



#WeBelongAfrica
Inclusive Governance Initiative



REDRESS, JUSTICE, AND ACCOUNTABILITY FOR ANTI-LGBTI
DISCRIMINATION: USE, LIMITATIONS, AND ALTERNATIVES TO
CRIMINAL LAW

22-23 March 2022, Johannesburg

Synthesis Report

Introduction

Amnesty International, ARASA, and UNDP hosted an African regional consultation, to critically reflect on the appropriate use of criminal law, incarceration and punitive approaches to human rights violations related to sexual orientation and gender identity.

Human rights violations, including discrimination, harassment and violence are pervasive for LGBTI people in Africa. The use of the criminal law to punish incidents of violence are largely uncontested, however, there is less clarity regarding when the use of the law is appropriate in response to other harms, including prejudice and intolerance and when such actions/behaviour should be criminalised. States have an obligation to address harmful stereotypes and prejudice and should be implementing multifaceted / holistic responses to address harmful stereotypes, prejudice societal values. Rather than addressing root causes and investing in measures targeted toward transforming social structures and conditions that foster stigma and structural discrimination, states are increasingly resorting to criminalization and retributive justice as a tool to respond to social challenges. These punitive solutions often do not address social inequality problems and both personal and contextual issues that shape and impact people's experiences and daily lives.

This consultation therefore sought to proactively engage with human rights activists and contribute to a possible shared position on the ability and use of criminal law to address social issues, including exploring alternative approaches to achieving redress, justice, and accountability from the state for human rights violations.

This discussion had regional relevance as many African countries, for example, continue to criminalize people's identities, behaviours, professions, or actions like consensual same-sex sexual activities, sex work and safe abortions. This unjust use of the criminal law has long been documented as a distinct barrier to states' ability to protect people's human rights and dignity. Therefore, human rights actors should be mindful of how advocating *for* criminal penalties in some settings might undermine movements' work on decriminalization by reinforcing the overreach of the criminal law that they are pushing back against and inevitably harm the very communities they are advocating for.

Human rights actors across Africa are pushing for decriminalization of identities, behaviours, professions, or actions and for policies and laws grounded on the protection of human rights. Drawing on the experiences and lessons from different countries and contexts, we, therefore, aimed to bring individuals and communities at risk of human rights violations and human rights actors together to start a conversation on how states can address human rights violations (driven by stigma, discrimination, and prejudice) beyond resorting to criminal law and punitive solutions. We aimed to create a safe space to engage meaningfully on the uses and limitations of criminal law to address social inequality problems, including alternative forms of redress, and restorative justice.

Rationale

- There is a need to ensure that ongoing human rights violations, including prejudice, stigma, and discrimination against LGBTI persons are addressed and have consequences and accountability implications. The question is the extent to which these measures ought

to be through criminal law. These are both principled and strategic questions for human rights movements about how to approach these issues and where they should be investing their time and energy.

- There is a need to develop sustained, long-term collaborative advocacy strategies and collective responses with affected communities to change social structures and consider meaningful reforms outside and beyond criminal law alone.

Objectives

The key objectives of the consultation include:

Short-term objectives

- To proactively engage with and solicit meaningful input from individuals and communities at risk of human rights violations and human rights activists on their experience of criminal justice processes of redress and accountability – what have been the challenges, successes, and learnings to be shared from different countries and contexts.
- To sensitize stakeholders on the implications of using criminal law as a tool for advancing sexual and gender rights and setting social norms.
- To establish the role of law in promoting protection, redress, accountability, and justice in response to stigma, prejudice, and discrimination
- To understand the circumstances and contexts when activists and rights holders want to call for punitive measures and what they hope to achieve.
- To consider alternative measures to reform society [and achieve LGBTI rights] rather than impose punitive solutions and carceral punishment as a measure of first resort, including restorative justice and the role of civil sanctions and their preventative powers.
- To create a platform to link conversations playing out in academic spaces with the experience and expertise of human rights actors working at community level.

Medium to long-term objectives

- To provide a platform for increased support for LGBTI individuals and communities to access justice in the context of widespread human rights violations, including stigma, discrimination, and prejudice.
- To foster regional and in-country partnerships for increased collaborative advocacy and campaigns for effective mechanisms to promoting protection, accountability, and justice in response to human rights violations such as discrimination.
- To consider states' due diligence responsibilities and explore ways to hold them accountable for the failure to alleviate conditions causing human rights violation driven by stigma, prejudice, and discrimination.
- To shift the human rights system's focus from a predominant emphasis on states' obligations to protect and punish, to a framework that places greater emphasis on the due diligence obligations to prevent, remedy and redress.

Methodology

The meeting involved presentations from academics, panel discussions and group information sharing and discussion. Individuals and communities at risk of human rights violations, including prejudice, stigma, and discrimination, were also among the resource persons. The meeting discussions and presentations were intended to contribute towards developing an understanding for considering if, when, and under what conditions, recourse to criminal law is compatible with human rights, how to approach these issues, and where LGBTI movements should invest their time and energy. It was facilitated by Felicita Hikuam, Director, AIDS and Rights Alliance for Southern Africa (ARASA) and Melanie Judge, Senior Advisor, LGBTI Inclusion, Africa, UNDP.

Participants

The meeting leveraged the wide reach and interdisciplinary strengths of Amnesty International, ARASA and UNDP to bring together participants of diverse backgrounds. With a focus on the African continent, it drew together leading feminists, women's and LGBTI rights activists, human rights activists, and academics to think about criminalization and the implications of using criminal law as a tool for advancing sexual rights and social change. About 30 participants participated in this forum from countries including Botswana, Kenya, Malawi, Namibia, South Africa and Zambia.

Critical Review of Criminal Law: Uses, Challenges and Lessons Learned

Introductory caveat

Criminal law does have its uses. *There are times when criminal law has uses – participants inputs / survey inputs on ‘good’ examples of criminal law; however, the use of criminal law not clearcut and raises various challenges - discussions focused primarily on the challenges and the lessons learned from the application of criminal law in various instances.*

We often run to law as our first and in some cases only port of call. In these cases, remedies must matter materially to those who are at the knife edge of the violence. We need to understand where the criminal justice system places the victim. It is often perpetrator driven, and often the enforcement structures are part of the problem which means that people don't necessarily report violations.

It was noted that the law is a very blunt tool when it comes to social justice issues. We need to find ways to place the victim at the centre. A victim centred; victim led approach would be most beneficial. All the while, understanding that what the victim requires will be very different on a case-by-case basis.

On the difference in the efficacy between civil and criminal law when dealing with social justice issues, it was noted that, like the criminal justice system, civil systems are also problematic. The court system is dominated by men and patriarchy plays a big role in the system. The cost of engaging with the civil justice system also often makes it financially inaccessible to most people.

There are a lot of response mechanisms that are in the rural areas. The first question that is asked is “was blood shed?” yet we know that the type of the violence faced by individuals are so varied. There is an idea that criminal law is strong and sends a strong message, however the violent thrusting of people's lives into the spotlight becomes another form of violence.

On the issue of the use of customary law as an alternative to the formal criminal justice system, it was noted that we haven't spent enough time as lawyers to ensure that we get the same level of constitutionality in the customary space. The reality in Malawi is that if you go to the traditional justice system for a response, the victim will need to pay for the traditional justice leaders to meet creating more financial strain on the victims. The same was noted from other contexts.

While it is generally accepted that criminal law does not have a role to play in issues around HIV transmission and exposure, sexual orientation, gender identity or sex work. Governments need to be held accountable for human rights violations and they should not be targeting sections of the population.

Societal perceptions about the LGBTI community are an important issue that leads to criminalisation. To meaningfully change society's perceptions, the work we do needs to be accompanied by community-led interventions. There is a need for knowledge and understanding of issues, for example sex work and the right to choose work. We can push for the decriminalisation agenda, but we need conversations on how we live with it in Africa.

Laws on their own do not determine social attitudes. Repeal of laws on their own does not change social attitudes. For law reform to be anywhere on the cards, you must work on changing hearts and minds. There is a need for a comprehensive community based and led intervention to change community attitudes.

South Africa is an example of why decriminalization alone is not enough. Communities still exist that are highly religious, highly cultural, and discriminatory. Trans and intersex persons are still struggling to get identity documents. We are not doing enough to change community perceptions. Decriminalisation should come with robust legislative reforms, community engagement and having people understand the law.

General use of criminal law poses various challenges for LGBTI persons / LGBTI advocacy:

- **Populations who are 'criminalized' struggle to use the criminal law to achieve justice:** The history of criminal laws being used to criminalize LGBTI persons in many countries across Africa. These populations are traditionally in conflict with the law causing various issues including:
 - Exacerbation of stigma and discrimination against LGBTI people, increases their marginalization, vulnerability, and the population becomes invisible within the justice system
 - Primary experiences with justice system for LGBTI persons is often as perpetrators of crime; not necessarily as source of protection for rights violations against LGBTI (e.g., violence, GBV / IPV in relationships, discrimination)
 - Further experiences with double discrimination in law enforcement, detention, application of broad, vague laws etc. Criminal laws may be there, but enforcement of the laws is inadequate and discriminatory in their application. This further remarginalises the community. Dealing with the criminal justice system is often another form of violence for LGBTI.
 - LGBTI people are often disregarded in attempts to use criminal law to enforce rights e.g. to protect from violence, theft, extortion etc.
 - Leads to fear of using / inherent risks in using the system: Where populations themselves are 'criminalized', they fear using the criminal law (fear repercussions risk of ill-treatment and sexual violence in the system)
- **Criminal law focused on retributive rather than restorative justice**
 - This focus makes justice less meaningful to individuals because crimes are against the public rather than individual.
 - The adversarial system that pits freedoms against each other narrows avenues for redress and fails to see perpetrator as product of society too. It fails to seek restorative justice for both victim / survivor and perpetrator.
- **Criminal law is not victim/survivor-centered**
 - Criminal law perpetrator driven.
 - People don't get justice and are further 'victimized' by system.

- **Criminal law should be used appropriately**
 - Criminal law should be clear, known, applied only when strictly necessary.
 - It should be the last resort and should be based on criteria e.g. legality, legitimate aim or purpose, necessity, proportionality, non-discrimination.
 - Language of law needs to be considered (carnal knowledge against order of nature etc.)

- **Criminal law is a ‘blunt’ tool in the face of structural barriers to justice**
 - Criminal law does not accommodate the varied forms of discrimination and violence (e.g. hate speech vs murder) experienced by LGBTI people.
 - Different geopolitical, legal and socio-economic contexts may require different responses to violence.

- **Criminal laws fails to address the root causes of / not useful for dealing with social injustice (and other issues including health)**
 - Criminal law is not always a useful remedy for all issues – e.g. doesn’t always achieve intended objective (as with HIV, COVID-19 efforts to limit spread by use of criminal law; efforts to curb / criminalize sexual relationships on basis of ‘morality’; efforts to achieve social justice e.g. gender equality, reduced GBV, reduced S&D and violence against LGBTI).
 - It doesn’t necessarily change social perceptions, doesn’t deal with root causes of crime (e.g. patriarchal norms, gender inequalities), doesn’t change IPV, doesn’t recognize perpetrator also a product of system. Doesn’t change minds.
 - Law is inherently a limited tool for changing the way SOGIESC issues are dealt with.

The existence of laws criminalising consensual adult same-sex conduct was widely seen as a challenge. In Uganda, LGBTIQ shelters were raided in 2019 and 2020. LGBTIQ people are not recognised to give input in civil spaces. The theoretical frameworks and foundations of the law that are perceived good tend to create an environment with persistence instances of stigma and discrimination.

- **Criminal law only as useful as enforcement by law enforcers:**
 - Law enforcement is often arbitrary as law enforcers disregard / fail to take action against certain crimes: Disregard for criminal laws around certain issues (e.g. GBV, LGBTI); criminal laws are not enforced (e.g. by police), corruption; police don’t report, register, don’t classify correctly, register as minor offences etc.)
 - Criminal law gives broad powers to law enforcers. It creates room for corruption and can lead to unjust application and can be used to target sectors of the population.

Botswana: State of Emergency

During the state of emergency, parliament decided to throw out the law-making process. The community didn't know whether the religious/cultural fundamentalists would use this to introduce discriminatory laws. There was a fear that the country was becoming a police state with a lot of militarisation and shrinking of civic spaces.

Over criminalisation and abuse of the criminal justice system was rife during the early days of COVID-19 prevention measures. We can regulate discrimination against LGBTI people when we know that criminal law can be used in this way by ensuring that we change the systems to make them more participatory and make them more inclusive for marginalised groups.

- **Criminal law may further harm vulnerable populations**
 - The use of vague, overly broad laws against populations, arbitrary enforcement, used to target marginalized, further marginalizes; detention (e.g. trans person in prisons)

The HIV Tribunal in Kenya has contributed significantly to reinforce justice. It is a quasi-judicial mechanism whose rulings are recognized within law, established by statute, constituted by actors within HIV space who are not necessarily judicial officers and who actively apply to Tribunal. The aim of the HIV Tribunal is to give PLHIV quick and immediate redress for human rights violations or criminalization.

- **Courts of law inaccessible for achieving redress / justice**
 - for various reasons:
 - *As set out above, negative previous experiences with system; hard to use the same system to protect rights.*
 - *Exorbitant costs e.g. of legal counsel for courts*
 - *Lack of awareness / understanding of law and legal system; need for accompaniment*
- **Criminal law and courts are part of a patriarchal system:**
 - *The system is created this way; dominated by men, heteronormative, patriarchal system, homophobic;*
 - *Laws and courts tend to uphold people who are in power and those that are privileged and excludes those who are poor;*
 - *This creates a difficulty with how to infuse queer consciousness into law and justice system built this way.*

These challenges, lessons learned, and other insights need to be considered in LGBTI's dealings with criminal law.

- *Proceed with caution – For example advocacy for criminalization of hate crimes may undermine advocacy for decriminalization of same sex sexual relations. There is a need to recognise that law is not the be all and end all.*

- *Need for broader, deeper interventions that impact on cultural, social norms and ensure redress, justice and accountability.*
- *Need for victim-centred, restorative justice approaches to ensure redress and accountability*
- *Note the importance of LGBTI inclusion in criminal laws. Including the discussions around criminalization of hate crimes in South Africa and Domestic Violence laws in Namibia.*

Alternative / accompanying strategies for achieving justice

Meeting discussed various alternative or accompanying strategies that should work alongside criminal law to achieve justice, including e.g.

- **Strengthening movements championing the rights of LGBTI**, *increase awareness and visibility, strengthen cross-movement, intersectional approaches (gender, SRHR) and advocate for LGBTI rights*
- **Promoting increased participation and inclusion of marginalized populations in process; and in decision-making spaces more broadly (including policy)**
- **Sensitivity to LGBTI in justice system including in detention**
- **Address root causes (e.g. poverty); prevention before punitive measures**
- **Selective use of criminal law: Criminal law has been important for advocacy; need to maintain this; use in ‘advocacy toolbox’; Selecting where criminal law is useful; identifying and advocate for those instances**
- **Restorative and transformative justice approach that centralizes victim / survivor. Victim-centred / victim-led approach; also works with perpetrator for unlearning / relearning.**
- **Awareness raising, sensitization, education: Comprehensive community-led interventions to shift societal attitudes Civic education / KYR, sensitization, education are key to shifting attitudes. Sensitize institutions too – police, parliament, schools, to bring about policy change.**
- **Use of alternative complaints mechanisms: Actively involve alternative mechanisms; Alternatives e.g. NHRIs, traditional courts, HIV tribunals, mobile courts that focus on victim and perpetrator, accompanying victims, Commissioners (e.g. Independent Police Complaints Commissioners)**

In 2012, the Kenya National Commission on Human Rights (KNCHR) instituted research on SRHR. The inquiry confirmed the systematic nature of the violations of SRHR especially against women and key populations. They worked at an institutional level to ensure that the structure within the commission understood the issues they were working on. They ensured that there was a department within the commission that dealt with SRHR issues. Dealing with hearts and minds issues with regards to staff.

- **Increase use of (non-criminal) other laws**, *e.g. use constitutional law, litigation that protects and promotes rights, take advantage of existing laws to protect; explore outside of colonial legal systems, archaic constitutions, what comparative models can shape freedom from violence. Civil remedies (e.g. for hate speech) although*

costly; Traditional remedies although traditional leaders not 'schooled' in human rights; also costly

- **Working with Legislature around policy** (not just law),
- **Provide additional support** to those in crisis situations e.g. safe houses

Moving Forward: What do we need to do to move forward?

- **Reframe idea of what justice means:** *shift vocab from law to justice. Recognise not all lawyers – review technical approaches, make sure terms are accessible. Identify our understanding of justice.*
- **Identify divergences and convergences.** *Be clear on what wanted – e.g. hate speech – how to define, consensus around what should be criminalized. When criminal law good, when useful (e.g. hate speech leading to commission of a hate crime – criminalize); role of criminal law in punishment, redress, addressing broader social justice issues, reconciliation beyond criminal law. Ways to centralise the victim.*
- **Increase understanding of how the system works; tools available for social change.** *Understand what communities want; find out what's going on in other countries, who is doing what (see below)*
- **Conduct situational analysis:** *understand who is doing what, what work is taking place (using criminal law in relation to anti-LGBTI discrimination) to help us understand and put puzzles together to come up with holistic approach. Be aware of different contexts, and what happens in different contexts. Key questions for country level – may be different for each country.*
- **Mapping (stakeholders, communities).** *Not just law enforcers, faith organizations, religious leaders etc. Allies and opposition. Figure out who we want to engage.*
- **Explore usefulness and challenges of alternative mechanisms** (e.g. NHRIs, queries around independence)
- **Strengthen coalitions and collaboration,** *Form coalitions across movements (e.g. women's and queer), in understanding how to use the law, how we include all; seek links to regional work, regional engagements*

The divergences that were highlighted were strongly based on the diversity in the room.

- Hate speech (criminalisation) how do we define what speech is being criminalised? There is a need to build consensus.
- The role of criminal law in context of punishment and redress. Addressing broader social justice issues that we are grappling with. Some felt that criminal law cannot be used to redress. Focusing on penal codes. How do we explore issues around reconciliation beyond criminal law as alternatives to achieving justice?
- Victim centred approach vs the perpetrator approach. Finding ways to centralise the victim in seeking justice in criminal law. The need for prevention before stepping into punitive measures.
- The roles of NHRIs as alternatives to criminal law. The vigilance that civil societies have. The lack of independence and resources that support the work. Many NHRIs

come across as toothless in terms of what they can achieve. What is the role of communities as accessing channels for NHRIs?

- Colonial laws: It was felt that we are not the intended beneficiaries of colonial legal systems. Why should we turn to these laws? Many of our constitutions are archaic and we need to explore what other comparative models we could utilise in order to shape what freedom from violence looks like.

What are the things we agree on, the common ground, for further engagement/action?

- Structural inequality makes the impact of criminal law very limited in the absence of a co-ordinated human rights agenda that builds intersectionalities, on national, regional, and individual level, plus joint efforts. There is a need to use criminalization of SRHR as a strategy
- Addressing gaps, understanding of the justice system, and mapping legal opportunities
- Identify and address root causes of discrimination, human rights violations that lead to hate crimes and establish victim friendly responses.
- Civic education is important.