



Being Gay in Africa – the human rights situation – speech to AWEPA in the Oireachtas – April 2017 by Les Allamby, Chair of the Commonwealth Forum of National Human Rights Institutions

Parliamentarians and colleagues, I am delighted to be invited to speak to the Association of European Parliamentarians with Africa.

This afternoon I am here wearing two hats. First as the Chief Commissioner of the Northern Ireland Human Rights Commission and second as the chair of the Commonwealth Forum of National Human Rights Institutions (CFNHRI).

Many of our forum members are African countries alongside Asia Pacific countries and countries within the Americas which have significant LGBTI legislative and other issues outstanding.

The difficulties faced by LGBTI individuals and organisations is a worldwide phenomenon. Close to home it took cases before the ECHR to end criminalisation of male gay acts in both parts of Ireland and more recently the ban on gay couples and unmarried couples even being considered for adoption only occurred after a legal challenge taken by the Northern Ireland Human Rights Commission. The recent uplifting outcome to the equal marriage referendum and subsequent legislation in Ireland can be counterpoised by the lengthy and protracted fight by Lydia Foy to have rights as a trans-gendered person recognised through the subsequent legislation and its sweep is most welcome. So we cannot be complacent and if recent history on LGBTI issues tells us anything, it is that nothing is achieved without a struggle. Nonetheless, some of the recent developments in Ireland are among the most positive in the world.

Turning to the situation in Africa I want to highlight three issues – first the legal situation for LGBTI individuals, secondly, the impact the law has in an everyday sense and thirdly some of the work being done by LGBTI organisations, NHRIs and others both regionally and globally.

Every year since 2006 ILGA issues 'State Sponsored Homophobia – a world survey of sexual orientation laws: criminalisation, protection and recognition'. Its first report highlighted the (then) 92 States across the world which criminalised same sex activity – in its most

recent report highlighted the number is now 73 States (37 per cent of UN States).

In Africa, 33 States criminalise same sex activity including in Sudan, 12 Northern States of Nigeria and Southern parts of Somalia where the death penalty is applied through codified arrangements under Sharia law.

In seven African States, propaganda/morality laws target freedom of expression related to sexual orientation namely Algeria, Egypt, Libya, Morocco, Nigeria, Somalia and Tunisia.

In contrast, no African State has hate crime legislation which covers sexual orientation as an aggravated circumstance for violent activity and only one State (South Africa) where incitement to hatred based on sexual orientation is prohibited.

Equally, marriage is only open for same sex couples in South Africa and no other African State recognises most rights attached to marriage through civil partnerships, civil unions or some other equivalent arrangements.

Only seven African States offer protection from discrimination in the workplace based on sexual orientation – Angola, Botswana, Cape Verde, Mauritius, Mozambique, Seychelles and South Africa and only two of these States, Mauritius and South Africa offer further direct protection beyond employment, while only South Africa allows for joint adoption or second parent adoption.

Beyond the listing of countries we must understand that an analysis of laws by themselves does not provide the full picture. In Egypt for example, where same sex relations are not prohibited by criminal law other legislation has been used to imprison gay men in recent years. In Kenya where same sex relationships between men is a criminal offence there is a relatively thriving movement of LGBTI organisations emboldened enough to successfully challenge the NGO Co-Ordination Board and Attorney General's decision to refuse registration of the National Gay and Lesbian Human Rights Commission on constitutional grounds as an abuse of power and contrary to freedom of association.

In addition, the criminalisation of same sex relationships and the lack of protection for the LGBTI community plays out in a number of ways.

First, the absence of legal protection provides succour to those who perpetuate violence and intimidation against LGBTI individuals and

organisations. Recently, there have been arbitrary arrests and detentions reported in Cameroon, Gambia, Senegal and Malawi and the closure of the Arab Spring has had particularly negative ramifications in Tunisia and Libya leading to militants imposing Sharia Law.

Secondly, it denies open expression of a person's LGBTI identity and often makes civic organising and campaigning and even more benign social and communal activities more difficult.

So a common trend (not confined to Africa) has been to make freedom of association more difficult. For example, in 2014 in Nigeria legislation prohibiting same sex marriage was passed but, the legislation also contained provision to prevent 'the registration of gay clubs, societies and organisations, their sustenance procession and meeting are also prohibited'. In 2016 in Uganda an NGO organisations act was passed to allow for the refusal to register organisations where its objectives are contrary to Ugandan Law. This was designed to inhibit LGBTI organisations from organising.

In effect, civic space is being closed down.

Thirdly, the prevailing negative climate inhibits LGBTI individuals from accessing important health services and information particularly around sexual health and reproductive needs.

Nonetheless, there are also shards of light in the current picture. Mozambique's revised penal code came into effect in June 2015. It contained no provisions criminalising same sex sexual activity and joined 19 other countries in Africa which have decriminalised same sex activity. Two recent judgements on freedom of association were given which are of great support to LGBTI activism. In the Kenya High Court the case of *Eric Gitari v NGO Organisation Board and others* ruled that the refusal to register the National Gay and Lesbian Human Rights Commission as an organisation was unlawful. The court held that constitutional protections of freedom of association covered every person in Kenya and rights to equality and dignity would not be advanced through discrimination based on sexual orientation.

In March 2016 in the case of *Rammage v Attorney General*, the Botswanan Court of Appeal also upheld that the refusal to register the organisation Lesbians, Gays and Bisexuals of Botswana was a violation of LGBTI activists right to freely assemble and associate. The Court of Appeal recognised that members of the gay, lesbian and transgender community 'form part of the rich diversity of any nation' and were fully entitled to the constitutional protection of

their dignity. In Botswana the court distinguished between the criminalisation of same sex activity and being gay – where being gay was not a crime and advocating for changes to the law was a democratic right of every citizen. A similar conclusion was reached by the Zambian High Court in the case of *People v Paul Kasonkomona*, an activist charged with soliciting for immoral purposes after advocating for the recognition of legal rights of gay people on television. The court distinguished soliciting from advocating for the rights of LGBTI individuals. A decision to close down SHAMS – a LGBTI organisation in Tunisia was also challenged and overturned.

These judgements do open up the space for advocacy for gay rights and recognises the legitimate place of LGBTI organisations in civic society.

The concept of the traditional family and apparent cultural norms are used by governments and some established churches to justify persecution and ostracising the LGBTI communities for example, the Catholic Church in Togo, Christian churches in Nigeria and Uganda and the use of Sharia law in Libya and countries beyond the continent of Africa.

So what are NHRIs doing? I want to highlight two initiatives. First, there is the Sexual Orientation, Gender Identity and Expression (SOGIE) project run through the Network of African National Human Rights Institutions, A tool kit has been produced to promote international and recognised human rights standards, but, informed by local laws, cultural norms and political structures. It sets out a floor of basic, formal democratic rights that everyone is entitled to. Five NHRIs in Ghana, Kenya, Malawi, South Africa and Uganda have validated the tool kit. Use of the tool kit is part of the wider capacity building and training undertaken by NHRIs both within their own organisations and within wider civil society.

A practical example of such an initiative is the Direct Reporting system the Ghanaian Commission on Human Rights and Administrative Justice and Ghana Aids Commission launched to give 'discrimination the Red Card'. It focused on people living with HIV and key populations including men having sex with men and female sex workers encouraging people in those groups to report discrimination online, by text or in person. There were initial privacy concerns but, these have been overcome and a number of significant case studies have emerged around tackling bullying based on sexual orientation and inappropriate disclosure of HIV status of patients by medical professionals to other members of a family.

Secondly NHRIs and civic society organisations are increasingly feeding in to the UN Treaty Monitoring Bodies country specific periodic reviews particularly the UN Convention for the Rights of the Child (UNCRC) and International Convention on Economic, Social and Cultural Rights (ICESCR) committees and the Universal Periodic Review periodic reviews. For example, the ICESCR review of Uganda highlighted health care and housing discrimination based on sexual orientation. In the UPR process, recommendations covering LGBTI issues have been made in Kenya, Liberia, Guinea, among others. The CFNHRI has recently published a practical guide to developing UPR submissions for NHRIs and civil society in recognition of the potential provided by the UPR process to raise important human rights issues on to the international stage.

The issue of LGBTI equality and recognition is being played out on the global human rights stage. It is a battle still to be won. The recent attempt by a number of African nations and others to delay a UN Human Rights Council resolution to authorise the appointment of an expert to monitor globally LGBTI rights is just one example of how contentious the issue remains. The attempt was not successful and in September the international law Professor Vitit Muntarbhorn of Thailand was appointed to the post. Nonetheless, it is a salutary reminder of the battle being fought within the UN to support the rights of LGBTI individuals and organisation.

The CFNHRI is looking to gain formal status to hold side events at the CHOGM meeting April 2018 and is working closely with our members, the Commonwealth Secretariat and the Foreign and Commonwealth Office to attain that status and one potential event we can organise is around LGBTI issues across the Commonwealth.

So is the glass half-full or half empty? I start from a glass half full perspective and what gives me cause for optimism is the courage and bravery I see from the LGBTI activists and organisations in Africa and the increasing willingness of many African NHRIs and civic organisations to engage in the fight for equal rights and decriminalisation of same sex activity and I would pay tribute to all those human rights defenders involved in this work.

Thank you.