


Towards More Effective Protection of Sexual Minorities under the African Human Rights System (A Subset of the African Union Treaty System)

Lazola Nomkala* 

LLB LLM

University of Johannesburg 
Johannesburg, South Africa

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Summary

This discussion explores the limitations and potential of the African Human Rights System, specifically as a subset of the African Union (AU) treaty framework in advancing protections for sexual minorities. It firstly outlines the institutional architecture of the system, including the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights. The paper then examines the current legal and normative protections available to sexual minorities within this framework, highlighting progressive developments alongside systemic shortcomings. Through detailed case studies of Uganda, Ghana, and Nigeria, the article documents the lived realities of sexual minorities and the persistence of individual as well as state-sponsored discrimination and violence, despite the existence of continental human rights instruments. The paper goes further to conduct a comparative analysis with the European Union and the Organization of American States, identifying effective jurisprudential and institutional practices that promote and protect sexual minority rights in those regions, with the goal of borrowing best practices. Finally, the discussion concludes with a set of

* Junior Legal and Compliance Officer, BCom (Law), LLB (University of the Western Cape).

practical recommendations to improve the African Human Rights system's response to the rights of sexual minorities. These include strengthening enforcement mechanisms, clarifying legal standards within the African Charter, increasing engagement with civil society actors, and fostering political will amongst member states of the African Union. Ultimately, the article argues that a more inclusive and enforceable approach is essential for the African Human Rights System to fulfil its mandate of universal human dignity and equality.

Keywords: Sexual minorities; Kito cases; Civil Society; African values; Discrimination

1. Introduction

Sexual minorities are subject to grave human rights violations in Africa. These violations will be articulated in this paper. For purposes of this discussion, sexual minorities will be characterised as those belonging to lesbian, gay, bisexual, trans, and queer communities (LGBTQ+). As proclaimed in the Constitutive Act of the African Union (AU), the Union was formed (amongst other things) to promote and protect human and people's rights.¹ More comprehensively the Constitutive Act expresses that one of the objectives of the AU will be to promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights ("African Charter") as well as other relevant human rights instruments.² The Constitutive Act of the AU further expresses that the Union shall function in accordance with the principle of respect for the democratic principles, human rights, rule of law and good governance.³ As previously alluded to, the African Charter is the key human rights instrument of the AU, as well as the former Organisation of African Unity (OAU).⁴ Thus the African human rights framework, which is a subset of the AU treaty system that deals exclusively in the promotion and protection of human rights, is firmly grounded in the African Charter. This subset

1 The Preamble and Articles 3 and 4 of the Constitutive Act of the African Union (2000/2001).

2 Art 3 of the Constitutive Act of the African Union.

3 Art 4 of the Constitutive Act of the African Union.

4 Preamble of the African Charter on Human and Peoples' Rights.

will be the focus of this discussion as it relates to the human rights protections awarded to sexual minorities regionally.

True to its form and inception, the African Charter prohibits discrimination. Specifically, article 2 of the African Charter provides that every individual shall be entitled to the enjoyment of the rights and freedoms as recognised and guaranteed in the African Charter without a distinction of any kind.⁵ This Article lists the prohibited grounds for discrimination, particularly regarding race or ethnic group. The list is non-exhaustive on account of the use of the term "...or other status".⁶ There is no express provision, however, calling for the protection of sexual minorities in the African human rights framework.

This paper will holistically analyse the consequences of this omission as well as any other gaps in the compliance mechanism of this framework that hinder the protection of sexual minorities. The contribution considers the following questions: What are the shortcomings of the AU treaty system in providing for the protection and promotion of sexual minorities? To answer this main question the following questions must be discussed: first, what are the current protection mechanisms that provide for the protection of sexual minorities? Second, have these protective mechanisms adequately protected sexual minorities? And, finally, there will be a comparative analysis on how sexual minority rights are protected in other regional human rights frameworks. The purpose of this analysis is to provide for best practices that may be implemented to better protect and promote the human rights of sexual minorities. The aim of the paper is to explore the extent that the conventions and compliance mechanisms of the AU treaty system provide protection for sexual minorities in Africa. Second, the paper seeks to investigate and draw inspiration from best practices implemented in other regional human rights frameworks, namely, the European Union (EU) and the Organization of American States (OAS). Then finally, the paper

5 Art 2 of the African Charter on Human and Peoples' Rights.

6 Namwase, Jjuuko and Nyarango "Sexual minority rights in Africa: What does it mean to be human?" in Namwase and Jjuuko (eds) *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (2017) 6.

offers possible recommendations that can strengthen the protection of sexual minorities.

2. Background of the African Union (AU) treaty system

The African Charter came into force on 21 October 1986.⁷ Upon its commencement, the Charter became one of the most widely accepted treaties, having been ratified by 54 African states (with the exclusion of Morocco).⁸ To ensure compliance with the provisions of the African Charter, the African Commission on Human and People's Rights (African Commission) as well as the African Court on Human and People's Rights (African Court) were established.⁹ Aggrieved parties may approach the African Court or the African Commission when their rights under the Charter have been violated.

The function of the Commission is to interpret the provisions of the African Charter and ensure that there is sufficient protection of human and people's rights on the continent.¹⁰ The Commission will interpret the African Charter upon the request of a state party, an organisation that is recognised by the African Union (AU) or an institution of the AU.¹¹ The Commission sets out in achieving this protective mandate by investigating allegations filed by non-governmental organisations (NGOs), state parties or individual citizens.¹² The Charter makes provision for the Commission to consider all relevant international law principles and judgments when making its decisions.¹³

The African Court was established by article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and People's Rights.¹⁴ The purpose

7 Centre for Human Rights *Guide to the African Human Rights System* (2021).

8 African Union "State Parties to the African Charter" available at <https://achpr.au.int/en/states> (17-06-2023).

9 Art 30 of the African Charter on Human and Peoples' Rights, 1981; art 1 of the Protocol to the African Charter on Human and Peoples' Rights, 1997.

10 Arts 45 (2) and (3) of the African Charter on Human and Peoples' Rights, 1981.

11 Art 45(3) of the African Charter on Human and Peoples' Rights, 1981.

12 Arts 48 and 55 of the African Charter on Human and Peoples' Rights, 1981.

13 Art 60 of the African Charter on Human and Peoples' Rights, 1981.

14 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

of the African Court is to ensure that there is compliance with the Charter and to enhance the protective mandate of the Commission.¹⁵ Its activities are regulated by its Rules of Procedure.¹⁶ Similarly to other regional court systems, the Court enjoys contentious and advisory jurisdiction. It enjoys contentious jurisdiction in that it may make decisions concerning the interpretation and application of the Charter.¹⁷ The court may also, upon request, provide a legal opinion on a matter concerning the Charter or any other relevant human rights instrument,¹⁸ including United Nations treaties that the respective states have ratified. Decisions handed down by the African Court of Human Rights are binding on the parties in the matter.¹⁹

3. Shortcomings of the AU treaty system in providing protection for sexual minorities

The gaps in the AU treaty system to provide protection for sexual minorities are both legally and politically driven. The African Charter provides for the rights that African people may enjoy, while the African Court and the African Commission are the focal bodies that interpret those rights and as far as possible ensure that there is compliance with those rights. This is not to say, however, that no other international law instrument may be consulted when determining whether a human rights violation has occurred. True to this, article 60 of the African Charter expresses that other conventions and protocols of the AU treaty system as well as the United Nations (UN) may be used as purposive guidance when determining whether a human right has been infringed.²⁰ In the absence of an express

15 Art 2 of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, 1998.

16 'A Guide to the African Human Rights system' (2021) *Pretoria University Press* (PULP); see also The African Court on Human and Peoples' Rights Rules of Court.

17 Art 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

18 Art 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

19 Art 30 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998; see also arts 27 and 28(2) of the Protocol.

20 Art 60 of the African Charter on Human and Peoples' Rights, 1981.

provision calling for the protection of sexual minorities, article 60 is of particular importance, as it allows the African Commission and African Court to better protect sexual minorities that experience human rights violations.

Prior to engaging with the shortcomings of this human rights framework, there must be a discussion on how the current protection mechanisms provide for the protection of sexual minorities. In *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Communication 295 of 2004) [2012] ACHPR 8, the African Commission interpreted non-discrimination in article 2 of the African Charter to include the ground of “sexual orientation”.²¹ Furthermore, the African Commission passed a resolution 275 “Protection against Violence and other forms of Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity”.²² The resolution interprets the scope of non-discrimination under article 2 of the African Charter to include the grounds of sexual orientation,²³ while also placing a duty on states to protect sexual minorities from human rights violations.²⁴ The Guidelines on Combating Sexual Violence and its Consequences in Africa, specifically article 4, which provide that the non-discrimination principle should be applied to all, irrespective of their sexual orientation, identity, and gender expression, to name a few listed grounds.²⁵ These guidelines further denote that states have an obligation to prevent sexual violence, including homophobic discrimination and stereotypes based on gender identity.²⁶ The African Commission has also issued guidelines on the training of law officials. In these guidelines the African Commission has expressed the view that African governments should protect individuals who

21 Namwase, Jjuuko and Nyarango (n 6) 6.

22 African Commission on Human and Peoples’ Rights 2020 report; see also Preamble of African Commission on Human and Peoples’ Rights Resolution 275 ‘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’ (LV) 2014.

23 African Commission on Human and Peoples’ Rights 2020 report (n 22).

24 African Commission on Human and Peoples’ Rights 2020 report (n 22).

25 Art 4 of the Guidelines on Combating Sexual Violence and its Consequences in Africa.

26 Art 7 of the Guidelines on Combating Sexual Violence and its Consequences in Africa.

belong to vulnerable groups, including sexual minorities.²⁷ The special rapporteur on human rights defenders in Africa published a report which called for African states to repeal punitive laws and practices which violated the right to freedom of assembly and association, including those of sexual minorities.²⁸ Moreover, the African Commission stated that the “failure of a state to prevent/respond” to acts of sexual and gender-based violence amounts to torture under article 5 of the Charter.²⁹ The Commission notes that these acts include the psychological as well physical acts committed against victims without their consent, including the “corrective rape” faced by lesbian women and other sexual minorities.³⁰ The African Commission is very clear in this general comment that sexual minorities are prone to the same violent acts faced by victims of gender-based violence. States should, therefore, take effective measures to adequately address these prevalent issues.³¹

The African Commission in its General Comment on Article 4 of the African Charter, articulated in no uncertain terms that the right to life is a foundational human right in international law.³² Further that this right is always recognised as customary international law and a *jus cogens* norm (therefore universally binding).³³ Additionally, the African Commission placed a duty on states to ensure the protection of vulnerable groups that are frequently targeted or at risk including on the grounds listed in article 2 of the African Charter and those

27 Human Rights Watch “African Commission Tackles Sexual Orientation, Gender Identity” available at <https://www.hrw.org/news/2017/06/01/african-commission-tackles-sexual-orientation-gender-identity> (26-06-2023).

28 Ibid.

29 African Commission on Human and Peoples’ Rights *General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)* 2017 (par 57).

30 African Commission on Human and Peoples’ Rights *General Comment No. 4* (n 29) par 57.

31 African Commission on Human and Peoples’ Rights *General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)* 2017.

32 African Commission on Human and Peoples’ Rights, *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)*, 2015.

33 African Commission on Human and Peoples’ Rights, *General Comment No. 3* (n 32).

highlighted in resolutions of the African Commission.³⁴ Thus, any state which sanctions the killing or torture of persons on the grounds of their sexual orientation is committing human rights violations as grounded in the African Charter, international law founding principles as well as other relevant international instruments.

Appreciating that the formation of the AU treaty system was politically motivated³⁵, it is only natural that its enforceability is for the most part dependent on the political will of the AU member states. The AU Executive Council, which is made up of the Foreign Ministers of the respective member states of the Union,³⁶ urged the African Commission to consider “African values” when reviewing observer status.³⁷ In lieu of this, the African Commission stripped the observer status of sexual minorities advocacy group Coalition of African Lesbians (CALs).³⁸ The Commission, in its 73rd ordinary session, refused to grant observer status to three human rights NGOs (Alternative Côte d’Ivoire; Human Rights First Rwanda; Synergia-Initiatives for Human Rights).³⁹ What is even more disappointing than this refusal from the Commission, is the rationale behind it. The Commission commented that there are no express provisions calling for the protection of sexual minorities in the Charter and further enunciated that the NGOs’ advocacy of sexual minorities was not in line with “African values” as enshrined in Article 29(7) of the Charter.⁴⁰ The respective NGOs are now limited regarding the type of protection and advocacy for sexual minorities that they can exercise,

34 African Commission on Human and Peoples’ Rights *General Comment No 3 on the African Charter on Human and Peoples’ Rights: The Right to Life* (Article 4) (18 November 2015).

35 Preamble to the Constitutive Act of the African Union (2000/2001).

36 Art 10 of the Constitutive Act of the African Union (2000/2001).

37 *The Mail & Guardian African Values Under Threat: African Commission Must Defend Them* <https://mg.co.za/thought-leader/2025-06-02-african-values-under-threat-african-commission-must-defend-them/> (14-06-2025).

38 *The Mail & Guardian* (n 37).

39 Human Rights Watch *Statement on African Commission’s Rejection of Observer Status Applications for Three Human Rights Organisations*, available at <https://www.hrw.org/news/2022/12/16/statement-african-commissions-rejection-observer-status-applications-three-human>, accessed (11-08-2023).

40 Human Rights Watch (n 39).

as they are not able use the compliance mechanisms of the African Human Rights Framework.

The omission of sexual minorities forming part of the listed grounds for non-discrimination in the African Charter has created hurdles in achieving protection for sexual minorities. The African Commission has been proactive in limiting such consequences with its interpretation of the non-discrimination in article 2 of the African Charter to include sexual minorities.⁴¹ The African Commission has also made great strides by introducing resolution 275, which places a duty on State parties to promote and protect sexual minorities.⁴² Seemingly however, this progress has been derailed because of the political pressure of regressive voices in the AU. The core issue undermining the compliance mechanisms of the AU is both legal and political. The solution will thus be found in the legal and political spheres.

4. Domestic violations of human rights for sexual minorities

To demonstrate the grave human rights violations experienced by sexual minorities in Africa, three states will be used as case studies (Ghana, Uganda and Nigeria). What follows is a discussion on the regressive laws, as well as political attitude that, in most instances, promotes the violation of the rights of sexual minorities. By the end of this discussion, it will be apparent that the AU treaty system as it stands, has been inefficient in protecting sexual minorities.

4.1 Ghana

More recently, in February 2024, the Ghanaian parliament passed the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill.⁴³ The Bill (certainly one of the most regressive of its kind) criminalises sexual relations amongst sexual minorities as

41 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 28 (ACHPR 2006).

42 African Commission on Human and Peoples' Rights, Resolution 275: 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).

43 Human Rights Watch: *Ghana: President Should Veto Anti-LGBT Bill*, available at <https://www.hrw.org/news/2024/03/05/ghana-president-should-veto-anti-lgbt-bill> (14-06-2025).

well as criminalises the promotion and advocacy of sexual minority rights on the basis that these acts infringe on the “family values” of Ghanaian society.⁴⁴ Pressure from the UN, World Bank and International Monetary Fund delayed the official coming into force of this legislation by way of presidential assent.⁴⁵ Individuals, as well as civil society, were also instrumental in halting the official enactment of the Bill. To this end, private individuals filed legal challenges in the Ghanaian Supreme Court on the parliamentary procedure followed and the constitutionality of the Bill.⁴⁶ To date, the Bill has lapsed.⁴⁷

While the Bill never had any legal force in Ghana, the passing of the Bill alone is indicative of the political climate in Ghana regarding sexual minority rights.⁴⁸ Since the introduction of the Bill back in 2021, the domestic police have raided and shut down a centre designed for sexual minorities.⁴⁹ Moreover, twenty-one sexual minority activists were unlawfully arrested and detained for organising a human rights meeting, on the grounds that they were promoting homosexuality.⁵⁰ The above punitive measures illustrate the myriad of ways in which sexual minorities are violated in Ghana, especially by the state.

4.2 Uganda

The treatment of sexual minorities in Uganda is an extreme example. Uganda’s Anti-Homosexuality Act expressly prohibits and punishes any person engaging in sexual relations with another person of the same sex.⁵¹ The Act is an example of the most draconian anti-

44 Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021 (Ghana), Memorandum; ss 3–6.

45 France24: *Ghana Supreme Court clears path for anti-LGBT law amid human rights concerns*, available at <https://www.france24.com/en/africa/20241218-ghana-supreme-court-clears-path-anti-lgbt-law-human-rights-concerns> (14-06-2025).

46 Citinewsroom “LGBTQ is not natural and I still oppose it – Bagbin”, available at <https://citinewsroom.com/2025/06/lgbtq-is-not-natural-and-i-still-oppose-it-bagbin/> (19-06-2025).

47 Citinewsroom (n 46).

48 Human Rights Watch (n 43).

49 Human Rights Watch (n 43).

50 Human Rights Watch (n 43).

51 Anti-Homosexuality Act, 2023 (Uganda), Preamble.

homosexual laws – the death penalty may even be imposed on anyone convicted of a listed homosexual act.⁵² After its enactment, attacks against sexual minorities have significantly increased. “Defend defenders”, a Kampala based organisation that defends human rights activists reported that within 24 hours of the Ugandan parliament passing the law they identified eight cases of sexual and physical violence against sexual minorities.⁵³ In addition, a coalition of Ugandan sexual minority rights organisations (Strategic Response) documented seventy cases of physical violence against sexual minorities between January and August 2023, coinciding with the inception and passage of the Anti-Homosexuality Act.⁵⁴ While the causal link between the enactment of the Anti-Homosexuality Act and the intensified human rights violations against sexual minorities cannot be proven, the Act coming certainly has not improved the situation in Uganda. Instead, it is in direct contravention of the African Charter, insofar as it sanctions discrimination against sexual minorities.

4.3 Nigeria

In Nigeria, same-sex marriage contracts or civil unions are prohibited.⁵⁵ As provided for in section 5(1) of the Prohibition of Same-Sex Marriage Act, if anyone commits this offence, they may face imprisonment for up to 14 years.⁵⁶ Even an individual who administers or witnesses a same-sex marriage could be liable to 10 years’ imprisonment.⁵⁷ The suppression and violation of sexual minority rights in Nigeria is not only codified law but also administered by state. In October 2023, 76 people were arrested by

52 Anti-Homosexuality Act, 2023 (Uganda), s 3.

53 Human Rights Watch: *They’re Putting Our Lives at Risk: How Uganda’s Anti-LGBT Climate Unleashes Abuse*, available at <https://www.hrw.org/report/2025/05/26/theyre-putting-our-lives-risk/how-ugandas-anti-lgbt-climate-unleashes-abuse> (19-06-2025).

54 Human Rights Watch (n 53).

55 See the Nigerian Same Sex Marriage (Prohibition) Act of 2013.

56 Nigerian Same Sex Marriage (Prohibition) Act.

57 Nigerian Same Sex Marriage (Prohibition) Act.

Nigerian security forces for organising a gay wedding.⁵⁸ Further, in June 2022, a Sharia court ruling convicted three men to stoning to death, for committing same-sex sexual acts.⁵⁹ These are gross violations of the rights enshrined in the African Charter, especially the right to non-discrimination and the right to not be arbitrarily deprived of the right to life.⁶⁰ Attacks on sexual minorities are not only perpetrated by the Nigerian state. In 2023, an estimated 70% of human rights violations on sexual minorities were “kito” cases.⁶¹ 2024 saw 241 recorded instances of assault, 173 instances of blackmail and 28 instances of mob violence.⁶² While these actions were not administered by the state, the state is still responsible regarding its inaction to provide protection to sexual minorities. Instead of enacting regressive laws that violate sexual minority rights, the state should promote their rights and ensure, through education and awareness programmes, that the rights and freedoms contained in the African Charter are respected.⁶³ African states’ duties in terms of the African Charter do not exclude sexual minorities.

5. Comparative study on protections of sexual minorities from different regional human rights frameworks

5.1 *The European Union (EU)*

The European Union’s Human rights framework is one of the most progressive regional frameworks when it comes to the promotion and protection of sexual minorities. This protection mechanism is twofold. Firstly the protection of sexual minorities is codified in key EU treaties and guidelines, making it easier to provide protections for sexual minorities. Article 21 of the Charter of Fundamental Rights

58 Human Dignity Trust: *Nigeria*, available at <https://www.humandignitytrust.org/country-profile/nigeria/> (14-06-2025).

59 Human Dignity Trust (n 58).

60 Arts 2 and 4 of the African Charter on Human and People’s Rights, 1981.

61 Human Dignity Trust (n 58). “Kito” cases refer to the blackmail of sexual minorities through entrapment, see BBC: *The Nigerians lured into a trap and blackmailed for being gay*, available at <https://www.bbc.com/news/world-africa-65560062> (14-06-2025).

62 n 58 above.

63 Art 25 of the African Charter on Human and Peoples’ Rights, 1981.

of the European Union prohibits any form of discrimination based on one's sexual orientation.⁶⁴ Secondly, the EU enjoys rich legal jurisprudence that very clearly sets out the means to which sexual minority rights should be promoted and protected.⁶⁵ In the *Dudgeon v The United Kingdom* case, the European Court on Human Rights (European Court) ruled that the criminalisation of homosexuality was a violation of the right to private life.⁶⁶ The European Court has also in multiple occasions declared that same-sex partners are vested with equal rights as opposite-sex partners.⁶⁷ Furthermore, in the *P v S and Cornwall County Council* case heard in the European Court of Justice (ECJ), the ECJ interpreted an EU Directive on the implementation of the principle of equal treatment of men and women in the workplace.⁶⁸ This was a landmark decision, as the ECJ in this case broadened the scope of the directive to apply to discrimination arising from the gender reassignment of a person.⁶⁹

5.2 *The Organization of American States (OAS)*

The establishment of the OAS was to create an order of peace and justice, to promote their collaboration and strengthen the solidarity of American States.⁷⁰ The OAS has made significant strides of its own in promoting and protecting the human rights of sexual minorities. This is a result of the Inter-American Court system fully stretching out its power when it comes to granting protections to sexual minorities. Specific reference can be made to the landmark decision in the *Atala and Daughters v Chile* case.⁷¹ In this case, the father of a child filed a complaint claiming that his child was at serious risk if she continued to stay with her lesbian mother (Mrs Atala) and her partner. The

64 Art 21 of the Charter of Fundamental Rights of the European Union.

65 *P v S and Cornwall County Council* [1996] ECR I – 2143, Case C-13_94.

66 Namwase, Jjuuko, Nyarango (n 6) 6.

67 Namwase, Jjuuko, Nyarango (n 6) 6; see also *Karner v Austria* (2003) 38 EHRR 528.

68 *P v S and Cornwall County Council* (n 65); see also Article 1 of the EU Council Directive 2000/78/EC (27 November 2000) “establishing a general framework for the equal treatment in employment and occupation”.

69 *P v S and Cornwall County Council* (n 65).

70 Art 1 of the Charter of the Organization of American States, 1967.

71 Rudman “The protection against discrimination based on sexual orientation under the African human rights system” 2015 *African Human Rights Law Journal* 6.

Chilean Supreme Court ruled in favour of the father and held that the child was indeed put in a situation of great risk, which put them in an adverse position in their social environment.⁷² Mrs Atala filed a petition with the Inter-American Commission. The Inter-American Commission and the Inter-American Court both found that Chile violated the right to equality and non-discrimination.⁷³ The case is significant, as the court interpreted article 1 of the Inter-American Convention of Human Rights to include sexual minorities.⁷⁴ Further, in the *Marta Lucia Alvarez Giraldo v Colombia* case, the Inter-American Commission agreed to hear a case which dealt with a decision not to allow intimate prison visits on account of the prisoner's sexual orientation, as doing so would violate the prisoners' right to privacy.⁷⁵ Evidently, judicial decisions have been essential in protecting sexual minorities in the Americas.

6. Recommendations and conclusion

A key take-away of this discussion is that, for a state to progress and protect sexual minority rights, both the letter of the law and political will should be utilised. Superseding its predecessor (the Organisation of African Unity), the AU was established to be the driving force to achieving continental integration.⁷⁶ Through the establishment of its treaty system, peace-building and the protection of human rights are critical in achieving its extensive continental integration.⁷⁷ It has become time for the AU to exercise strong progressive leadership to enhance the protection of sexual minorities on the continent. The AU is empowered by article 22 of its Constitutive Act to impose sanctions on any member state that fails to comply with its decisions and/or

72 Rudman (n 71) 12.

73 Rudman (n 71) 12.

74 *Atala Riffo and Daughters v. Chile* Inter-American Court of Human Rights, Advisory Opinion OC-24/17 (2017).

75 Namwase, Jjuuko, Nyarango (n 6) 6.

76 Babatunde *Transcending Member States: Political and Legal Dynamics of Building Continental Supranationalism in Africa* (2022); see also the Preamble of the AU Constitutive Act.

77 Arts 3(a) and 3(h) of the AU Constitutive Act; see also Babatunde (n 76); see also the Preamble of the AU Constitutive Act.

policies.⁷⁸ Furthermore, the AU is permitted to intervene in states in the case of grave circumstances such as war crimes or crimes against humanity.⁷⁹ Thus, should the situation necessitate, the AU has bite. However, whether the AU is willing to act against the discrimination of sexual minorities is another matter. The Ghanaian speaker of Parliament, in a visit to Uganda, proudly proclaimed that recognition of sexual minorities does not form part of traditional “African values”. He stated that “LGBT is not African. It is not natural, and God did not create it. This is an imposition that we must all resist”.⁸⁰ This is an indication that if any action is to be taken by the AU to progress sexual minority rights, this action needs to be informed by the will of the people.

As demonstrated above, sexual minorities are often “othered” and characterised as a threat to traditional African values. This narrative is largely rooted in colonisation.⁸¹ The introduction of Christianity and Victorian morality sparked the first wave of homophobia.⁸² Regrettably, Western influences from conservative religious groups are still lighting the fire for the spread of homophobia on the continent.⁸³ A recent conference organised by the African Christian Professionals Forum, advocated for the opposition to abortion, sexual minority rights and comprehensive sexuality education.⁸⁴ These kinds of regressive advocacy efforts significantly undermine the strides made by individuals and civil society in advancing the rights of sexual minorities. This emphasises the urgent need for progressive actors to adopt a stronger, more coordinated, and multifaceted approach – one that combines legal, social, and political strategies to counter backlash and sustain momentum for inclusive human rights protections.

78 Art 22(2) of the AU Constitutive Act, see also Babatunde (n 76); see also the Preamble of the AU Constitutive Act.

79 Art 4(h) of the AU Constitutive Act.

80 Citinewsroom (n 46).

81 Namwase, Jjuuko, Nyarango (n 66) 6.

82 Namwase, Jjuuko, Nyarango (n 66) 6.

83 The Mail & Guardian (n 37).

84 The Mail & Guardian (n 37).

In the landmark case, *Letsweletse Motshidiemang v The Attorney-General*, the Botswana High Court decriminalised consensual same-sex sexual acts.⁸⁵ In its decision, the court purposively interpreted the Constitution so that the rights and freedoms (dignity, privacy, liberty, and non-discrimination) contained in the Constitution are extended to sexual minorities.⁸⁶ Furthermore, the court referred to Article 10 of the African Charter on the Rights and Welfare of the Child in making its point that the applicant is entitled to the right to privacy.⁸⁷ Notably, the court relied on the expertise of a prominent human rights advocacy group: Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) in making its decision.⁸⁸ This case is a perfect illustration of the progress that can be made when civil society is engaged in providing protection to sexual minorities.

Moreover, more grassroots-level work needs to be performed in education and advocacy regarding sexual minority rights. Indeed, religious leaders and human rights organisations should champion for the free expression of gender identity and sexuality in society.⁸⁹ Ordinary people need to be convinced of the inherent humanity of sexual minorities, so that governments can be pressured to play a more proactive role in the AU when it comes to realising the rights of sexual minorities. Furthermore, states such as South Africa, Mozambique and Cape Verde, which are the most progressive in their recognition of sexual minority rights, need to lobby the AU to advocate for the protection of sexual minority rights on the continent.

The AU treaty system remains largely ineffective in safeguarding the rights of sexual minorities, because of both legal and political barriers. Foremost, there is the notable omission of an explicit provision in the African Charter on Human and Peoples' Rights prohibiting discrimination based on sexual orientation or gender

85 Esterhuizen "Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curae)*" 2019 *African Human Rights Law Journal* 843.

86 Esterhuizen (n 85) 850.

87 *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curae)* MAHGB-000591-16 (par 121).

88 Esterhuizen (n 85) 857.

89 Ibrahim "LGBT rights in Africa and the discursive role of international human rights law" 2015 *African Human Rights Law Journal* 263.

identity. This legal gap is compounded by the political dominance of conservative voices within the African Union, many of whom actively advocate for the criminalisation of same-sex relationships under the guise of protecting “African values”. Consequently, efforts to advance the rights of LGBTQ+ individuals face both institutional inertia and ideological opposition. Meaningful change will require sustained grassroots advocacy aimed at shifting public perceptions and challenging the notion that sexual diversity is un-African or contrary to African values. Only through this kind of societal transformation can governments be pressured to adopt more progressive stances within the AU and take concrete steps to advance the rights and protections of sexual minorities across the continent.