with considerable success, as did Rwandese civil society in lobbying against the criminalisation of same-sex conduct. The Ugandan LGBTI community and mainstream civil society lobbying against the Bahati Bill is another notable example of this.

**Litigation**

Litigation provides a window of opportunity for law reform in this area. For example, the South African law against same sex intimacy was struck down in court leading to the inclusion of ‘sexual orientation’ in the Constitution as ground upon which one may not be discriminated against. In Kenya, the *Home Park Caterers* case, which challenged discrimination against people living with HIV in the workplace, culminated in an act of parliament expressly prohibiting such discrimination. In Uganda, the High Court affirmed the rights of gays and lesbians whose pictures Rolling Stone magazine had published under the headline “Hang Them.” Further, in *Adrian Jjuuko vs Attorney General of Uganda*, the attempt to exclude sexual and gender minorities from the protections of the Equal Opportunities Commission Act 2007 has been challenged. The case is awaiting judgment. Several cases are currently pending in courts and others are in the pipeline. It is hoped that this will change the human rights discourse on sexual and gender minorities in East Africa.

**Education and Sensitisation:**

Ignorance about sexual and gender minorities poses a major challenge to the realisation of LGBTI rights in East Africa. LGBTI organisations
have taken up the challenge and rolled out programmes to educate different members of the society. An example of this is the ‘meet the people programme’ currently being implemented by Transgender Education and Advocacy. The programme involves training of judicial officers (judges, magistrates and legal researchers) on gender minorities and human rights. This training is important in light of the frequency of charges for impersonation brought in court against gender minorities. During one of the trainings, magistrates from up-country stations expressed their frustration in dealing with these kinds of cases. Most of them stated that they usually ask their equally ignorant probation officers to investigate the persons charged and often fine or jail the accused. The “meet the people” programme is also aimed at university students, particularly law students. Sessions have been held at Mount Kenya University, Kabarak University and the University of Nairobi.

Other sensitisation initiatives could include training of health workers, some of which are already being done by LGBTI organisations in East Africa. Training of health workers is paramount as the lack of access to health care still poses a major challenge to the community at large and MSMs in particular. In no East African country does the medical school curriculum make mention of homosexuality. While there is a fleeting mention of transgenders or transsexuals in some countries such as Kenya, the possibility of hormonal therapy and sex reassignment surgery for transsexuals is non-existent.

Wide spread state-based discrimination and harassment points to the need to sensitise police officers and other law enforcement agents such as chiefs. Media training is also important considering the significant role the media plays in influencing the attitudes of both the government and the society at large. The media has been key in shaping public opinion on LGBTI issues in Uganda. The media is also instrumental in any effective legal and policy advocacy. Educational and sensitisation work can be done by LGBTI organisations alone or in collaboration with other civil society groups for optimum effect.
Conclusion

In conclusion, East African states must endeavour to repeal the harmful criminalisation of same-sex conduct as this will go a long way to reducing stigma, discrimination and other human rights violations against LGBTI persons. However, favourable laws can only help if governments enforce them. Such laws would put East African states in compliance with their obligations under the ICCPR.

In addition, governments should commit to education and sensitisation programmes to combat prejudice against LGBTI persons throughout East Africa. The struggle for recognition and equal treatment continues. The community is out and active, and even though the movement is experiencing serious challenges, the day is coming when tears will give way to joy.