



**A SOCIAL-LEGAL ANALYSIS OF THE REALISATION OF GENDER
AND SEXUAL MINORITIES' RIGHTS WITHIN THE AFRICAN HUMAN
RIGHTS SYSTEM**

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BY

MR CHRISTIAN NDUWAYO

STUDENT NUMBER: u21813622

PREPARED UNDER THE SUPERVISION OF

PROFESSOR NARSINGHEN RAJEN

FACULTY OF LAW, UNIVERSITY OF MAURITIUS, MOKA, MAURITIUS

AND

DOCTOR AYODELE SOGUNRO

CENTER FOR HUMAN RIGHTS, FACULTY OF LAW, UNIVERSITY OF PRETORIA,
PRETORIA, SOUTH AFRICA

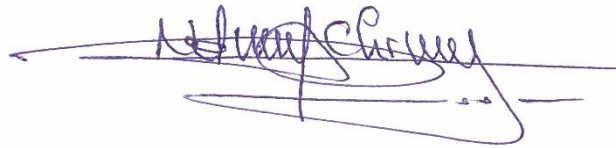
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LIST OF ABBREVIATION

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
AHA	Anti-Homosexuality Act
AHB	Anti-Homosexuality Bill
AMSHer	African Men for Sexual Health and Rights
AU	African Union
CAL	Coalition of African Lesbians
CASRA	Collective of African Sexuality Rights related Advocates
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
HIV	human immunodeficiency virus
ISLA	Initiative for Strategic Litigation in Africa
LGBTIQ+	Lesbian, gay, bisexual, transgendered, intersex, and queer
MSM	Men who have sex with men
NGOs	Non-governmental organisations
OAU	Organisation of the African Unity
PLHIV	People living with HIV
SRHR	Sexual and reproductive health and rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

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CHAPTER 1: INTRODUCTION

1.1 Background to the research

The international human rights system has formalised the evolution and normalisation of equal dignity to every human being. Human dignity as a core value is – as a right itself, or even as a principle – the foundation of human rights.¹ The Universal Declaration of Human Rights (UDHR)² and subsequent international human rights instruments repeatedly invoke human dignity generically as the only consensually identifiable basis from which human rights are derived.³ Although existing social norms in the African context seem to dictate where and when the principle of human dignity should or should not be applied, the very existence of the African human rights system emphasizes that this concept is inherent in every human being and entails that states have a positive obligation to progressively realise it through its instruments.⁴ The African Charter on Human and Peoples' Rights (the African Charter), as an instrument of the African human rights system, has mentioned in its Preamble dignity as one of the essential objectives for the achievement of the legitimate aspirations of the African peoples. Several African countries have integrated the African Charter – and by extension, the core value of human dignity – in their national law by virtue of the constitutional system in place.⁵

Reaffirming the need for respect for fundamental human rights and peoples' rights and in particular the right to development, the Assembly of the Organisation of African Unity (OAU) – which later became the African Union (AU) – called on the Secretary-General to organise a restricted meeting of highly qualified experts to prepare a preliminary draft of the African Charter providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights.⁶ Being an international human rights

¹ P Łuków 'A difficult legacy: Human dignity as the founding value of Human Rights' (2018) 19 *Human Rights Review* 320.

² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) <http://www.refworld.org/docid/3ae6b3712c.html> (accessed 8 October 2021).

³ PG Carozza 'Human dignity and the foundations of Human Rights' (2020) *The Heritage Foundation* 1 <https://www.heritage.org/sites/default/files/2020-12/SR239.pdf> (accessed 8 October 2021).

⁴ African Charter on Human and Peoples' Rights (African Charter) (1986), article 5.

⁵ Centre for Human Rights University of Pretoria *Guide to the African human rights system - Celebrating 40 years since the adoption of the African Charter on Human and Peoples' Rights 1981 - 2021* (2021) PULP 12.

⁶ African Commission on Human and Peoples' Rights 'History of the African Charter' <https://www.achpr.org/hotac> (accessed 10 August 2021).

instrument intended to promote and protect human rights and fundamental freedoms across Africa, the African Charter helped to steer Africa from the age of human wrongs into a new era of human rights. The Charter sets standards and establishes the groundwork for the promotion and protection of human rights in Africa.⁷

However, gender and sexual minorities all across Africa continue to be subjected to the dogma of normativity. This situation is in addition to the fact that the African human rights system has not fully protected them to date. It is impossible to achieve full human potential and sustainable development if an entire population is left behind and deprived of all its rights and opportunities. Nor can one speak of the promotion and protection of human rights in a context where the very people charged with the task of realising them undermine all efforts to achieve them.

This research critically analyses the extent to which the African human rights system has been inclusive of gender and sexual minorities, and how far it has gone in realising their rights within its various existing frameworks and mechanisms.

1.2 Problem statement

In Africa, the notion of gender and sexual minorities remains a controversial and rather complex subject, highly linked to the Western world,⁸ qualified as an irrelevant issue requiring minimal or no attention,⁹ not very welcomed by the public opinion,¹⁰ and by those whose mandate it is to ensure that no discrimination is made against any person¹¹ as it appears in most African countries' constitutions.

⁷ African Commission on Human and Peoples' Rights 'African Charter on Human and Peoples' Rights' <https://www.achpr.org/legalinstruments/detail?id=49> (accessed 10 August 2021).

⁸ South African Institute of Race Relations 'LGBTQ rights in Sub-Saharan Africa: Perspectives of the region from the region' (2019) 4 <https://irr.org.za/reports/occasional-reports/files/lgbtq-rights-in-sub-saharan-africa.pdf> (accessed 11 August 2021).

⁹ 'Uganda's speaker of parliament blasts efforts to protect LGBT refugees' *MambaOnline* 31 March 2018 <https://www.mambaonline.com/2018/03/31/uganda-speaker-parliament-blasts-efforts-protect-lgbt-refugees/> (accessed 11 August 2021).

¹⁰ 'Ghanaian newspaper warns of "international conspiracy" to push LGBT rights' *MambaOnline* 26 May 2018 <https://www.mambaonline.com/2018/05/26/ghanaian-newspaper-warns-international-conspiracy-push-lgbt-rights/> (accessed 11 August 2021).

¹¹ Human Rights Committee '3rd periodic report submitted by Burundi under article 40 of the Covenant, due in 2018' ICCPR 2020 CCPR/C/BDI/3 para 27 <https://digitallibrary.un.org/record/3894105?ln=fr> (accessed 11 August 2021); see also <https://twitter.com/Ikiriho/status/1021305954153975809> (accessed 11 August 2021).

Out of 54 African countries, 32 countries still criminalise same-sex relationships.¹² Among the 32 African countries, the sentence can be up to eight years of prison as it is the case for Morocco, Algeria, Tunisia, Namibia, and Chad.¹³ The maximum sentence can range from 10 years to life imprisonment for countries like Uganda, Tanzania, Kenya, The Gambia, and Zambia.¹⁴ The penalty can be a death sentence explicitly mentioned in the law for countries like Mauritania, and in 12 Northern states of Nigeria¹⁵ – where the legal framework is partly or wholly based on Sharia law¹⁶ – or without this being explicitly mentioned in the law as is the case for Somalia (including Somaliland).¹⁷

For most African countries that repress same-sex relationships, it is essential to mention that what is repressed remains the sexual act. However, the intention to punish the non-conformity of gender and sexual minorities with preconceived notions based on a social and legitimate objective that people adopt roles, forms of expression and behaviours that are considered rights or obligations depending on their assigned sex at birth is the root cause of human rights abuses and violations they face.¹⁸

Documenting and monitoring human rights abuses and violations remains an essential task in advancing the rights of gender and sexual minorities across Africa. This work is only made possible by LGBTIQ+ community-based organisations established across the continent that advocate for the fundamental rights and freedoms of gender and sexual minorities. However, most of them lack a formal protective legal framework, which causes increased administrative harassment and burden, and prevents them from effectively addressing community needs in an environment with little or no recourse mechanism.

¹² ILGA World 'State sponsored homophobia report - Global legislation overview update' (2020) 114 https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf (accessed 11 August 2021).

¹³ ILGA World 'Sexual orientation laws in the world - From criminalisation of consensual same-sex sexual acts between adults to protection against discrimination based on sexual orientation' https://ilga.org/downloads/ENG_ILGA_World_map_sexual_orientation_laws_dec2020.pdf (accessed 11 August 2021).

¹⁴ As above.

¹⁵ n 12 above, 25.

¹⁶ As above, 31.

¹⁷ As above, 25.

¹⁸ UN Human Rights Council 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity 2021' A/HRC/47/27 para 3 <https://undocs.org/A/HRC/47/27> (accessed 11 August 2021).

Fifty-four AU member states out of 55 have ratified the African Charter.¹⁹ The African Charter grants the same rights to all individuals under the jurisdiction of a State Party without any distinction,²⁰ and is an integral part of national laws by virtue of the constitutional system in place in a number of African countries.²¹ A Commission whose mandate is defined under Article 45 of the African Charter was created and granted observer status to an organisation advocating for the rights of gender and sexual minorities in Africa, only to have this status withdrawn following a decision by the AU Executive Council based on the need to consider 'African values' in the granting of observer status.²²

Given that the issue of gender and sexual minorities is very diverse in Africa,²³ the purpose of this research is to assess the work done within the frameworks and mechanisms of the African human rights system in terms of promoting and protecting the rights of gender and sexual minorities, while analysing the inclusiveness of its approach to the realisation of their rights.

1.3 Research questions

The main research question that the study seeks to answer is: To what extent has the African human rights system been inclusive of the rights of gender and sexual minorities within its normative and institutional frameworks?

This question leads to the following sub-questions:

1. What are the normative and institutional frameworks of the African human rights system?
2. What has been the approach of these norms and institutions of the African human rights system to gender and sexual minorities' issues?
3. To what extent has the approach of the African human rights system, particularly the African Commission on Human and Peoples' Rights (the African

¹⁹ African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights' <https://www.achpr.org/ratificationtable?id=49> (accessed 11 August 2021).

²⁰ n 4 above, articles 2, 3, & 19.

²¹ African Commission on Human and Peoples' Rights 'Impact of the African Charter on domestic human rights in Africa' <https://www.achpr.org/iotacodhria> (accessed 11 August 2021).

²² Article 19 'ACHPR: Withdrawing Coalition of African Lesbians' observer status threatens civil society participation' (2018) <https://www.article19.org/resources/achpr-concern-with-decision-to-withdraw-coalition-of-african-lesbians-observer-status/> (accessed 11 August 2021).

²³ The landscape is such that some African countries penalize same-sex relationships, others have not mentioned it in their legislation, and some others have already decriminalized it.

Commission), been inclusive of gender and sexual minorities in realising their rights?

1.4 Research methodology

This study is based on desk review. For the first two sub-questions, the study adopts a doctrinal and critical research approach to the appropriate human rights instruments and institutions, relevant laws, case-law, reports of human rights institutions, books, journal articles, newspaper reports, and thesis, among others. The study adopts a social-legal research approach for the last sub-question.

It is descriptive and based on two main aspects – a legal aspect and a social aspect – while its scope solely applies to the African human rights system. Particular focus is placed on the African Commission as one of the African human rights system's institutions that has already addressed the issue of gender and sexual minorities in a specific way

Although this is a descriptive study, certain aspects are analytical in order to bring insights.

1.5 Literature review

This research aims to review the literature around the existing norms and institutions of the African human rights system, and their intersectionality with the realisation of the rights of gender and sexual minorities. Over the last few decades, discourses on the rights of gender and sexual minorities within the African human rights system have begun to emerge. A number of books and articles have been written on the wide spectrum of this topic. Despite this, it is not easy to find extensive literature that addresses the specific issue discussed in this study.

In his book, Viljoen²⁴ presents a comprehensive, holistic, analytical, and critical overview of the norms, institutions, and processes of the African regional human rights system within the AU. Heyns and Killander²⁵ present a digest of documents on human rights adopted under the auspices of the AU and its predecessor, the Organization of

²⁴ F Viljoen *International human rights law in Africa* (2012) xiii.

²⁵ CH Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) vii.

African Unity, including documents adopted by the African Commission, the African Court on Human and Peoples' Rights (the African Court), and the African Committee of Experts on the Rights and Welfare of the Child (the African Children's Rights Committee). In his article, Mutua²⁶ critically evaluates the African human rights system and assesses its potential impact on human rights conditions on the continent. This study is in line with their respective work.

In their book, Namwase and Jjuuko²⁷ discusses the legal and political protection of gender and sexual minorities' rights in Africa. Jjuuko²⁸ discusses opportunity and challenges in the promotion and protection of gender and sexual minorities' rights in the African regional human rights system.

Rudman²⁹ uses both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights approaches to explore both the legal avenues under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the rights and obligations under the African Charter available to anyone who would want to challenge any domestic law criminalising same-sex consensual sexual acts and/or any of the other related prohibitions.

Viljoen³⁰ discusses the interpretation of the issue of sexual orientation in the African Charter by the African Commission. Murray and Viljoen³¹ discuss how the African Charter regards the issue of gender and sexual minorities' rights, and suggest ways of making use of the mechanisms available through the African Commission by those working towards the realisation of gender and sexual minorities' rights.

²⁶ M Mutua 'The African human rights system: A critical evaluation' Prepared for United Nations Development Programme Human Development Report 2000 (2000) 4 https://digitalcommons.law.buffalo.edu/other_scholarship/16 (accessed 10 October 2021).

²⁷ S Namwase & A Jjuuko *Protecting the human rights of sexual minorities in contemporary Africa* (2017).

²⁸ A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 262.

²⁹ A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1-27.

³⁰ F Viljoen 'Minority sexual orientation as a challenge to the harmonised interpretation of international human rights law' in CM Buckley *et al* (eds) *Towards convergence in international human rights law: Approaches of regional and international systems* (2017) 156.

³¹ R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 87.

Tamale argues that what is often called African morality or traditional values is the result of a construction and a (re)interpretation by former colonial authorities in collaboration with African male patriarchs that have now become the dominant culture.³² Ngwena, in his dialogue on the subject of who is African and what is African, builds his thesis on discursively interrogating the making of an African race and African culture(s) and sexuality(ies) in ways that are not just historically conscious but also have a heuristic capacity to contest 'nativism.'³³ This research goes further by analysing existing challenges in the quest for inclusiveness in the normative naming of who is African and what is African.

This study contributes to the existing researches on the approach of the African human rights system to issues of gender and sexual minorities. It looks at the extent at which the African human rights system has been inclusive of the rights of gender and sexual minorities within its norms and institutions from a social-legal perspective, which is the subject of consideration in this dissertation.

1.6 Significance of the research

This research brings out a socio-legal aspect to the existing debate on gender and sexual minorities across Africa. On the one hand, it discusses the approach of the African human rights system to gender and sexual minorities' issues within its norms and institutions. On the other hand, it analyses the scope of this approach in realising their rights.

As such, this research aims to look at the work that has been done within the African human rights system system's norms and institutions to promote and protect the rights of gender and sexual minorities, and how conducive and inclusive this work has been to the realisation of their rights.

1.7 Clarification of terminology

The main objective of this study is to provide a general overview of the African human rights system, critically analysing it in terms of its norms, institutions, and processes, while assessing the extent to which it has been inclusive of the rights of gender and

³² S Tamale 'The right to culture and the culture of rights: a critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 51.

³³ C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) viii.

sexual minorities. As part of this study, norms, institutions, and processes of the African human rights system are analysed under two frameworks: the normative framework and the institutional framework. This study also alludes to the concepts of social construct and social norms.

The key terms used throughout the study are defined as follows:

Institutional framework: An institutional framework refers to a formal organisational structure which is set as a precondition for the successful implementation of a specific norm in place. Such a framework involves setting up structures responsible for the interpretation of the specific norm, as well as supervising and monitoring its implementation.

For the purpose of this study, institutional frameworks refer to African human rights treaty institutions responsible of the interpretation of African human rights treaties or instruments relevant to it.

Normative framework: A normative framework is a model that helps thinking through certain trade-offs in order to address a specific area of concern. It refers to a norm in place which dictates and regulates a specific process in order to address a specific issue.

For the purpose of this study, normative frameworks refer to African human rights treaties or instruments relevant to it.

Power dynamics: Power dynamics can be understood as a relationship between two or more entities that are not necessarily linked by a hierarchical structure and one of which exercises power over the other(s), or may use influence to exercise power over the other(s).

1.8 Limitations of the research

This research highlights the work that has been carried out within the African human rights system to promote and protect the rights of gender and sexual minorities, and the extent of inclusiveness that has been brought into play throughout this work.

Given the proposed title, this research was to be based largely on empirical data collection and analysis. But in the scope of its analysis, this research considers

different reports of human rights institutions, state reports, case-law, communications, and general comments with a sociological views on the subject matter. However, it would not be possible to process such a large amount of data. The selection of specific sources used for this research is based on data of undeniable relevance to promoting and protecting gender and sexual minorities' rights in Africa.

1.9 Structure of the research

The chapters of this study are described as follows:

Chapter one constitutes the introduction of the study. It sets out the background to the study, the problem statement, the research questions, the research methodology, and the significance of the study. It includes a literature review, a clarification of terminology, and a description of the study's limitations.

Chapter two disseminates the African human rights system architecture, gives a general overview of its normative and institutional frameworks, and critically analyses them. It focuses on their processes and functioning within the AU.

Chapter three looks at the intersectionality between the normative and institutional frameworks of the African human rights system and the notion of gender and sexual minorities. It examines different avenues used by the existing norms and institutions within the African human rights system to mitigate gender and sexual minorities' issues.

Chapter four discusses the extent to which the approach of the African human rights system has been inclusive of gender and sexual minorities in promoting and protecting their rights, while simultaneously exploring the obstacles to this process. It focuses on the African Commission as one of the African human rights system's institutions that has already done significant work to advance the rights of gender and sexual minorities.

Chapter five summarises the research, provides a conclusion, and outlines some recommendations.

CHAPTER 2: THE AFRICAN HUMAN RIGHTS SYSTEM'S NORMATIVE AND INSTITUTIONAL FRAMEWORKS

2.1 Introduction

The African human rights system is composed of several human rights treaties between the African Union (AU) member states and the mechanisms that monitor compliance with these treaties¹ in order to promote and protect human rights across the continent. The African human rights system is the youngest of the three judicial or quasi-judicial regional human rights systems, and was created under the auspices of the AU.² Like the Inter-American human rights system and the European human rights system, the African human rights system plays a significant role in protecting human rights among its member states, including by deciding states' responsibility for violations alleged in complaints submitted by individuals.³

This chapter provides a general understanding of the norms and institutions of the African human rights system which was established under the auspices of the AU. It looks at their processes and functioning, and critically analyses them.

2.2 Background to the establishment of the African Union

The AU is a continental political body composed of the 55 member states that constitute the countries of the African continent. It was officially launched in 2002 as the successor to the Organization of African Unity (OAU).⁴

The AU was born out of the desire of the OAU Assembly to reposition itself in the face of the myriad of political, economic and social problems that were plaguing the continent.⁵ That extraordinary session came as an opportunity for reflection after the achievement of the main purposes of the OAU⁶ had failed.

¹ Women Enabled International 'Accountability toolkit: African human rights system fact sheet' 1 <https://www.womenenabled.org/atk/Women%20Enabled%20International%20accountABILITY%20toolkit%20-%20African%20Human%20Rights%20System%20-%20FINAL.pdf> (accessed 20 August 2021).

² International Justice Resource Center 'African human rights system' <https://ijrcenter.org/regional/african/> (accessed 20 August 2021).

³ n 1 above.

⁴ African Union 'About the African Union' <https://au.int/en/overview> (accessed 20 August 2021).

⁵ K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 99.

⁶ Charter of the Organisation of the African Unity (1963), article 2.

That extraordinary session led the African Heads of states and governments to adopt the Sirte Declaration⁷ which called for the establishment of the AU. The implementation of the decisions of the Sirte Declaration, and in particular the preparation of the legal constitutive text of the Union, was entrusted to the Council of Ministers. They were charged to do so taking into account the Charter of the OAU and the 1991 Treaty Establishing the African Economic Community (the Abuja Treaty),⁸ as well as to model it on the European Union.⁹ The Constitutive Act of the AU (the AU Constitutive Act) entered into force on 26 May 2001.¹⁰

As opposed to the Charter of the OAU,¹¹ which moderately recognised the importance of human rights – which only referred to promoting international co-operation, having due regard to the Charter of the United Nations (the UN Charter) and the UDHR,¹² but which was deepened by the adoption of the African Charter on Human and Peoples' Rights (African Charter) in 1981 – the AU Constitutive Act reflects a growing commitment to the importance of human rights by providing that the objectives of the AU shall be to encourage international co-operation, taking due regard to the UN Charter and the UDHR,¹³ as well as to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.¹⁴ The AU Constitutive Act provides that the AU shall function to promote gender equality,¹⁵ to respect democratic principles; human rights; the rule of law and good governance,¹⁶ to respect the sanctity of human life; condemnation and rejection of impunity and political assassination; acts of terrorism and subversive activities.¹⁷

Apart from individual obligations from member states to ensure the guarantee of human rights within their jurisdictions, the AU has also an obligation to ensure the effective guarantee of human rights across Africa. It is through the normative and

⁷ Sirte Declaration 1999.

⁸ As above, para 8(iii).

⁹ Kindiki (n 5).

¹⁰ African Union 'Constitutive Act of the African Union' (AU Constitutive Act) <https://au.int/en/treaties/constitutive-act-african-union> (accessed 20 August 2021).

¹¹ The OAU was built on the principles of non-interference and state sovereignty. The AU instituted a change of focus towards the notion of protection and intolerance to undemocratic changes of government.

¹² n 6 above, article 2(1)(e).

¹³ Constitutive Act of the African Union (AU Constitutive Act) (2001), article 3(e).

¹⁴ As above, article 3(h).

¹⁵ As above, article 4(l).

¹⁶ As above, article 4(m).

¹⁷ As above, article 4(o).

institutional frameworks of the African human rights system – which was established under the auspices of the AU – that its commitment to the realisation of human rights for all African people is fulfilled.

2.3 Normative framework of the African human rights system

The African human rights system derives its norms from various sources. The scope of this research focuses on 3 human rights treaties of the AU, which are the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), and the African Charter on the Rights and Welfare of the Child (the African Children's Charter).

2.3.1 The African Charter on Human and Peoples' Rights

The African Charter is the founding instrument of the African human rights system. Although the notion of continental system for the promotion and protection of human rights dates back to the meeting of African jurists in Lagos, Nigeria, in 1961,¹⁸ it did not come under the consideration of the former OAU until 1979, when the organisation called an experts' meeting in Dakar, Senegal, to prepare a preliminary draft of a human rights charter for Africa.¹⁹ The draft was finalised in Banjul, The Gambia, in 1981 and was unanimously adopted at the 19th summit of the OAU in Nairobi, Kenya, in June 1981. Five years later, in October 1986, the African Charter came into force with its ratification by a simple majority of OAU member states.²⁰ Out of the 55 AU member states, 54 countries have ratified the African Charter.²¹

The African Charter is a binding treaty.²² A particular aspect of the African Charter lies in its main features that distinguish it from other regional human rights treaties: these main features constitute a consideration of the lived realities of African people.²³ The African Charter recognises the indivisibility and justiciability of all rights²⁴ (all three

¹⁸ G Naldi *The Organization of African: An Analysis of Its Role* (1999) 109-113.

¹⁹ CH Heyns *Human rights law in Africa* (2004) 127.

²⁰ SA Dersso & Institute for Security Studies *Promotion of human security in Africa: The Role of African human rights institutions* (2008) 11.

²¹ African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights' <https://www.achpr.org/ratificationtable?id=49> (accessed 25 August 2021).

²² African Charter on Human and Peoples' Rights (African Charter) (1986).

²³ M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; E Bondzie-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1998) 31 *Harvard Law Journal* 643.

²⁴ F Viljoen *International human rights law in Africa* (2012) 214.

generations of rights are recognised and socio-economic rights are justiciable),²⁵ does not allow derogations,²⁶ recognises not only individual rights but also peoples' rights²⁷ (such as peoples' rights to development, free disposal of natural resources, and self-determination),²⁸ and imposes duties to everyone.²⁹

In his book, Heyns highlights critics made on the position of the African Charter regarding the exercise of several civil and political rights only insofar as they are not limited by national legislation.³⁰ In *Civil Liberties Organisation v Nigeria* however, the use of 'subject to or within the law' do not allow national laws to ignore the rights guaranteed by the African Charter, but rather to refer to the constitution and international human rights standard.³¹

According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. The African Commission has shed light on this provision by establishing that, subject to nullifying the right to express one's opinion, national law may not in any way preclude the right to express and disseminate one's opinions.³²

The above is well reflected in article 27(2) of the African Charter which provides for legitimate reasons for limiting rights and freedoms as being the rights of others, collective security, morality and common interest. The African Commission's interpretation of this provision is that the limitation must be enacted in a law of general application,³³ and that morality does not refer to popular will defining what is and is not acceptable in the public interest.³⁴

²⁵ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

²⁶ *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

²⁷ Viljoen (n 24) 219.

²⁸ *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

²⁹ n 22, Preamble.

³⁰ Heyns (n 19) 688.

³¹ Communication 101/93, *Civil Liberties Organisation v Nigeria*, Thirteenth Annual Activity Report (ACHPR), para 16.

³² *Media Rights Agenda* (n 26) para 66.

³³ *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 44.

³⁴ *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 69.

2.3.2 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Maputo Protocol was adopted in Maputo, Mozambique, on 11 July 2003.³⁵ It then entered into force on 25 November 2005. To date, 42 of the 55 African countries have ratified the Protocol³⁶ and 13 countries still have to become parties to the treaty.³⁷ Out of the 42 countries, 6 countries have ratified the Protocol with reservations.³⁸

The particularity of the Maputo Protocol is that it was designed taking into account the realities of African women. It refers, among other rights, to the prohibition of all forms of violence against women,³⁹ to the prohibition of female genital mutilation and other practices,⁴⁰ to the prohibition of child marriages,⁴¹ to sexual and reproductive health rights,⁴² to equal opportunity and access,⁴³ to the protection of women in armed conflicts,⁴⁴ as well as to special protection of elderly women;⁴⁵ women with disabilities;⁴⁶ women in distress;⁴⁷ and widows.⁴⁸

³⁵ CH Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 65.

³⁶ Equality Now 'The Maputo Protocol turns 18 today. But what does this mean for women and girls in Africa?' 11 July 2021 https://www.equalitynow.org/maputo_protocol_turns_18 (accessed 30 August 2021).

³⁷ As above.

³⁸ African Union 'High level consultation on the ratification of the Maputo Protocol' 29 January 2018 <https://au.int/en/newsevents/20180129/high-level-consultation-ratification-maputo-protocol> (accessed 30 August 2021).

³⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2005), article 4.

⁴⁰ As above, article 5.

⁴¹ As above, article 6.

⁴² As above, article 14.

⁴³ As above, articles 7; 8; 12; 13 & 21.

⁴⁴ As above, article 11.

⁴⁵ As above, article 22.

⁴⁶ As above, article 23.

⁴⁷ As above, article 24.

⁴⁸ As above, article 20.

The Maputo Protocol is supplemented by three general comments: two issued by the African Commission,⁴⁹ and one, for a first time, by both the African Committee on the Rights and the Welfare of the Child (ACERWC) and the African Commission.⁵⁰

The Maputo Protocol offers a broader approach to the realisation of women's rights in Africa than any other international treaty, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁵¹ States parties to this Protocol are required to submit periodic reports indicating what legislative and other measures they have undertaken to fully realise the rights recognised in it in accordance with article 62 of the African Charter.⁵²

Article 27 of the Maputo Protocol stipulates that the African Court of Justice and Human Rights is the competent authority to hear matters of interpretation arising from its application and interpretation. However, article 27 of the Maputo Protocol must be read together with article 32 of the same Protocol.

2.3.3 The African Charter on the Rights and Welfare of the Child

The African Children's Charter was adopted in Addis Ababa, Ethiopia on 11 July 1990 and entered into force on 29 November 1999. The African Children's Charter is similar to the UN Convention on the Rights of the Child. However, persons under the age of 18 years are protected to a higher level under the African Children's Charter, which also provides an individual complaint procedure.⁵³ Out of the 55 AU member states,

⁴⁹ African Commission on Human and Peoples' Rights 'General Comments No.1 on Article 14(1) (d) & (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' <https://www.achpr.org/legalinstruments/detail?id=14> (accessed 3 September 2021); African Commission on Human and Peoples' Rights 'General Comment No. 2 on Article 14(1)(a), (b), (c) & (f) and Article 14(2)(a) & (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' <https://www.achpr.org/legalinstruments/detail?id=13> (accessed 3 September 2021).

⁵⁰ African Commission on Human and Peoples' Rights 'Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) & the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage' https://www.maputoprotocol.up.ac.za/images/files/documents/general_comments_on_child_marriage/joint_gc_acerwc_achpr_ending_child_marriage_eng.pdf (accessed 3 September 2021).

⁵¹ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13 <https://www.refworld.org/docid/3ae6b3970.html> (accessed 3 September 2021).

⁵² n 39 above, article 26.

⁵³ Heyns & Killander (n 35) 80.

50 countries have ratified the African Children's Charter,⁵⁴ from which 4 countries have made reservations.

The African Children's Charter⁵⁵ followed the lead of the African Charter by including all three 'generations' of human rights. The rights to education and to health are in principle justiciable.⁵⁶ The best interest of the child is central to the interpretation of the African Children's Charter.

A particular aspect about the African Children's Charter lies in the fact that it is a binding instrument safeguarding the rights of children that have been established by a continental body for the first time. The Charter is in many ways more protective than its universal counterpart, the UN Convention on the Rights of the Child, particularly with respect to child refugees, child marriage, and child soldiers.

As one of its mandate, the ACERWC is the competent authority to monitor the implementation and ensure protection of the rights enshrined in the African Children's Charter,⁵⁷ and to hear matters of interpretation arising from its application and interpretation.⁵⁸

2.4 Institutional framework of the African human rights system

The primary bodies most relevant to human rights protection under the African human rights system are the African Court of Human and Peoples' Rights (the African Court) (which will be replaced by the African Court of Justice and Human Rights), the African Commission, and the ACERWC.⁵⁹ Other AU organs have to complement and support these primary human rights institutions in the exercise of their mandates, even though the primary responsibility for human rights lies with them.⁶⁰

⁵⁴ ACERWC 'Ratifications table' <https://www.acerwc.africa/ratifications-table/> (accessed 5 September 2021).

⁵⁵ African Charter on the Rights and Welfare of the Child (African Children's Charter) (1999).

⁵⁶ Viljoen (n 24) 218.

⁵⁷ n 55 above, article 42(b).

⁵⁸ As above, article 42(c).

⁵⁹ Viljoen (n 24) 169.

⁶⁰ As above.

2.4.1 The African Court of Human and Peoples' Rights

The African Court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol on the African Human Rights Court). The Protocol was adopted in Ouagadougou, Burkina Faso, on 10 June 1998 and entered into force on 25 January 2004.⁶¹ Under the provisions of this Protocol, the African Court is mandated to complement the African Commission's protective mandate entrusted to it by the African Charter.⁶²

The Protocol on the African Human Rights Court is to be replaced by the Protocol on the Statute of the African Court of Justice and Human Rights upon its entry into force. The Protocol on the Statute of the African Court of Justice and Human Rights extends the jurisdiction of the African Court on Human and Peoples' Rights to international crimes. It was adopted in 2008, but has not yet entered into force.⁶³ Additionally, a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) was adopted on 27 June 2014. It provides the African Court of Justice and Human Rights with criminal jurisdiction. No state has ratified it yet.⁶⁴

To date, 31 AU member states have ratified the Protocol establishing the African Court.⁶⁵ Côte d'Ivoire withdrew from the African Human Rights and Peoples Court following an order from that Court to suspend an arrest warrant against presidential hopeful Guillaume Soro.⁶⁶

The seat of the African Court is in Arusha, Tanzania. The African Court is composed of 11 judges.⁶⁷ The African Court has its Rules of Court of the African Court of Human

⁶¹ Heyns & Killander (n 35) 41.

⁶² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the African Court Protocol) (2004), article 2.

⁶³ Heyns & Killander (n 35) 47.

⁶⁴ As above, 62.

⁶⁵ African Court on Human and Peoples' Rights 'Basic information' <https://www.african-court.org/wpafc/basic-information/> (accessed 10 September 2021).

⁶⁶ 'Ivory Coast withdraws from African Human Rights and Peoples Court' *AfricaNews* 30 April 2020 <https://www.africanews.com/2020/04/30/ivory-coast-withdraws-from-african-human-rights-and-peoples-court/> (accessed 10 September 2021).

⁶⁷ n 62 above, article 11.

and Peoples' Rights (Rules of Court).⁶⁸ Designed to complement and fill in gaps, they are an essential part of its overall functionality. The electoral process for the judges of the African Court is very important, given that seats are limited and not every member state is represented. Once elected, the judges choose their own President and Vice-President for a two-year term, renewable once.⁶⁹

The African Court has jurisdiction to hear cases and disputes submitted to it regarding the interpretation and application of both the African Charter and the African Children's Charter, the Protocol establishing it, any relevant human rights instruments ratified by member states concerned. The African Court decides in the event of a dispute over its jurisdiction.⁷⁰ The African Court has jurisdiction to facilitate amicable settlements pursuant to the African Charter,⁷¹ as well as to issue advisory.⁷²

In addition to the African Commission, member states and African intergovernmental organisations that can institute cases directly before the African Court, individuals and non-governmental organisations (NGOs) with observer status before the African Commission can also do so if the concerned member state has made a declaration accepting the jurisdiction of the African Court to receive such cases.⁷³

Out of the 31 AU member states, only 10 countries have ever made declarations under article 34(6) of the Protocol of the African Court allowing individuals and NGOs to submit cases directly to the Court. Out of the 10 countries, only 6 countries remain.⁷⁴

The judgments of the African Court are definitive and without appeal. They are legally binding on states. In its annual report to the AU, the African Court specifies states that have failed to abide by its judgments.⁷⁵ The AU Executive Council is tasked with overseeing the execution of judgments on behalf of the AU Assembly.

⁶⁸ As above, article 33; Rules of Court of the African Court of Human and Peoples' Rights (Rules of Court) (2020).

⁶⁹ Viljoen (n 24) 420.

⁷⁰ n 62 above, article 3.

⁷¹ As above, article 9.

⁷² As above, article 4.

⁷³ As above, article 5.

⁷⁴ N De Silva & M Plagis 'A court in crisis: African states' increasing resistance to Africa's Human Rights Court' (2020) *OpinioJuris* 19 May 2020 <http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/> (accessed 15 September 2021).

⁷⁵ n 62 above, article 31.

2.4.2 The African Commission on Human and Peoples' Rights

The African Commission is part of the African human rights system as a quasi-judicial organ. The African Commission was established under the African Charter as an organ to promote and protect human and peoples' rights in Africa.⁷⁶ It is the supervisory mechanism created by the African Charter.⁷⁷ The African Commission and the African Court have complementary mandates.

The African Commission is not recognised by the AU Constitutive Act as one of the AU organs. However, the African Commission started to operate within the framework of the AU since 2002.⁷⁸ It sits in Banjul, The Gambia. It is composed of 11 members (commissioners).⁷⁹ The African Commission is guided by its own Rules of Procedure of the African Commission on Human and Peoples' Rights (Rules of Procedure) in all aspects of its functioning and the process for electing its commissioners.⁸⁰ The functioning costs are provided by the AU.⁸¹

The African Commission holds three mandates: promotional, protective and interpretative.⁸² Its promotional mandate⁸³ entrusts it with the task of, among other things, gathering relevant information, formulating rules and principles upon which legislations of member states can be based on, carrying out studies and researches and co-operating with other institutions concerned with promoting and protecting human rights in Africa. As part of its protective mandate, the African Commission examines member states' reports;⁸⁴ inter-state communications alleging human rights violations;⁸⁵ as well as human rights violations' complaints from individuals,⁸⁶ and issues concluding observations. Its interpretative mandate entails it with the task to

⁷⁶ n 22 above, article 30.

⁷⁷ Heyns & Killander (n 35) 29.

⁷⁸ 1st ordinary session of the Assembly of the African Union 'Decision on the interim period' (2002) ASS/AU/Dec.1(I) para xi in *Decisions and declarations of the Assembly of the African Union* https://au.int/sites/default/files/decisions/9549-assembly_en_9_10_july_2002_assembly_heads_state_government_first_ordinary_session_0.pdf (accessed 18 September 2021).

⁷⁹ n 22 above, article 31.

⁸⁰ As above, article 42(2); Rules of Procedure of the African Commission on Human and Peoples' Rights (Rules of Procedure) (2020).

⁸¹ As above, article 41; Rules of Procedure, rules 22 & 23.

⁸² n 22 above, article 45.

⁸³ As above, article 45(1)(a), (b) & (c).

⁸⁴ As above, article 62.

⁸⁵ As above, article 47.

⁸⁶ As above, article 55.

interpret provisions of the African Charter⁸⁷ by issuing general comments, thematic resolutions, guidelines or principles.

The Africa Commission can receive communication from individuals and NGOs under article 55 of the African Charter. In *Jawara v The Gambia*, the African Commission made it clear about its jurisdiction to consider any communication from anyone as far as the rights contained in the African Charter are concerned.⁸⁸

Following state reporting guidelines, member states are required to submit a two-yearly situational report on human and peoples' rights with regard to the guarantee of the rights enshrined in the African Charter. The AU did not assign the task of reviewing state reports to any relevant body until the African Commission requested from the AU to be the organ responsible for this task,⁸⁹ which was accepted.

In addition to reviewing state reports, receiving, reviewing and investigating communications, the African Commission is also empowered to use any appropriate investigative method,⁹⁰ providing it with some flexibility to adopt investigative methods within its protective mandate. The two main protective functions carried out by the African Commission are the conduct of inquiry missions to member states and the appointment of special rapporteurs on human rights' thematic issues on the continent.⁹¹

2.4.3 The African Committee on the Rights and the Welfare of the Child

The ACERWC was established under the African Children's Charter. Just like the African Commission, the ACERWC is not recognised by the AU Constitutive Act as one of the AU organs. However, the ACERWC started to operate within the framework of the AU since 2002.⁹² It seats in Maseru, Lesotho.

⁸⁷ As above, article 45(3).

⁸⁸ *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) 42.

⁸⁹ African Commission on Human and Peoples' Rights '3R Recommendation on Periodic Reports - ACHPR/Recom.3(III)88' <https://www.achpr.org/sessions/resolutions?id=4> (accessed 20 September 2021).

⁹⁰ n 22 above, article 46.

⁹¹ VOO Nmehielle *The African human rights system: Its laws, practice, and institutions* (2001) 180.

⁹² n 78 above.

Similarly to the African Court, the ACERWC is composed of 11 members.⁹³ They are nominated by their respective states⁹⁴ to serve in their personal and independent capacity, and are elected by secret ballot by the AU Assembly.⁹⁵ Their term of office is for 5 years and is renewable only once.⁹⁶ The ACERWC has its own Revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child (Rules of Procedure) which guide its functioning and the process for electing its members.⁹⁷

As the only regional treaty body of its kind to focus on the rights and welfare of the child, the mandate of the ACERWC involves, among other things, promoting and protecting the rights and welfare of the child, gathering relevant information, formulating rules and principles for the protection of the rights and welfare of the child, co-operating with other institutions concerned with the rights and welfare of the child, interpreting the African Children's Charter and monitoring its implementation by member states. Member States are required to submit reports on the implementation of this Charter within 2 years of the entry into force of this Charter for the member state concerned, and every 3 years thereafter.⁹⁸

Additionally, the ACERWC is vested with the authority to conduct investigations conferred upon it by the African Children's Charter.⁹⁹ These investigations, also called special mechanisms, are conducted through special rapporteurs and working groups on different children's rights' thematic.

2.5 Conclusion

This chapter has reflected the willingness of the AU Assembly to learn from the era of its predecessor, the OAU, which struggled to remain relevant in the midst of challenging times, and to embrace a new era that takes into account the realities facing the continent. Unlike its predecessor, the Constitutive Act of the AU specifically sets out as one of the foundations for its adoption a determination to promote and protect

⁹³ n 55 above, article 33.

⁹⁴ As above, article 35.

⁹⁵ As above, article 34.

⁹⁶ As above, article 37.

⁹⁷ As above, article 38(1); Revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child (Rules of Procedure) (2018).

⁹⁸ As above, article 43.

⁹⁹ As above, article 44.

human and peoples' rights, to consolidate democratic institutions and culture, and to ensure good governance and the rule of law.¹⁰⁰

It has been argued in this chapter that even though the African human rights system is the youngest from all three regional human rights systems, it has developed a more comprehensive approach to human rights issues compared to its two counterparts. Moreover, its founding instrument, the African Charter, has a particular aspect that distinguishes it from other regional human rights treaties: its main features are impregnated with issues regarding lived realities of African people.

However, cross-cutting issues remain. On the one hand, the realistic possibility of fully promoting and protecting human and peoples' rights in a context of lack of political will of African states, lack of human and financial resources, poor economic conditions, cultural preconceptions and stereotypes, poverty, ignorance and illiteracy. On the other hand, states' failure to fully engage with institutional frameworks; particularly with respect to compliance with African Commission decisions; ratification of the different protocols; and granting individual complaints to the Court, are all examples of states' considerations to human rights responsibilities, which raises questions about the importance of adopting norms and establishing institutions if the end result is not to comply with them.

¹⁰⁰ n 13, Preamble.

CHAPTER 3: THE AFRICAN HUMAN RIGHTS SYSTEM'S APPROACH TO GENDER AND SEXUAL MINORITIES' ISSUES WITHIN ITS NORMS AND INSTITUTIONS

3.1 Introduction

The previous chapter discussed the important consideration given to the human and peoples' rights dimension by the AU in establishing its Constitutive Act¹ as that was in a way an attempt to move away from the failures of its predecessor, the OAU, whose main focus was on the principles of non-interference and state sovereignty.² Through its desire to reposition the continent, the AU Assembly established a binding treaty³ – whose particularity is that its main features constitute a consideration of the lived realities of African people⁴ – which is the founding instrument of the African human rights system.

In most African countries, gender and minority issues are evolving in increasingly discriminatory contexts, while in others, these same issues are confronted with contexts related to social and cultural inclusion.⁵ The current particular situation is that of Ghana where a controversial bill has been proposed in its parliament.⁶ Any social or medical support towards gender and sexual minorities would also not be allowed.⁷ If

¹ Constitutive Act of the African Union (AU Constitutive Act) (2001), article 3(e).

² The OAU was built on the principles of non-interference and state sovereignty. The AU instituted a change of focus towards the notion of protection and intolerance to undemocratic changes of government.

³ CH Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 29.

⁴ M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; E Bondzie-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1998) 31 *Harvard Law Journal* 643.

⁵ S Namwase *et al* 'Sexual minorities' rights in Africa: What does it mean to be human; and who gets to decide?' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 3-4.

⁶ 'Ghana's president calls for tolerance as parliament considers anti-LGBTQ law' *NBC News* 22 October 2021 <https://www.nbcnews.com/nbc-out/out-news/ghana-s-president-calls-tolerance-parliament-considers-anti-lgbtq-law-n1282154> (accessed 27 September 2021).

⁷ 'Ghana's LGBTQ community calls for global help over anti-gay bill' *VOA* 3 August 2021 https://www.voanews.com/a/africa_ghanas-lgbtq-community-calls-global-help-over-anti-gay-bill/6209113.html (accessed 27 September 2021).

passed, this bill would be added to the already existing situation in Nigeria.⁸ The same situation happened in Uganda, but the bill was rejected.⁹

All of these trends of broadening the scope of criminalisation are in addition to existing discriminatory laws. This is in addition to anti-gay statements made by various African leaders,¹⁰ the same leaders who form the AU Assembly, which is the political body empowered to take the lead on various issues facing the continent and which oversees and monitors the African human rights system.

This chapter will examine legal avenues for interpreting gender and sexual minorities' issues by making use of the rights enshrined in the African Charter, while discussing different ways in which these designated African human rights system's normative and institutional frameworks have addressed gender and sexual minorities' issues.

3.2 The notion of gender and sexual minorities within normative frameworks of the African human rights system

As mentioned in section 2.3, the scope of this research has its focus on 3 human rights treaties of the AU, which are the African Charter; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol); and the African Charter on the Rights and Welfare of the Child (African Children's Charter), notwithstanding the fact that the African human rights system derives its norms from various sources. The purpose of this section is to present an overview of the current position of these norms in relation to gender and sexual minorities' rights issues.

3.2.1 The African Charter on Human and Peoples' Rights

The African Charter is the instrument that underpins the African human rights system. It is the one that sets the rights that are guaranteed in the African human rights system,

⁸ The Same-Sex Marriage (Prohibition) Act (2013) which was signed into law by President Goodluck Jonathan on 7 January 2014.

⁹ Human Rights Watch 'Uganda: Reject Sexual Offenses Bill' 6 may 2021 updated 3 August 2021 <https://www.hrw.org/news/2021/05/06/uganda-reject-sexual-offenses-bill> (accessed 27 September 2021).

¹⁰ The following are the most notable: Yahya Jammeh of The Gambia, late Robert Mugabe of Zimbabwe, Yoweri Museveni of Uganda, and Paul Biya of Cameroon.

and all other human rights instruments make reference to it.¹¹ Even though the notion of gender and sexual minorities is not expressly mentioned in the African Charter, this does not in any way imply that the rights of gender and sexual minorities are not considered in the African Charter. In fact, this demonstrates that the African Charter has made no distinction as to who should or should not enjoy the rights enshrined in it.

Whilst written in very neutral language reflecting a unique system, the approach of the language used in the African Charter illustrates the universality of human rights and their application to all, regardless of difference.¹² Scholars such as Izugbara and others draw our attention on the vocabulary used in the African Charter which stipulates inclusion and equality of all. Such vocabulary includes 'every human being', 'every citizen', and 'no one'.¹³ In fact, 12 provisions in the African Charter address to the rights of 'every individual',¹⁴ irrespective of their sexual orientation and gender identity and expression.¹⁵ Rudman departs from the view that discrimination is not referred to in the African Charter, article 2 of which refers to distinction instead.¹⁶ However, without defining the two terms, it is the view of the writer to refer to the Preamble of the African Charter which outstandingly mentions discrimination.

The Preamble of the African Charter directly endorses the UN Charter and the UDHR, instruments on which the UN human rights system is based. The Preamble of the African Charter implies complementarity with rather than replacement of the UN human rights system. These international human rights instruments have been used to protect the rights of gender and sexual minorities, and the African Charter builds on them. In addition, article 60 of the African Charter refers to other African instruments, the UN Charter, the UDHR, and other UN instruments for guidance when referring to international law on human and peoples' rights.¹⁷ Article 61 refers, among others, to

¹¹ A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 267.

¹² As above, 268.

¹³ C Izugbara *et al* 'Regional legal and policy instruments for addressing LGBT exclusion in Africa' (2020) 28(1) in *Sexual and Reproductive Health Matters* 105.

¹⁴ As above.

¹⁵ F Viljoen *International human rights law in Africa* (2012) 265.

¹⁶ A Rudman 'The Protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 15.

¹⁷ African Charter on Human and Peoples' Rights (African Charter) (1986), article 60.

African practices consistent with international human and peoples' rights standards as subsidiary measures for determining the principles of law.¹⁸ Therefore, one could then argue complementarity of the African human rights system to the international human rights system.

The African Charter recognises individual rights. Among other characteristics, sex and other status are grounds on which no individual should be denied the enjoyment of the rights and freedoms enshrined in the African Charter.¹⁹ In addition to the interpretation given to article 2 – with reference to sex and other status to include sexual orientation and gender identity – by the UN human rights system,²⁰ which is complementary to the African human rights system, the interpretation given by the African Commission on Human and Peoples' Rights (African Commission) provides greater clarity on the principle of non-discrimination. In *Zimbabwe Human Rights NGO Forum v Zimbabwe*,²¹ the African Commission ruled that the purpose of the principle of non-discrimination is to ensure equal treatment of persons regardless of, among other grounds, their sexual orientation. In making this decision, the African Commission referred to *Legal Resources Foundation v Zambia*,²² ruling that the right to equality is an important right because its availability or absence affects a person's ability to enjoy many other rights.

The rights to equality²³ and dignity,²⁴ on which the recognition of the rights of sexual and gender minorities in other human rights systems has been built, are also included in the African Charter. Reference to the right to privacy is not clearly made. However, according to Murray and Viljoen,²⁵ it is possible to argue that the African Charter implies the right to privacy under the right to respect for life and the integrity of a person,²⁶ the right to respect of the dignity inherent in a human being,²⁷ and the right to liberty and

¹⁸ As above, article 61.

¹⁹ As above, article 2.

²⁰ *Toonen v Australia*, communication 488/1992, Human Rights Committee, views, 31 March 1994, para 8.7.

²¹ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169.

²² *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 63.

²³ n 17, articles 3 & 19.

²⁴ As above, article 5.

²⁵ R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 89.

²⁶ n 17 above, article 4.

²⁷ As above, article 5.

security of a person²⁸ with reference to the concept of implied rights used by the African Commission in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*.²⁹

The use of 'subject to or within the law' in particular provisions of the African Charter can be perceived as a limitation to individual rights. Article 27(2) of the African Charter provides for legitimate reasons for limiting rights and freedoms as being the rights of others, collective security, morality and common interest. However, the African Commission's interpretation of this provision is that the limitation must be enacted in a law of general application,³⁰ and that morality does not refer to popular will defining what is and is not acceptable in the public interest.³¹ The fact is that the general opinion on sexual and gender minorities' issues in Africa does not detract from the guarantee of rights offered to gender and sexual minorities by the African Charter.

The African Charter also confers duties on individuals. Its articles 28 and 29 illustrate this. More importantly, article 29(7) urges each individual to use a spirit of tolerance, dialogue and consultation to preserve and strengthen positive African cultural values in his or her relations with other members of society in order to contribute to the promotion of the moral well-being of society. This shows that duties conferred on each individual by the African Charter are in no way discriminatory.

If there is to be an explicit mention of gender and sexual minorities in the African Charter, the African Commission's interpretation of its Article 2 as discussed above would be one reference. The other reference, as Viljoen implies, is that the African Charter was drafted in such a way that it could encompass future developments and that it has generally been interpreted as a living document.³² He refers to the recognition of indigenous peoples' rights³³ without this word or concept appearing in the text of the African Charter.

²⁸ As above, article 6.

²⁹ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 65.

³⁰ *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 44.

³¹ *Legal Resources Foundation*, para 69.

³² Viljoen (n 15) 267; *Atala Riffo & Daughters v Chile*. Inter-American Court of Human Rights, merits judgment, 24 February 2012, para 83.

³³ *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

To return to the notion of gender and sexual minorities, one must recognise that the African Charter was adopted in a context where conversations revolved around the desire to re-position the continent in the face of the myriad of political, economic and social problems that were plaguing it.³⁴ However, the African Charter is sufficiently equipped to address the rights of gender and sexual minorities, as it has been the case for indigenous peoples' rights.

3.2.2 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Like the African Charter, from which the Maputo Protocol derives, no specific mention was made of gender and sexual minorities. Similar to the African Charter as mentioned in the previous sub-section, the fact that gender and sexual minorities are not expressly mentioned in the Maputo Protocol does not imply that their rights are not enshrined in it. Rather, it shows that the Maputo Protocol makes no distinction as to the rights it confers. Therefore, the rights to dignity;³⁵ to life, integrity and security of the person;³⁶ to elimination of harmful practices;³⁷ to access to justice and equal protection of the law;³⁸ to health and reproductive rights;³⁹ to positive cultural context;⁴⁰ and to inheritance,⁴¹ among others, are provided for in the Maputo Protocol and are granted to all women without any distinction.

In its Preamble, the Maputo Protocol refers to articles 2 and 18 of the African Charter, which refer respectively to the principle of non-discrimination and the duty of member states to eliminate all forms of discrimination against women and to insure international protection to all women.⁴² So far, 2 general comments have been issued by the African Commission on the interpretation and the implementation of the Protocol, and have been inclusive of sexual orientation as one of the grounds on which women are

³⁴ K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 99.

³⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2005), article 3.

³⁶ As above, article 4.

³⁷ As above, article 5.

³⁸ As above, article 8.

³⁹ As above, article 14.

⁴⁰ As above, article 17.

⁴¹ As above, article 21.

⁴² As above, Preamble.

discriminated against.⁴³ These general comments are in addition to various other interpretations of the African Charter mentioned in the previous sub-section.

The Maputo Protocol distinguishes itself from other legal instruments in the sense that women are defined as persons of female gender.⁴⁴ Building on *Toonen v Australia*, lesbian and transgender women in Africa must also benefit from this definition.⁴⁵ Scholars such as Izugbara and others argue that, since its adoption, the goal to consolidate rights of women got better. They refer to the Revised Maputo Plan of Action of 2015, the AU stated that there is a need to 'contribute to the sexual and reproductive health and rights (SRHR) targets set out in the SDGs'.⁴⁶ Snyman departs from a teleological interpretation of the Maputo Protocol and asserts that cultural relativism and heteronormativity are lens from which African transgender women are excluded from its protective scope,⁴⁷ and therefore still face denial of legal recognition, among other rights.

3.2.3 The African Charter on the Rights and Welfare of the Child

The African Children's Charter safeguards the rights of African children as defined in its article 2.⁴⁸ Similar to the two previous treaties, the African Children's Charter does not explicitly mention gender and sexual minorities in its text. However, the African Children's Charter makes reference to the principle of non-discrimination where the rights guaranteed therein apply to all children without distinction, among other characteristics, to sex and other status.⁴⁹ Interpretation made from UN treaties bodies, sex should be interpreted to include sexual orientation, and other status should be

⁴³ African Commission on Human and Peoples' Rights 'General Comments No.1 on Article 14(1) (d) & (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' para 4 <https://www.achpr.org/legalinstruments/detail?id=14> (accessed 1 October 2021); African Commission on Human and Peoples' Rights 'General Comment No. 2 on Article 14(1)(a), (b), (c) & (f) and Article 14(2)(a) & (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' para 12 <https://www.achpr.org/legalinstruments/detail?id=13> (accessed 1 October 2021).

⁴⁴ n 35 above, article 1(k).

⁴⁵ A Budoo 'Rights of LGBTIQ+ persons in Africa during COVID-19' *Global Campus of Human Rights* (2020).

⁴⁶ Izugbara (n 13 above), 107.

⁴⁷ TC Snyman 'The protection of African transgender women's rights to dignity, life and health through a teleological reading of the Maputo Protocol' unpublished LLM thesis, Stellenbosch University, 2019, 17-18.

⁴⁸ African Charter on the Rights and Welfare of the Child (African Children's Charter) (1999), article 2.

⁴⁹ As above, article 3.

interpreted to include gender and sexual orientation.⁵⁰ Following the same pattern, gender should be interpreted to include gender identity.

One particular aspect of the African Children's Charter is its consideration of the right to privacy,⁵¹ which is not expressly mentioned in both the African Charter and the Maputo Protocol. Particular attention to the best interest of the child⁵² is also given to intersex and transgender children when it comes to gender identity and sexual development.

3.3 The notion of gender and sexual minorities within institutional frameworks of the African human rights system

Similar to section 2.4, this section will focus on the primary bodies most relevant to the protection of human rights within the African human rights system, which are the African Court of Human and Peoples' Rights (African Court), the African Commission, and the African Committee on the Rights and the Welfare of the Child (ACERWC).

3.3.1 The African Court of Human and Peoples' Rights

Sub-section 2.4.1 has given a comprehensive overview of the functioning of the African Court. The right-holders under the African Charter are everyone, every human being, and every individual.⁵³ These rights are therefore recognised to all people without distinction. This notion is confirmed by article 2 of the African Charter. If the Court is seized, its judgments are rendered under the African Charter and any other human rights instruments ratified by the state concerned.⁵⁴ The African Charter and UN instruments are sources of law applicable by the African Court and protect the rights of all persons, including gender and sexual minorities.

In light of the above, even though no case dealing with gender and sexual minorities' issues has ever been adjudicated by the Court, it does not imply that such a case would not be received by the Court if it would find itself to have jurisdiction to adjudicate the matter. It would be inconceivable to think that a person could not seize the Court for a

⁵⁰ *Toonen* (n 20); Viljoen (n 15) 265.

⁵¹ n 48 above, article 10.

⁵² As above, article 4.

⁵³ Viljoen (n 15) 264.

⁵⁴ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the African Court Protocol) (2004), article 7.

dispute over which the Court would have jurisdiction just because that person would be openly gay.

3.3.2 The African Commission on Human and Peoples' Rights

The African Commission is the human right body within the African human rights system with more engagement regarding the notion of gender and sexual minorities. The interpretation to include sexual orientation as a ground for non-discrimination departs from a case brought before the African Commission.⁵⁵ The African Commission is invested with an interpretative mandate, a protective mandate, and a promotional mandate.

The followings are areas where the African Commission made its contribution on topics involving gender and sexual minorities:

Communications procedures

The African Commission may receive communications from member states,⁵⁶ but also from individuals and NGOs⁵⁷ with regard to violation of rights enshrined in the African Charter.

Only one communication has ever been brought to the African Commission,⁵⁸ where the applicant was asking the Commission to consider the legal status of homosexuals in Zimbabwe, criminalisation of sexual conduct between men, and statements made by public authorities against same-sex sexual conduct.⁵⁹ The case was withdrawn before its consideration by the Commission. However, even though the *Zimbabwe Human Rights NGO Forum v Zimbabwe* case⁶⁰ was not about gender and sexual minorities' issues, its interpretation from the Commission to add sexual orientation as a ground for non-discrimination was ground-breaking.

⁵⁵ *Zimbabwe Human Rights NGO Forum* (n 21).

⁵⁶ n 17 above, article 47.

⁵⁷ As above, article 55.

⁵⁸ Communication 136/94, *William A Courson v Zimbabwe*, Eighth Annual Activity Report (ACHPR).

⁵⁹ Viljoen (n 15) 265.

⁶⁰ *Zimbabwe Human Rights NGO Forum* (n 21).

State reporting

States' reporting processes are enshrined in article 62 of the African Charter. Member states are required to submit periodic reports indicating legislative and other measures undertaken to fully realise the rights recognised in the African Charter.

Although not consistent in addressing gender and sexual minorities' issues, the African Commission has addressed these issues from time to time while issuing concluding observations in the process of reviewing member states' reports. For example, not only did 3 Commissioners ask questions about 11 gay men whose rights were abused, but the Commission expressed its 'concern for the upsurge of intolerance towards sexual minorities' in its concluding observations when reviewing Cameroon's state report for its 3rd periodic report.⁶¹ On the contrary, the Commission did not address the situation with regard to the 2009 Anti-Homosexuality Bill⁶² when reviewing Uganda's state report for its 4th periodic report.⁶³

Special mechanisms

Special mechanisms are part of the protective and promotional mandates of the African Commission. These special mechanisms consist mostly in field visits (also called promotional visits), special rapporteurs, working groups, and committees.

The mandate of the African Commission's HIV Committee also applies to men who have sex with men (MSM).⁶⁴ Besides, more and more engagements with regard to gender and sexual minorities' issues translate from various initiatives such as, among others, the press release on the arbitrary arrest and detention of 21 LGBT+ human

⁶¹ African Commission on Human and Peoples' Rights 'Concluding Observations on the 1st periodic report of Cameroon' adopted at the Commission's 39th ordinary session, 11-25 May 2005, para 14 https://www.achpr.org/public/Document/file/English/achpr39_conc_staterep1_cameroon_2005_eng.pdf (accessed 7 October 2021).

⁶² The Anti-Homosexuality Bill, 2009.

⁶³ African Commission on Human and Peoples' Rights 'Concluding Observations on the 4th periodic report of the Republic of Uganda' adopted at the Commission's 49th ordinary session, 28 April - 12 May 2011 https://www.achpr.org/public/Document/file/English/achpr49_conc_staterep4_uganda_2011_eng.pdf (accessed 7 October 2021).

⁶⁴ African Commission on Human and Peoples' Rights 'Resolution on the Establishment of a Committee on the Protection of the Rights of People living with HIV (PLHIV) and those at risk, vulnerable to and affected by HIV' 2010 para 10(f) ACHPR/Res.163 (XLVII) in *Recommendations and Resolutions adopted by the African Commission on Human and Peoples' Rights* <https://www.droitsafricain.net/en/files/AdoptResolutionsCodified1988-2017Vol-1ENG.pdf> (accessed 10 October 2021).

rights defenders in Ghana,⁶⁵ the compendium on the legal protection of human rights defenders in Africa,⁶⁶ the report of the study on the situation of women human rights defenders in Africa,⁶⁷ the report of the study group on freedom of association and assembly in Africa.⁶⁸

Granting of observer status to organisations

The African Commission is vested with the power to grant observer status to NGOs applying for it.

One outstanding case is that of the Coalition of African Lesbians (CAL). CAL submitted its application for observer status before the African Commission in May 2008.⁶⁹ CAL's observer status was denied on 20 May 2010.⁷⁰ CAL reapplied a few years later, and it was granted observer status on 25 April 2015.⁷¹ But the Executive Council of the AU to which the African Commission reports requested it to withdraw the observer status.

General comments, resolutions, and guidelines

This is by far the area in which the African Commission has made the most progress on gender and sexual minorities' issues. Two relevant general comments have been mentioned throughout this research.⁷² This is in addition to general comment no. 4 on

⁶⁵ African Commission on Human and Peoples' Rights 'Press Release on the Arbitrary Arrest and Detention of 21 LGBT+ Human Rights Defenders in Ghana' https://www.achpr.org/fr_pressrelease/detail?id=584 (accessed 10 October 2021).

⁶⁶ African Commission on Human and Peoples' Rights 'Compendium on the legal protection of human rights defenders in Africa' https://www.achpr.org/public/Document/file/English/english_chrd.pdf (accessed 10 October 2021).

⁶⁷ African Commission on Human and Peoples' Rights 'Report of the Study on the Situation of Women Human Rights Defenders in Africa' https://www.achpr.org/public/Document/file/English/report_of_the_study_on_the_situation_of_women_human_rights_defenders_in_africa.pdf (accessed 10 October 2021).

⁶⁸ African Commission on Human and Peoples' Rights 'Report of the Study Group on Freedom of Association & Assembly in Africa' https://www.achpr.org/public/Document/file/English/report_of_the_study_group_on_freedom_of_association_assembly_in_africa.pdf (accessed 10 October 2021).

⁶⁹ S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' *Feminist Africa* (2011), 19.

⁷⁰ As above, 31.

⁷¹ Jjuko (n 11 above), 280.

⁷² n 43 above.

the African Charter on the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment.⁷³

The most famous resolution to date adopted by the African Commission is the 2014 resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity (Resolution 275).⁷⁴ This resolution is fully dedicated to gender and sexual minorities. Two other resolutions join this one, but more broadly. These are the resolution on the establishment of a Committee on the Protection of the rights of people living with HIV and those at risk, vulnerable to and affected by HIV,⁷⁵ and the resolution on the situation of human rights defenders.⁷⁶

Furthermore, the 2010 principles and guidelines on the implementation on economic, social and cultural rights in the African Charter⁷⁷ define the term prohibited grounds of discrimination to include the ground of sexual orientation⁷⁸ and define the term vulnerable and disadvantaged groups to include lesbian, gay, bisexual, transgendered and intersex (LGBTI) people.⁷⁹ This is in addition to the 2015 guidelines on the conditions of arrest, police custody and pre-trial detention in Africa which define the term vulnerable persons and person with special needs to include sexual identity;⁸⁰ the

⁷³ African Commission on Human and Peoples' Rights 'General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)' para 20

https://www.achpr.org/public/Document/file/English/achpr_general_comment_no.4_english.pdf (accessed 10 October 2021).

⁷⁴ African Commission on Human and Peoples' Rights 'Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity' 2014 ACHPR/Res.275 (LV) in *Recommendations and Resolutions adopted by the African Commission on Human and Peoples' Rights*

<https://www.droitafrcain.net/en/files/AdoptResolutionsCodified1988-2017Vol-1ENG.pdf> (accessed 10 October 2021).

⁷⁵ n 64 above.

⁷⁶ African Commission on Human and Peoples' Rights 'Resolution on the Situation of Human Rights Defenders in Africa' 2017 para 3 ACHPR/Res. 376 (LX) in *Recommendations and Resolutions adopted by the African Commission on Human and Peoples' Rights*

<https://www.droitafrcain.net/en/files/AdoptResolutionsCodified1988-2017Vol-1ENG.pdf> (accessed 10 October 2021).

⁷⁷ African Commission on Human and Peoples' Rights 'Principles and guidelines on the implementation on economic, social and cultural rights in the African Charter on Human and Peoples' Rights' https://www.achpr.org/public/Document/file/English/achpr_instr_guide_draft_esc_rights_eng.pdf (accessed 10 October 2021).

⁷⁸ As above, para 1(d).

⁷⁹ As above, para 1(e).

⁸⁰ African Commission on Human and Peoples' Rights 'Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa' 8-10 https://www.achpr.org/public/Document/file/English/conditions_of_arrest_police_custody_toolkit.pdf (accessed 10 October 2021).

2017 guidelines for the policing of assemblies by law enforcement officials in Africa which define the term particular vulnerable individuals or groups to experiencing limitations on their right to freedom of assembly to include sexual orientation;⁸¹ the 2017 guidelines on combating sexual violence and its consequences in Africa which define the term sexual violence to include anal sex,⁸² and include sexual orientation, gender identity or expression as a factor that can increase sexual violence;⁸³ and the 2018 principles on the declassification and decriminalization of petty offences in Africa which define the term vulnerable persons to include persons marginalised on the basis of sexual orientation or gender identity.⁸⁴

3.3.3 The African Committee on the Rights and the Welfare of the Child

The ACERWC is the body responsible for the supervision and implementation of the rights enshrined in the African Children's Charter. Similar to the African Commission, the ACERWC is vested with both the promotional and the protective mandates.

So far, no comprehensive approach including gender and sexual minorities African children in the work of the Committee can be mentioned. This does not mean that gender and sexual minorities' African children do not encounter different issues such as stigmatisation, discrimination, and discriminatory laws, among other things. An example can be drawn from the ministerial order 620/613 of 7 June 2011 establishing the school regulations in force in Burundi,⁸⁵ which mentions in its article 9 homosexuality as one of the offences that merit expulsion and non-admission to any institution for the current school year. The Committee did not raise any concerns to

⁸¹ African Commission on Human and Peoples' Rights 'Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa' para 7.2.8 https://www.achpr.org/public/Document/file/Any/achpr_guidelines_on_policing_assemblies_eng_fre_p_or_ara.pdf (accessed 10 October 2021).

⁸² African Commission on Human and Peoples' Rights 'Guidelines on Combating Sexual Violence and its Consequences in Africa' para 3(1)(b) https://www.achpr.org/public/Document/file/English/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf (accessed 10 October 2021).

⁸³ As above, para 3(2)(e).

⁸⁴ African Commission on Human and Peoples' Rights 'Principles on the Declassification and Decriminalization of Petty Offences in Africa' 10 https://www.achpr.org/public/Document/file/English/principles_on_the_decriminalisation_of_petty_offences_efpa.pdf (accessed 10 October 2021).

⁸⁵ Movement for Individual Liberties 'Burundi: Misunderstanding of Sexual Orientation/Gender Identity and Sexual Practice Leads to Discrimination in Schools' trans <https://pdfslide.tips/documents/moli-burundi-rapport-education-2012-lgbt-fr.html> (accessed 13 October 2021).

address the matter when issuing its concluding observations and recommendations when reviewing the state report.⁸⁶

3.4 Conclusion

This chapter assessed legal avenues for asserting the recognition of gender and sexual minorities within the African human rights system. Where it has been the case, this chapter also discussed ways in which normative and institutional frameworks of the African human rights system have approached the notion of gender and sexual minorities. With particular reference given to claw-back clauses and other limitative provisions set forth in the African Charter, it is submitted that no doubt remains as to whether gender and sexual minorities are rights-holders, and that sexual orientation has been asserted as a ground to non-discrimination.

The facts speak for themselves when it comes to assessing the work done by the African Commission on issues related to gender and sexual minorities. This brings us to the next chapter, which is an in-depth analysis of the extent to which the African Commission has been inclusive of the rights of gender and sexual minorities, and eventually outlining limitations and analysing them, if there are any.

⁸⁶ African Committee of Experts on the Rights and Welfare of the Child 'Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Initial Report of the Republic of Burundi on the Status of the Implementation of the African Charter on the Rights and Welfare of the Child' <https://www.acerwc.africa/wp-content/uploads/2020/11/Draft-CO-Burundi-1.pdf> (accessed 13 October 2021).

CHAPTER 4: SOCIO-LEGAL ASPECTS OF THE INCLUSION OF SEXUAL AND GENDER MINORITIES' RIGHTS IN THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

4.1 Introduction

In the previous chapter, two questions were addressed: (i) whether gender and sexual minorities are also rights-holders like everyone else by virtue of chapter 2 of the African Charter establishing grounds of non-discrimination; (ii) ways in which normative and institutional frameworks of the African human rights system have approached the notion of gender and sexual minorities.

The first question addresses the lack of explicit recognition of gender and sexual minorities under the Charter. Its answer builds on the purpose of the principle of non-discrimination which has to ensure equal treatment of all people,¹ on the principle of equality as a core value to the enjoyment of other rights,² and on a prospective interpretation of the Charter³ drawing from the recognition of indigenous peoples' rights without any appearance of the notion explicitly mentioned in it⁴. The second question can be referred to the remarkable jurisprudence set forth by the African Commission under its interpretative,⁵ promotional,⁶ and protective⁷ mandates.

¹ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169.

² *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 63.

³ F Viljoen *International human rights law in Africa* (2012) 267; *Atala Riffo & Daughters v Chile*. Inter-American Court of Human Rights, merits judgment, 24 February 2012, para 83.

⁴ *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

⁵ African Commission on Human and Peoples' Rights 'General Comments No.1 on Article 14(1) (d) & (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' para 44 <https://www.achpr.org/legalinstruments/detail?id=14> (accessed 15 October 2021); African Commission on Human and Peoples' Rights 'General Comment No. 2 on Article 14(1)(a), (b), (c) & (f) and Article 14(2)(a) & (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' para 12 <https://www.achpr.org/legalinstruments/detail?id=13> (accessed 15 October 2021).

⁶ African Commission on Human and Peoples' Rights 'Compendium on the legal protection of human rights defenders in Africa'

https://www.achpr.org/public/Document/file/English/english_chrd.pdf (accessed 15 October 2021); African Commission on Human and Peoples' Rights 'Report of the Study on the Situation of Women Human Rights Defenders in Africa'

https://www.achpr.org/public/Document/file/English/report_of_the_study_on_the_situation_of_women_human_rights_defenders_in_africa.pdf (accessed 15 October 2021); African Commission on Human and Peoples' Rights 'Report of the Study Group on Freedom of Association & Assembly in Africa' https://www.achpr.org/public/Document/file/English/report_of_the_study_group_on_freedom_of_association_assembly_in_africa.pdf (accessed 15 October 2021).

⁷ African Commission on Human and Peoples' Rights 'Resolution on the Establishment of a Committee on the Protection of the Rights of People living with HIV (PLHIV) and those at risk, vulnerable to and

The lead taken by the African Commission with regard to gender and sexual minorities' rights cannot be denied. By virtue of an in-depth analysis, the purpose of this chapter is to assess the legal aspect of the extent to which the work done by the African Commission has been inclusive of the rights of gender and sexual minorities, and eventually draw out social-political limitations to a progressive inclusion and analyse them.

4.2 The rights of gender and sexual minorities under the African Commission: A socio-legal analysis

As mentioned above, the work done by the African Commission through its three main mandates to advance the rights of gender and sexual minorities is to be strongly acknowledged and commended. This work has been – or rather is being – carried out in a variety of ways through special mechanisms. These are promotional visits, concluding observations, press release, thematic reports, and general comments, among others.

Notwithstanding other achievements of the African Commission in promoting and protecting gender and sexual minorities' rights, this section is disaggregated into three sub-sections strictly linked to the rights of gender and sexual minorities. These are: the adoption of Resolution 275, the granting of observer status to CAL, and the relationship between the Commission and LGBTIQ+ NGOs.

affected by HIV' 2010 para 10(f) ACHPR/Res.163 (XLVII) in *Recommendations and Resolutions adopted by the African Commission on Human and Peoples' Rights* <https://www.droitafricain.net/en/files/AdoptResolutionsCodified1988-2017Vol-1ENG.pdf> (accessed 15 October 2021); African Commission on Human and Peoples' Rights 'Press Release on the Arbitrary Arrest and Detention of 21 LGBT + Human Rights Defenders in Ghana' <https://www.achpr.org/pressrelease/detail?id=584> (accessed 15 October 2021); African Commission on Human and Peoples' Rights 'Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity' 2014 ACHPR/Res.275 (LV) in *Recommendations and Resolutions adopted by the African Commission on Human and Peoples' Rights* <https://www.droitafricain.net/en/files/AdoptResolutionsCodified1988-2017Vol-1ENG.pdf> (accessed 15 October 2021); African Commission on Human and Peoples' Rights 'Resolution on the Situation of Human Rights Defenders in Africa' 2017 para 3 ACHPR/Res. 376 (LX) in *Recommendations and Resolutions adopted by the African Commission on Human and Peoples' Rights* <https://www.droitafricain.net/en/files/AdoptResolutionsCodified1988-2017Vol-1ENG.pdf> (accessed 15 October 2021).

4.2.1 The adoption of Resolution 275

The fight against all forms of violence in Africa is supported by two binding regional treaties. The main treaty is the African Charter, which provides for the principle of non-discrimination,⁸ the right to equality before the law and equal protection of the law,⁹ the rights to life and physical integrity,¹⁰ the right to dignity and the prohibition of torture, degrading; cruel or inhumane treatment or punishment.¹¹ The Maputo Protocol further requires state parties to take specific measures to end violence against all women.

After CAL was denied observer status, the idea was to develop a resolution based on the Resolution that the UN had just passed to commission a study on violence based on sexual orientation and gender identity.¹² The collective of African sexuality rights related advocates (CASRA) – comprising organisations working on issues of sexual orientation, gender identity and sexual rights in Africa and working primarily at the African Commission such as CAL, African Men for Sexual Health and Rights (AMSHeR), the Initiative for Strategic Litigation in Africa (ISLA), and Heartland Alliance for Human Needs and Human Rights Global Initiatives for Human Rights – started working on a resolution to end violence against people based on sexual orientation and gender identity and expression in Africa.¹³

The thought behind Resolution 275 was tactical in the sense that violence was the key to get the Resolution passed. But there were two identified problems that needed to be addressed: one on the lack of knowledge around gender identity and sexual expression, another one around violence against people related to sexual orientation and gender identity and expression. In addition to African LGBTIQ+ organisations submitting shadow reports to inform commissioners about the real situation faced by gender and sexual minorities in different parts of the continent for them to realise the gravity of the issue, CAL and AMSHeR together worked on an informative book tracing

⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2005), article 2.

⁹ As above, article 3.

¹⁰ As above, article 4.

¹¹ As above, article 5.

¹² UN Human Rights Council, 17th session, 17/19 Human rights, sexual orientation and gender identity A/HRC/RES/17/19 (2011) <https://undocs.org/A/HRC/RES/17/19> (accessed 18 October 2021).

¹³ The Commission: From silence to resistance <https://www.youtube.com/watch?v=q97-g6PbqJY> (accessed 18 October 2021).

violence based on sexual orientation and gender identity and expression in Africa.¹⁴ This led to get friendly commissioners who recognised gender identity and sexual expression as a human rights issue to speak on the lunch of the book produced by CAL and AMSHeR during the NGOs forum prior the 55th ordinary session of the African Commission of which Resolution 275 was adopted.¹⁵

The concerning context of violations of the rights of persons based on their real or perceived sexual orientation or gender identity gave rise to the Commission's mandate to interpret the meaning of the rights enshrined in the Charter in light of the situation facing gender and sexual minorities. Being guided by the African Charter itself, the African Commission referred to particular provisions of the African Charter in adopting Resolution 275. The African Commission adopted Resolution 275 from 28 April to 12 May 2014.

Reference to these provisions as a basis for affirming the legality and legitimacy of the resolution reflected the legal appreciation and consideration given to the rights of gender and sexual minorities as also reflected in the African Charter. The fact that the African Commission – which is responsible for implementing the provisions of the African Charter – has been considerate of the rights of gender and sexual minorities, through the adoption of Resolution 275, removes any ambiguity about the fact that the rights of gender and sexual minorities are not covered by the provisions of the African Charter.

The adoption of Resolution 275 was both historic and important. In fact, the Resolution was the first of its own through which the rights of sexual and gender minorities were clearly acknowledged. The Resolution was important because it came at a time where existing discriminatory laws were being supplemented by more drastic ones, as this was the case for Nigeria¹⁶ and Uganda.¹⁷ The Resolution, in a way, was also reflective

¹⁴ Pretoria University Law Press (PULP) 'Violence based on perceived or real sexual orientation and gender identity in Africa' <https://www.pulp.up.ac.za/component/edocman/violence-based-on-perceived-or-real-sexual-orientation-and-gender-identity-in-africa> (accessed 18 October 2021).

¹⁵ African Commission on Human and Peoples' Rights 'Final Communiqué of the 55th Ordinary Session of the African Commission on Human and Peoples' Rights' para 38(e) https://www.achpr.org/public/Document/file/English/achpr_fico_2014_eng.pdf (accessed 18 October 2021).

¹⁶ The Same-Sex Marriage (Prohibition) Act, 2013.

¹⁷ The Anti-Homosexuality Act, 2014.

of a willingness to address the misleading assumption that homosexuality was somehow 'un-African.'

4.2.2 CAL's observer status granting process

Beyond the adoption of Resolution 275, one of the most significant aspects of the recognition of the rights of gender and sexual minorities within the African human rights system is undoubtedly the process of granting observer status before the African Commission to CAL.

Initially, CAL submitted its application for observer status before the African Commission in May 2008.¹⁸ The application was postponed several times until it was addressed in May 2010 at the 47th Session of the Commission. The African Commission decided to deny observer status to CAL on 20 May 2010¹⁹ reason given to the fact that the organisation were not promoting and protecting any of the rights enshrined in the African Charter,²⁰ and it was followed by a huge mobilisation from other civil society organisations working at the Commission which were condemning the denial.²¹ However, the African Commission's refusal to grant observer status to CAL was contradictory for the following reasons: (i) the assertion that the rights of gender and sexual minorities were not recognised by the Charter was tantamount to question the Charter since it enshrines the rights of everyone as provided for in its numerous provisions, but also to claim that the gender and sexual minorities were not worthy of equal rights; (ii) the statement made by the Commission justified, amidst increasing homophobia, the contentions of most African states that the African Charter did not protect gender and sexual minorities; (iii) the granting of observer status a year earlier to an organisation *Alternatives Cameroun*²² with a specific mandate to work on the right to health of men who have sex with men and other sexual minorities.²³ With

¹⁸ S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' *Feminist Africa* (2011) 19.

¹⁹ As above, 31.

²⁰ African Commission on Human and Peoples' Rights '28th Activity Report' para 33 EX.CL/600(XVII) 8 https://www.achpr.org/public/Document/file/English/achpr47eo8_actrep28_20092010_eng.pdf (accessed 20 October 2021).

²¹ n 13 above. No less than 21 civil society organisations used their public statements to denounce the Commission's failure to grant CAL observer status.

²² African Commission on Human and Peoples' Rights '26th Activity Report' para 11 EX.CL/529(XV) 3 https://www.achpr.org/public/Document/file/English/achpr45eo6_actrep26_20082009_eng.pdf (accessed 20 October 2021).

²³ Viljoen (n 3) 267.

this third reason as an example, everything pointed to the fact that the reason for the refusal was only the word lesbian, which was standing out in the name of the organization.²⁴

CAL reapplied in August 2014, and it was granted observer status on 25 April 2015.²⁵ Subsequently, the Executive Council of the AU during its 27th ordinary session made a decision requesting the Commission to take into account the fundamental African values, identity and good traditions, to review its criteria for granting observer status to NGOs and to withdraw CAL's observer status in line with African values.²⁶ The Commission, in its 39th activity report, replied to the request of the Executive Council stating it had to take further consideration including, among others, a legal analysis of the matter, the notion of African values, the relationship with its stakeholders.²⁷ The Commission mentioned as well that a case on the matter was pending before the African Court. In fact, two NGOs – the Centre for Human Rights, Faculty of Law, University of Pretoria (Centre) which has observer status before the Commission and CAL – had approached the African Court in November 2015 seeking for an advisory opinion on whether the Executive Council of the AU did not overstep its mandate to 'consider' the Commission's report when it requested it to withdraw its decision to grant observer status to CAL. Mention has to be made on the fact that the Rules of Procedure of the African Commission do not provide for withdrawal of observer status. Nevertheless, the request was dismissed by the African Court given the fact that the two NGOs were not qualified to submit the request before it, a process that is proving

²⁴ As above.

²⁵ A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 280; CAL 'Statement on decision of the African Commission on Human and Peoples' Rights to grant observer status to the Coalition of African Lesbians' <https://www.cal.org.za/2015/04/25/statement-on-decision-of-the-african-commission-on-human-and-peoples-rights-to-grant-observer-status-to-the-coalition-of-african-lesbians-cal/> (accessed 20 October 2021).

²⁶ Executive Council of the African Union, 27th ordinary session, para 7, EX.CL/Dec.887(XXVII) https://au.int/sites/default/files/decisions/31762-ex_cl_dec_873_-_898_xxvii_e.pdf (accessed 20 October 2021).

²⁷ African Commission on Human and Peoples' Rights '39th Activity Report' para 50 https://www.achpr.org/public/Document/file/English/actrep39_2015_eng.pdf (accessed 20 October 2021).

to be extremely difficult. The Commission withdrew CAL's observer status on 28 August 2018.²⁸

Withdrawal of CAL's observer status came after years of intense advocacy to get it. While this kind of process seemed to be a mere formality in principle,²⁹ the process described above is a proof of the intense work done by CAL and its various partners to get observer status before the African Commission. Whereas recognition of CAL on the table of the African Commission would have better contributed to the implementation of Resolution 275 by AU member states, withdrawing CAL's observer status has also contributed to making this valuable document one for the drawers. Depriving CAL of a place at the table of the African Commission and a voice in the space it holds, the Commission – or rather the AU Assembly – wrongly reinforced the feeling that gender and sexual minorities are in fact not worthy of being considered as human beings, not recognised as rights-holders under the African Charter,³⁰ which simply amounts to denying their existence. A further analysis of the implications of these events is set out in section 4.3 below.

4.2.3 Engagement with LGBTIQ+ NGOs

NGOs have carry a prominent role in drawing the attention of the African Commission to violations of the African Charter, bringing communications on behalf of individuals, monitoring states' compliance with the Charter, among others.³¹

Prior to the work of the African Commission, an NGO forum is held. The NGO Forum is a space where many African NGOs, as well as international organisations, meet and discuss specific thematic issues.³² The NGO forum does not discriminate between human rights NGOs that can participate in the forum. Particular themes discussed at the NGO forum are submitted to the African Commission as resolutions and

²⁸ International Justice Resource Center 'African Commission bows to political pressure, withdraws NGO's observer status' <https://ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/> (accessed 20 October 2021).

²⁹ Of the 9 NGOs that were considered for observer status, only CAL was rejected; Activity report (n 20 above) para 30.

³⁰ Viljoen (n 3), 267.

³¹ African Commission on Human and Peoples' Rights 'Non-governmental organisations' <https://www.achpr.org/ngos> (accessed 22 October 2021).

³² R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 110.

observations, of which some are adopted in its own forum and included its activity reports.³³ In its 28th activity report,³⁴ mention was made on existing reports of increased intimidation, harassment and homophobic attacks directed at people of different sexual orientation. Resolution 275 adopted by the African Commission was purely informed by the work of LGBTIQ+ organisations, and its adoption was a consideration of the work done by LGBTIQ+ organisations at the African Commission.

The African Commission allows issues related to LGBTI rights to be raised in session. In its 30th activity report³⁵ the Commission mentioned that it had received concerns relating to sexual minorities.

The Commission has also asked NGOs to prepare a paper on LGBTI rights.³⁶ Commissioners have also met NGOs in this regard.³⁷ This is in addition to the possible interaction between NGOs and special rapporteurs on various cross-cutting human rights issues involving the rights of gender and sexual minorities.

However, it is possible to assume the resentment that the decision to withdraw CAL's observer status has created among not only organisations advocating for the rights of gender and sexual minorities, but also other civil society organisations with regard to believing in the strength of the African human rights system.³⁸ This has created a sense of disempowerment and loss of confidence and regard in the power and independence of the African Commission to carry out its mandate to promote and protect human rights for all.

4.3 The rights of gender and sexual minorities under the African Commission: Social-political challenges to a progressive inclusion

The above analysis has shown that the African Commission has taken the lead with the passing of a resolution specifically dedicated to gender and sexual minorities'

³³ As above.

³⁴ n 20 above, para 17.

³⁵ African Commission on Human and Peoples' Rights '30th activity report' para 252 EX.CL/717(XX) https://www.achpr.org/public/Document/file/English/achpr49_actrep30_2011_eng.pdf (accessed 22 October 2021).

³⁶ African Commission on Human and Peoples' Rights '26th activity report' para 13 EX.CL/529(XV) https://www.achpr.org/public/Document/file/English/achpr45eo6_actrep26_20082009_eng.pdf (accessed 22 October 2021).

³⁷ n 18 above, 28.

³⁸ n 13 above.

rights, as well as with engaging in different ways on their issues. This section is set to draw out potential limitations to the work that the Commission has been doing in promoting and protecting the rights of gender and sexual minorities.

4.3.1 Power dynamics and political compliance

The request made by the Executive Council of the AU to the African Commission to withdraw CAL's observer status placed it in a critical position. It is worth highlighting and understanding the power dynamics between these two bodies.

On the one hand, although the Executive Council is the highest second political body. There is no hierarchical relationship between the two bodies, but both bodies are responsible to the AU Assembly. On the other hand, the African Commission was established under the African Charter as an organ to promote and protect human and peoples' rights in Africa.³⁹ Among a number of characteristics, commissioners must be impartial and have competence in matters of human and peoples' rights.⁴⁰ This is way sufficient to assert that commissioners had taken enough time to evaluate the re-application of CAL's observer status. One last particular aspect is that the African Commission operates through its secretariat, which is funded by the AU Assembly.

The Executive Council's request therefore placed the African Commission in two positions: (i) failure to comply with the Executive Council's directives meant not only a loss of funding, but also a loss of political support for the elections, knowing the influence the Executive Council could have on the AU Assembly; (ii) compliance with them would result in a backlash from civil society organisations, a loss of confidence in their personal capacity to serve, and an infringement on their independence.

It is worth noting the complexity of the situation when monitoring mechanisms are established and maintained by states that are monitored and held accountable by the same monitoring mechanisms.⁴¹

³⁹ African Charter on Human and Peoples' Rights (African Charter) (1986), article 30.

⁴⁰ As above, article 31.

⁴¹ Centre for Human Rights University of Pretoria 'Press statement: African Court rejects Centre for Human Rights and CAL request, leaving political tension within AU unresolved' 6 October 2017 <https://www.chr.up.ac.za/news-archive/2017/1272-press-statement-african-court-rejects-centre-for-human-rights-and-cal-request-leaving-political-tension-within-au-unresolved> (accessed 24 October 2021).

Even if the African Court rejected the advisory request, it is the view of the writer to notice that no grounds of legitimacy or legality can be invoked to justify the way in which an organ tasked to 'consider reports' would question the decision of another organ for which it is not hierarchically responsible.

4.3.2 African morality and traditional values

The notion of gender and sexual minorities remains a controversial and rather complex subject, highly linked to the Western world,⁴² and is still qualified as an irrelevant issue requiring minimal or no attention⁴³ in the African context. In such a context, but also in the absence of a concise definition of what African values and traditions are, the simplest choice is to refer to what is easily understandable. The reference in the African Charter to the family as the guardian of morals and traditional values recognised by the community,⁴⁴ as well as to the historical tradition and values of African civilisation,⁴⁵ could be interpreted as an affirmation of the position of those who believe that homosexuality is a Western import and that recognition of their rights to be part of the 'African community' would bring about its end.

It is arguable that the concept of morality itself is much nuanced and that it does not constitute a set. As an example, polygamy could be accepted in a culture and not necessarily in another. Besides, gender and sexual minorities have long existed and are still existing and no African civilisation has already disappeared because of their existence.

Scholars, such as Murray *et al*,⁴⁶ retrace the existence of same-sex sexual relations and non-binary genders in traditional and pre-colonial Africa. Restrictive laws on consensual same-sex sexual acts were introduced by colonial masters. As these sexual acts were not intended to procreation or social alliances as the only dimensions where sexual morality would feat, they were seen as a sin and would therefore be

⁴² South African Institute of Race Relations 'LGBTQ rights in Sub-Saharan Africa: Perspectives of the region from the region' (2019) 4 <https://irr.org.za/reports/occasional-reports/files/lgbtq-rights-in-sub-saharan-africa.pdf> (accessed 23 October 2021).

⁴³ 'Uganda's Speaker of Parliament blasts efforts to protect LGBT refugees' *MambaOnline* 31 March 2018 <https://www.mambaonline.com/2018/03/31/uganda-speaker-parliament-blasts-efforts-protect-lgbt-refugees/> (accessed 23 October 2021).

⁴⁴ n 39 above, article 18(2).

⁴⁵ As above, Preamble.

⁴⁶ SO Murray *et al* (ed) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (2021) XV.

restricted.⁴⁷ This is further proven by the fact that the same laws remained in force long after the colonial era.

Tamale in placing African culture in a context argues that what is often called African morality or traditional values is the result of a construction and a (re)interpretation by former colonial authorities in collaboration with African male patriarchs that have now become the dominant culture.⁴⁸ As Chanock points out, a re-appropriation by the political elite of postcolonial Africa has relied on a culturalism which dismissed anything outside the dominant cultural frameworks as part of the legacies of colonialism, and that nothing that hints at colonisation should be accepted again.⁴⁹ While reaffirming the existence of sexual and gender minorities in pre-colonial Africa, Ngwena, when referring to inclusive Africanness, mentions sexuality as being understood not for its sameness, but for its relational and non-hierarchical difference and for its capacity to evolve and take new forms.⁵⁰

Denial of the rights of gender and sexual minorities on the basis of African morality and traditional values is simply a violation of the principle of non-discrimination set forth in the African Charter, and leads to (i) hiding behind national laws to justify the institutionalised violence faced by gender and sexual minorities; (ii) denying their dignity as human beings capable of bearing important responsibilities; and (iii) limiting their potential as human beings to exercise and enjoy the most fundamental rights on an equal basis with others.

Mention should be made on the diversity of the notion of gender and sexual minorities across the continent. It is the view of the writer to assert that African morality and traditional values – beyond the fact that this is a broad concept – should constitute a case by case appreciation, especially as the African Charter mentions duty to mutual respect and tolerance in its provision.⁵¹

⁴⁷ O Phillips 'Constituting the global gay: Issues of individual subjectivity and sexuality in Southern Africa' in D Herman & C Stychin (eds) *Sexuality in the legal arena* (2000) 9.

⁴⁸ S Tamale 'The right to culture and the culture of rights: a critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 51.

⁴⁹ C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) 242.

⁵⁰ As above, 208.

⁵¹ n 38 above, article 28.

Today, the notion of family is no longer reduced to a father, a mother and children. The notion of family includes, among others, single-parent families; young heads-of-households among which gender and sexual minorities are part of, due to the change in current societies,⁵² thus emphasising a need for the African value system and African family values to take into account current realities.

4.3.3 Majority morality

In *Legal Resources Foundation v Zambia*,⁵³ the African Commission has set a precedent on limitation of rights based on morality in asserting that morality does not refer to popular will defining what is and is not acceptable in the public interest.

The African Commission has special rapporteurs on various human rights issues that undermine the promotion and protection of human and peoples' rights across the continent. By adopting Resolution 275, the Commission asserted that violence against people based on their real or perceived sexual orientation and gender identity and expression is also an area of concern. The fact that no special rapporteur on the rights of gender and sexual minorities has never been appointed undermines in a way the Commission's promotional and protective mandates on the rights of gender and sexual minorities.

4.3.4 Religious beliefs

In some countries, such as Nigeria and Mauritania, where Sharia law is applied, gender and sexual minorities can be sentenced to death.⁵⁴ This is an important example that religion can be a limitation on the rights of gender and sexual minorities. Church sermons are still based on biblical scriptures to condemn gender and sexual minorities,⁵⁵ even though the current Pope has declared himself to be non-judgmental.⁵⁶

⁵² R Sharma 'The family and family structure classification redefined for the current times' *J Fam Med Primary Care* (2013) 2(4) *Journal of Family Medicine and Primary Care* 310.

⁵³ *Legal Resources Foundation*, para 69.

⁵⁴ ILGA World 'State sponsored homophobia report - Global legislation overview update' (2020) 38 https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf (accessed 23 October 2021).

⁵⁵ The Holy Bible, King James version, Leviticus 18:22; Leviticus 20:13.

⁵⁶ 'Pope Francis: Who am I to judge gay people?' *BBC* 29 July 2013 <https://www.bbc.com/news/world-europe-23489702> (accessed 24 October 2021).

Africa is a continent where religion plays an important role. It is still a struggle to reconcile faith with the rights of gender and sexual minorities. The notion of gender and sexual minorities is extremely approached with sexual lenses, making it against religion, which makes difficult any approach with a human rights lens.⁵⁷ Conformity to religious, moral or cultural norms becomes a *sine qua non* condition for demanding respect for human rights.

4.4 Conclusion

This chapter assessed the legal aspect of the extent to which the work done by the African Commission has been inclusive of the rights of gender and sexual minorities. There is no doubt about an avenue of the inclusion of the rights of gender and sexual minorities within the scope of work of the African Commission. But quite a number of limitations are still there. The research has touched on the most relevant ones that limit progressive inclusion of gender and sexual minorities' issues within the scope of work of the African Commission and analysed them. Other limitations arise from them. The analysis has concluded that the independence of the African Commission is at stake when it comes to gender and sexual minorities' rights.

⁵⁷ Jjuuko (n 25) 263.

CHAPTER 5: SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter provides a brief summary of the research. It outlines the research question and establishes the main findings. It provides a conclusion and makes recommendations.

5.2 Summary of findings

This research sought to examine the extent to which the African human rights system has been inclusive of the rights of gender and sexual minorities within its normative and institutional frameworks. The research focused particularly on the work of the African Commission as it is the body with significant work on promoting and protecting the rights of gender and sexual minorities.

The research was intended to respond to the following sub-questions:

1. What are the normative and institutional frameworks of the African human rights system?
2. What has been the approach of these norms and institutions of the African human rights system to gender and sexual minorities' issues?
3. To what extent has the approach of the African human rights system, particularly the African Commission on Human and Peoples' Rights (the African Commission), been inclusive of gender and sexual minorities in realising their rights?

The research has come to the following findings:

First, the research found out that even if the African human rights system is the youngest of all three regional human rights systems, it has given consideration to individual rights, peoples' rights, as well as to both states' and individuals' duties compared to its two counterparts. Moreover, its founding instrument, the African Charter, has a particular aspect that distinguishes it from other regional human rights treaties: its main features are in consideration of the lived realities of African people.

Second, the research has shown that whereas the African Commission has been proactive in promoting and protecting the rights of gender and sexual minorities, the other

bodies in the African human rights system have barely engaged with their rights. The African Court has made it hard for two NGOs with observer status to get an advisory opinion. One would then question the right to get justice before the African Court. Furthermore, only one case regarding the rights of gender and sexual minorities has ever been brought to the Commission and it was withdrawn. One would also be fair in admitting that the system has rarely been tested with cases concerning gender and sexual minorities' rights.

Third, the research has also found that the independence of the African Commission has been compromised. This poses a serious threat on its future engagement with civil society organisations or individuals seeking justice before the Commission.

Lastly, the research found out that some principles on the basis of which discriminatory laws still exist are outdated. These principles are contained in what are perceived to be African traditional and family values and morality by the political elite, and do not reflect the realities experienced by African people.

5.3 Conclusion

In view of the findings above, the following conclusions are made:

The African Commission should be commended for the enabled environment set and the lead taken in promoting and protecting the rights of gender and sexual minorities. Quite a rich jurisprudence has been established. It is now the role of other human rights institutions within the African human rights system, such as the African Children's Rights Committee, to follow the lead and be pro-active in advancing the rights of gender and sexual minorities within their scope.

There is an urgent need for the African Commission to work on getting back its independence. In doing so, it will get back the trust invested in it, not only from individuals and NGOs seeking justice for violations of human rights, but also from the whole regional and international community. In this regard, it is submitted that the AU Assembly should put more trust in the competence, the independence, and the impartiality of the people it elects.

A point has been made about the concept of morality, and that it is in no way meant to infringe on the rights of the minority. It is submitted that there is no such a thing as

African traditional and family values if the essence of these values are not meant to reinforce mutual respect and tolerance. Regardless of the assumptions surrounding gender and sexual minorities, the fact is that they are also part of the African continent and rights-holders. People, all around the world, regardless of their difference, have the duty to find a common ground and live together.

5.4 Recommendations

Based on the findings and conclusions outlined above, the following recommendations are submitted as worthy of consideration and possible implementation by the following individuals or organizations:

5.4.1 The AU Assembly

The request from the Executive Council of the AU is a proof that there has been politicisation of the issue of gender and sexual minorities. An inclusive dialogue on the rights of sexual minorities in Africa should take place under the lead of the AU and would include various key stakeholders, such as experts on human rights; religious people; health practitioners; politicians; commissioners; and most importantly, members of the LGBTIQ+ community in Africa who would open up about their struggles as human beings without any judgment or threats, and in total respect, dignity, and tolerance.

The AU Assembly should instruct all its political organs to refrain from interfering in the affairs of the African Commission, unless it affects its mandate to promote and protect human rights. But here again, the AU Assembly would be the only one competent to make a decision.

5.4.2 Other human rights institutions within the African human rights system

It is imperative that all human rights institutions build on the jurisprudence set forth by the African Commission on advancing the rights of gender and sexual minorities. An understanding should be drawn from the fact that human dignity is a prerequisite to the right to have rights, and that dignity must be at the core of the recognition of the rights of gender and sexual minorities.

5.4.3 LBGTIQ+ activists and NGOs

To recognise the work done so far by the African Commission, and to use the African Commission and its special mechanisms to promote and protect the rights of gender and sexual minorities.

To take ownership of the struggle for the promotion and protection of the rights of gender and sexual minorities, and challenge national discriminatory laws in local courts and tribunals by using the jurisprudence set forth by the African Commission.

5.4.4 The media

Media can play a significant role to allow for more space towards freedom of expression. There must be more promotion of awareness campaigns done to fight against discrimination on the basis of real or perceived sexual orientation and gender identity. For instance, *Mauritius Broadcasting Cooperation*¹ which is a national media engage on various topics relating to gender and sexual minorities in Mauritius. This kind of activity from media encourages citizens to be better educated on the rights of gender and sexual minorities.

5.4.5 Educational institutions

At educational level, there must be more engagement from the Ministry of Education in collaboration with the Ministry of Health and that of Gender Equality. There must be special sessions at schools, both primary and secondary, to educate students on tolerance and acceptance on fragmented gender and sexual identities. A good initiative to this recommendation would be to build genderless toilets at schools.

5.4.6 Policy-makers

Politicians should be more open to talk about sexual minorities rights. There is a need to give more legitimacy to gender and sexual minorities in most African countries that have not yet done so. South Africa can be used as a model that other countries can look upon. South Africa is one of the most tolerant countries across the continent when

¹ 'Anti-LGBT demonstrations: Cardinal Maurice Piat and the Council of Religions react' trans *MBC 6* June 2018 <https://mbcradio.tv/article/vid%C3%A9o-manifestations-anti-lgbt-le-cardinal-maurice-piat-et-le-conseil-des-religions> (accessed 24 October 2021).

it comes to recognition of gender and sexual minorities. For instance, in its Constitution, South Africa includes both sex and gender making no distinction between the two. In fact, it is the only African country which provides for protection for both sex and gender.² Furthermore, the adoption of the Alteration of Sex Description and Sex Status Act 49 of 2003 has proved South Africa's commitment and support towards gender and sexual minorities.³

Word count: 18 988 (including footnotes).

² Constitution of South Africa No. 108 of 1996, article 9(3).

³ Alteration of Sex Description and Sex Status Act 49 of 2003.

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