Sexual minorities and African human rights mechanisms: reflections on contexts and considerations for addressing discrimination

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ABSTRACT: This article uses the *Eric Gitari* cases as springboard for reflecting on the contexts and considerations that African human rights mechanisms should keep in mind as they seek to ensure non-discrimination for sexual minorities, which has faced significant pushbacks. The article explores how human rights mechanisms can establish pragmatic approaches towards ensuring non-discrimination for sexual minorities. It concludes that these mechanisms must not legitimise discrimination against sexual minorities. Sexual minorities must not be urged or expected to give up their agency by shelving or drawing back from making rights-claims on society. Yet, backlash evidenced in the past decade suggests the need for continuous reflection on how they should frame their rights claims.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Minorités sexuelles et mécanismes africains de protection des droits de l'homme: réflexions sur les contextes et considérations pour lutter contre la discrimination

RÉSUMÉ: Cette contribution part des affaires *Eric Gitari* pour réfléchir aux contextes et aux considérations que les mécanismes africains de protection des droits de l'homme devraient garder à l'esprit lorsqu'ils cherchent à garantir le droit des minorités sexuelles à la non-discrimination, un droit qui a fait l'objet d'importants obstacles. La contribution explore la manière dont les mécanismes des droits de l'homme peuvent établir des approches pragmatiques pour garantir la non-discrimination des minorités sexuelles. Elle conclut que ces mécanismes ne doivent pas légitimer la discrimination à l'encontre des minorités sexuelles. Les minorités sexuelles ne doivent pas être incitées à renoncer à leur pouvoir d'action en s'abstenant de revendiquer le respect de leurs droits par la société. Cependant, les réactions négatives observées au cours de la dernière décennie suggèrent la nécessité d'une réflexion permanente sur la manière dont elles devraient formuler les revendications de leurs droits.

KEY WORDS: non-discrimination, sexual minorities, African human rights mechanisms, backlash

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1 INTRODUCTION

Ensuring non-discrimination for sexual minorities in Africa remains mired in policies and laws characterised by extreme social prejudice and stigma. The dangers inherent in arguing against the discrimination of sexual minorities were paradoxically accentuated in February 2023 when Kenya's Supreme Court, in *NGOs Co-ordination Board v EG & 4 Others*[1] determined that limiting persons from associating purely on the basis of their sexual orientation was unconstitutional, and that the prohibition on discrimination in the Constitution of Kenya covers all persons, whether heterosexual, gay, lesbian or intersex. The Supreme Court's decision supported the findings of the Court of Appeal[2] and the High Court,[3] cases to which this article refers collectively as the *Gitari* cases.

The decisions in the *Gitari* cases, which are steeped in the Lockean liberal understanding that equality and autonomy of the individual is universal,[4] prompted a whirlwind of condemnation and recrimination against the Supreme Court and the gay and lesbian community. President Ruto commented that he respected the Court's decision, 'but our culture and religion does not allow same-sex marriages'.[5] The Speaker of the National Assembly remarked that Kenya was deeply religious and that all institutions, including the judiciary, had the duty to uphold, defend and protect public morals.[6] Leaders of various faiths

1 *NGOs Co-ordination Board v EG & 4 Others; Katiba Institute (Amicus Curiae)* [2023] KESC 17 (KLR), http://kenyalaw.org/caselaw/cases/view/252450/ (accessed 14 July 2023).

2 NGOs *Co-Ordination Board v EG & 5 Others* [2019] eKLR, http://kenyalaw.org/caselaw/cases/view/170057/ (accessed 14 July 2023).

3 *EG v NGOs Co-ordination Board & 4 Others* [2015] eKLR.

4 See an explanation of Locke's liberal approach in N Kahn-Fogel 'African law and the rights of sexual minorities: Western universalism and African resistance' in M Ndulo and C Emeziem (eds) *The Routledge handbook of African law* (2022) 407.

5 E Musandi 'Kenya's President criticises court ruling on LGBTQ group' *AP News* 2 March 2023.

6 I Mwangi 'Wetangula says Supreme Court ruling on LGBTQ will lead to unintended consequences' *Capital News* 27 February 2023.

expressed disenchantment,[7] and an application was filed for the Supreme Court to review its decision.[8] Draconian anti-gay legislation was even contemplated, akin to the law most recently enacted in Uganda.[9] At the same time, reports indicated increased threats of or actual violence perpetrated on individuals known as or assumed to be gay or lesbian.[10]

Despite the backlash it raised, the decision of the Supreme Court resonated with judicial determinations in other African states, including Botswana, where the Court of Appeal declared that gay persons had the right to assemble and associate, and that Botswana's refusal to register the Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) as a non-governmental organisation (NGO) was an unjustifiable limitation of its members' rights.[11] The Supreme Court of Eswatini also returned a verdict favouring the registration of Eswatini Sexual and Gender Minorities (ESGM) as a non-profit organisation.[12] African domestic courts also made other determinations protecting lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) persons from discrimination.[13]

In this article I use the *Gitari* cases as a springboard for reflecting on some of the contexts and considerations that African human rights mechanisms, such as the African Commission on Human and Peoples'

7 Eg, see response by Christ is the Answer Ministries (CITAM).

8 In September 2023 the Supreme Court dismissed an application for review of its decision, determining that the application was a disguised appeal from the Court's judgment (Application E011 of 2023).

9 Uganda's Anti-Homosexuality Act 2023 creates offences, including that of homosexuality, punishable by life imprisonment (sec 2); and aggravated homosexuality, punishable by the death penalty (sec 3), https://www.parliament.go.ug/sites/default/files/The%20Anti-Homosexuality%20Act%2C%202023.pdf (accessed 7 September 2023).

10 Eg, NGLHRC reported that abuses against LGBTIQ individuals increased from 78 in January 2023 to 117 in February and 367 in March; A Mersie 'For LGBTQ Kenyans, court win prompts backlash as threats escalate' *Reuters* 20 April 2023.

11 *Attorney General of Botswana v Thuto Rammoge & 19 Others* Civil Appeal CACGB-128-14, https://www.law.utoronto.ca/sites/default/files/documents/reprohealth/lg-botswana_2016_appeal.pdf (accessed 1 August 2023).

12 See 'Supreme Court of Eswatini unanimously finds Registrar's decision on LGBTIQ+organisationunconstitutional', https://www.southernafricalitigationcentre.org/2023/06/16/supreme-court-of-eswatini-unanimously-finds-registrars-decision-on-lgbtiq-organisation-unconstitutional/ (accessed 1 August 2023).

13 In Botswana the Court of Appeal determined that the criminalisation of gay homosexual sex was unconstitutional (*Attorney General v Letsweletse Motshidiemang* Civil Appeal CACGB-157-19), https://www.humandignitytrust.org/wp-content/uploads/resources/2021.11.29-AG-Botswana-v-Motshidiemang.pdf (accessed 1 August 2023). Kenya's Court of Appeal determined that the use of evidence obtained through anal examination of an accused is unconstitutional (*COI & Another v Chief Magistrate Ukunda Law Courts & 4 Others* [2018] eKLR), http://kenyalaw.org/caselaw/cases/view/171200/ (accessed 1 August 2023). Most recently, in October 2023, the Supreme Court of Mauritius declared sec 250 of the Criminal Code, which criminalised same-sex conduct, as discriminatory and unconstitutional (*Abdool Ridwan Firaas Ah Seek v State of Mauritius*), https://www.humandignitytrust.org/wp-content/uploads/2023/10/Judgment-AH-SEEK-.pdf (accessed 23 October 2023); F Viljoen 'Mauritius is the latest nation to decriminalise same-sex relations in a divided continent' *The Conversation* (12 October 2023).

Rights (African Commission), should keep in mind as they seek to ensure non-discrimination for sexual minorities on a continent that stakes claim to essentialist communitarian ideals. I draw on the fact that ensuring non-discrimination for sexual minorities has faced significant pushbacks, manifested most recently in November 2022, when the African Commission, at its 73rd ordinary session, stated that sexual and gender minority rights are not protected in the African Charter on Human and Peoples' Rights (African Charter).[14] Paradoxically, the Guidelines on the Protection of all Persons from Enforced Disappearances in Africa, which the Commission launched during the same session,[15] restate the Commission's long-standing unambiguous affirmation of non-discrimination for LGBTIQ persons. Guideline 2.6 obligates states to ensure that the rights of victims of enforced disappearance are upheld on a non-discriminatory basis, irrespective of grounds including sexual orientation and gender identity.[16]

My reflections address how human rights mechanisms can establish pragmatic approaches towards ensuring non-discrimination for sexual minorities. To the above ends, I agree with Kahn-Fogel that while advocates for African sexual minorities must not abandon their liberal commitments, they should nuance and deploy their arguments more cannily, and sometimes they may need to employ forbearance rather than conspicuous advocacy.[17] My ultimate thesis, however, is that continental (as indeed domestic) human rights mechanisms must not abet compromise to justify discrimination for sexual minorities.

The reflections in this article draw on the insights I gained over a decade as a commissioner at the Kenya National Commission on Human Rights (KNCHR), and as a commissioner for six years at the African Commission. During that time I worked extensively on the rights of LGBTIQ persons, including participating in the preparation of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity,[18] using opportunities offered by the Universal Periodic Review (UPR) to

14 Final Communiqué of the 73rd ordinary session of the African Commission on Human and Peoples' Rights 18 November 2022 para 58, https://achpr.au.int/index.php/en/news/final-communiques/2022-11-18/final-communique-73rd-ordinary-session (accessed 14 September 2023); see also F Viljoen 'LGBTQ+ rights: African Union watchdog goes back on its own word' *The Conversation* 20 March 2023, https://theconversation.com/lgbtq-rights-african-union-watch dog-goes-back-on-its-own-word-197555 (accessed 14 September 2023).

15 Final Communiqué (n 14) para 42.

16 Guidelines on the protection of all persons from enforced disappearances in Africa https://achpr.au.int/en/documents/2022-10-25/guidelines-protection-persons-enforced-disappearances-africa (accessed 1 September 2023).

17 Kahn-Fogel (n 4).

18 'Yogyakarta principles on the application of international human rights law in relation to sexual orientation and gender identity' November 2006, https://www.refworld.org/pdfid/48244e602.pdf (accessed 25 October 2023).

recommend the decriminalisation of homosexual sex in Kenya,[19] spearheading the adoption of African Commission 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',[20] as well as the high points and low points at the African Commission when it first issued and then later withdrew the NGO observer status of the Coalition of African Lesbians (CAL).[21]

The scope of this article is limited to sexual minorities, understood to include lesbian, gay and bisexual (LGB) persons, as distinct from transgender or intersex persons. While the case I am making resonates in many respects as much for transgender and intersex persons as for LGB persons, the realities and priorities of specific subcategories under the LGBTIQ umbrella vary, and overly-generalised and un-nuanced analyses may undermine an understanding of the meaning and essence of anti-discrimination for subcategories covered under the term.

Part 2 of the article draws meanings from the *Gitari* cases for ensuring non-discrimination on sexual minorities at the continental level. Part 3 revisits the conceptual and normative arguments which have been made for and against protecting sexual minorities from discrimination. Part 4 suggests strategic and operational considerations which human rights mechanisms should keep in mind as they endeavour to ensure non-discrimination for sexual minorities. Part 5 concludes the article.

2 IMPLICATIONS OF THE *GITARI* DECISIONS

The genesis of the *Gitari* cases was the refusal of the NGO Coordination Board to reserve names towards the registration of the National Gay and Lesbian Human Rights Commission (NGLHRC), an NGO that would advocate for the rights of sexual minorities.[22] The essence of the determinations in the *Gitari* cases in the High Court, Court of Appeal and Supreme Court[23] were twofold.

19 See 'Accounting for human rights protection under the Universal Periodic Review mechanism: the difference that Kenya's stakeholders made' KNCHR 2011, https://www.knchr.org/Portals/0/InternationalObligationsReports/Accounting_For_Human_Rights_Protection_Under_the_UPR.pdf?ver=2013-02-21-150102-893 (accessed 25 October 2023).

20 See part 4.6 of the article.

21 See part 4.7 of the article.

22 Eg, see A Kirui & A Okoth 'Defending the wretched of the earth: Supreme Court Petition No 16 of 2019; *Non-governmental Co-ordinations Board vs Eric Gitari and others*' *The Platform* Issue 89 June 2023, https://theplatform.co.ke/defending-the-wretched-of-the-earth-supreme-courtpetition-no-16-of-2019-non-governmental-organisations-co-ordination-board-vs-eric-gitari-others/ (accessed 23 October 2023).

23 *Gitari* cases (nn 1, 2 & 3).

First, the right of LGBTIQ persons, as indeed other persons, to associate was guaranteed under article 36 of the Constitution,[24] and the criminalisation of sex against the order of nature in sections 162, 163 and 165 of the Penal Code[25] did not limit the rights of LGBTIQ persons to associate. Their right to associate included the right to form an association regardless of their sexual orientation.[26]

Second, the decision of the NGOs Coordination Board not to reserve the names for the proposed NGO was discriminatory and violated article 27(4) of the Constitution. Specifically, the use of the word 'sex' under article 27(4) of the Constitution referred to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise. The word 'including' in sub-article 4 was only illustrative, and would also comprise freedom from discrimination based on a person's sexual orientation. Interpretation of non-discrimination that excluded people based on their sexual orientation conflicted with the constitutional principles of human dignity, inclusiveness, equality, human rights and non-discrimination.[27]

The ebb and flow of arguments in support of and opposition to the registration of NGLHRC highlight a number of matters relevant to the proceeding reflections.

First, it is patent that courts have become the vanguard for protecting sexual minorities from discrimination. This was noted in the Court of Appeal, when one judge remarked, *obiter* (in passing), on the need for 'the peoples' representatives' in parliament, the executive, county assemblies, religious organisations, the media, and the general populace, 'to engage in honest and open discussions over these human beings'.[28] This reality exists despite pushbacks from public opinion; and is hardly surprising in light of the constitutional rationales for establishing and providing mandates to courts. In the words of the South African Constitutional Court:[29]

> Public opinion ... is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour ... The very reason for ... vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.

Second, though, a question arising is whether or the extent to which bearing that mantle exposes domestic courts and, by extension continental human rights mechanisms, to backlash, and whether that is a hazard of the job which all concerned have to take in their stride, or

24 Constitution of Kenya 2010, Const2010 (kenyalaw.org) (accessed 23 October 2023).

25 Penal Code Cap 63, CAP. 63 (kenyalaw.org) (accessed 23 October 2023).

26 *Gitari* case (n 1) paras 64-65, 72.

27 *Gitari* case (n 1) para 79.

28 *Gitari* case (n 2) judgment of Waki JA.

29 *State v T Makwanyane and M Mchumu* CCT3/94, http://www.saflii.org/za/cases/ZACC/1995/3.html (accessed 6 September 2023).

whether countermeasures exist that all involved may take. At the continental level, genuine concerns have been raised that the ability of the African Commission to function independently in the performance of its mandate has become the target of political backlash, notably from states, the Permanent Representatives Committee (PRC) and the Executive Council.[30]

Third, one of the contentions in the minority determinations in the Court of Appeal posited that rights crystallise only when Parliament enacts legislation: that discrimination on account of sexual orientation has not crystallised into a right in favour of the respondent, and that this may happen only when that right was entrenched into the Constitution or legislated.[31] This contention is a conundrum that supporters of antigay discrimination must keep exploring. Still, the case I am making is that the relevance of the crystallisation argument may not justify the discrimination of segments of society. In any case, no realistic initiative exists to codify protection of LGB persons from discrimination in an international human rights instrument let alone a regional one, and human rights mechanisms including the African Commission have fallen back on soft law instruments to affirm the rights of sexual minorities.

Fourth, the majority and minority opinions in the Supreme Court diverged on the cusp of the living constitutionalism versus originalism theories, that is, on the question of whether to interpret the Constitution as a living and dynamic instrument or whether to see it as a static unadaptable instrument bound by the express intentions of the original drafters.[32] One may, in fact, not overplay this divergence since it is the original drafters of the Constitution that allowed open-ended prohibited grounds of discrimination in article 27 of the Constitution. In any case, the African human rights mechanisms have on multiple occasions used soft-law instruments to interpret human rights instruments such as the African Charter as living instruments.

30 J Biegon 'The rise and rise of political backlash: African Union Executive Council's decision to review the mandate and working methods of the African Commission' 2 August 2018, https://www.ejiltalk.org/the-rise-and-rise-of-political-backlash-african-union-executive-councils-decision-to-review-the-mandate-and-working-methods-of-the-african-commission/ (accessed 14 September 2023).

31 *Gitari* case (n 2), judgment of Nambuye JA.

32 Eg, see *Gitari* case (n 1), judgment of Ibrahim SCJ paras 122, 123; judgment of Ouko SCJ para 218.

3 REVISITING THE CONCEPTUAL AND NORMATIVE DIALECTIC FOR PROTECTING SEXUAL MINORITIES FROM DISCRIMINATION

3.1 Human rights as claims on society

The reflections throughout this article are anchored on a pragmatic, as distinct from abstract, understanding that locates human rights as claims that an individual makes upon society on account of being a human being (the universality principle).[33] This understanding does not undermine the important philosophical principles at the heart of human rights, as articulated with utmost solemnity in the Universal Declaration of Human Rights.[34] Yet, advocacy on sexual minorities has to contend with the welcome fact that the history of human rights is a history of rights claims on society, rights contestations with society and rights conferred by society. This indeed was the case in respect of marginalised groups like women, for example in England, who propelled themselves from chattels in the nineteenth century to people with equal suffrage rights in the twentieth century. Similarly, black South Africans eventually succeeded in their claims against discrimination on the basis of race.[35]

In the above regard, the challenge that confronts activism in Africa is one of closing the circle. While continental and domestic mechanisms and judiciaries gradually recognise LGB persons as rights claimants and rights holders, the letter of the law invariably remains unsupportive of LGB rights – at best providing ambiguous affirmation of their rights while, at worst, specifically denying legal autonomy to them. A consequent often-raised question used to critique anti-discrimination initiatives is whether social norms must precede legal change or whether legal change may spur greater public support for equal LGB rights. One study concludes that ensuring the removal of

33 L Henkin 'Rights here and there' (1981) 8 *Columbia Law Review* 1582. In a similar vein, the concept of the 'struggle approach' of human rights contends that human rights claims may be backed by self-help, and that the notion of universal human rights may justify legitimate resistance to claim those rights; see eg C Heyns 'A "struggle approach" to human rights' in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: a reader* (2006) 15.

34 Universal Declaration of Human Rights United Nations 1948 art 1, https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf (accessed 25 October 2023).

35 This is illustrated by the following statement by Bishop Desmond Tutu, explaining his support for the rights of sexual minorities: 'For me this struggle is a seamless robe. Opposing apartheid was a matter of justice. Opposing discrimination against women is a matter of justice. Opposing discrimination on the basis of sexual orientation is a matter of justice.' 'It is also a matter of love … We all must be allowed to love each other with honour. Yet all over the world, lesbian, gay, bisexual, and transgender people are persecuted. We treat them as pariahs and push them outside our communities. We make them doubt that they too are children of God. This must be nearly the ultimate blasphemy. We blame them for what they are.' DM Tutu *God is not a Christian and other provocations* (2011).

discriminatory laws and the enactment of equal rights for sexual minorities calls for change both in the law as well as in social values, but either legal change or people's beliefs may precede the other.[36] The study cites South Africa of which the Constitution[37] guaranteed equal rights, including for sexual minorities, before the public had accepted the equality of LGB individuals.[38]

3.2 The liberal/communitarian dichotomy

Some critics of the rights of LGB persons argue against the liberal discourse which locates human rights in the individual. Rather, they favour the communitarian discourse that requires the individual to defer to the community.[39] The liberal discourse frames individual rights and liberties, at their simplest, in commanding terms that broach no compromise; while communitarian positions insist that collective social wellbeing trumps individual liberties.[40] Yet, the liberal/communitarian dialectic is not that un-nuanced, and it may be better understood as a continuum in which individuals and communities may be at different points of the spectrum. In fact, contemporary African philosophers, including Mogobe Ramose, Kwasi Wiredu and Kwame Gyekye,[41] generally agree that the continent's cultures evidenced, and to a significant degree still evidence a communitarian or communal character underpinned by a particular view of morality. These philosophers also generally agree that the individual can define personhood by membership of the community only partly, and hence the welfare of the community is as important as the welfare of the individual.[42]

I agree that the libertarian-communitarian divide should not be framed in un-nuanced essentialist terms that broach no bridging possibilities. As Uwazuruike explains,[43] communitarian philosophies hold the middle-ground between the extremes of libertarianism and authoritarianism. It seeks to protect the needs of the community from 'radical individualists' focused on absolute fulfilment of individual rights. It recognises individual human dignity as well as the 'social dimension' of human existence and proposes an agenda to advance commonly held social values without unduly compromising individual rights.[44]

36 J Heymann, A Sprague & A Raub *Advancing equality: how constitutional rights can make a difference worldwide* (2020) ch 6.

37 Constitution of the Republic of South Africa 1996, Government of South Africa, https://www.gov.za/documents/constitution-republic-south-africa-1996 (accessed 25 October 2023).

38 Heymann and others (n 36).

39 See generally the analysis in Kahn-Fogel (n 4).

40 As above.

41 B Hallen *A short history of African philosophy* (2009) 138-143.

42 As above.

43 A Uwazuruike *Human rights under the African Charter* (2020) ch 2.

44 As above.

3.3 The universalist-relativist discourse of human rights

A particular premise for discounting the rights claims of sexual minorities is based on assertions about the particularities of African values, as articulated in the universalist-relativist debate. Universalists contend that human rights are universal and that they apply to each person by virtue of being human irrespective of culture, while relativists contend that purported universal rights are in fact conceptions anchored on Western values.[45]

Mudimbe cites many African values: the idea of community, the principle of harmony between evolving humans and changing nature, and the vision of a unitary universe.[46] Although these values may seem abstract, they formed the basis for canons, for example, of sexual offences in traditional African societies, including adultery, fornication, incest, rape, seduction, homosexual relations, sleeping with a forbidden relative or domestic animal, intimacy between relatives, and children looking at the genitals of their parents.[47] Still, this reflection of one author, writing about traditional Kikuyu culture, is overly-general:[48]

> Any form of sexual intercourse other than the natural form, between men and women acting in a normal way, is out of the question. It is considered taboo even to have sexual intercourse with a woman in any position except the regular one, face to face ... Owing to these restrictions, the practice of homosexuality is unknown among the Gikuyu. The freedom of intercourse allowed between young people of opposite sex makes it unnecessary, and encourages them to acquire experience which will be useful in married life.

Strict cultural relativists insist that belief systems are culturally specific and incomprehensible to one another, and that the notion of universal human rights is a mere ruse for imperialist assertion of Western hegemony. [49] They eschew same-sex relations as an unacceptable form of cultural imperialism.[50] Yet, as Uwazuruike has pointed out, it is telling that many African constitutions are generally modelled after Western constitutions instead of adopting the often-touted African traditional communitarian system.[51] Indeed, the again often-repeated paradox is that African states such as Kenya turned the criminalisation of homosexual sex from a law received from England into an indigenous norm appropriated as the cultural *status quo*.[52]

45 J Donnelly 'Cultural relativism and universal human rights' reprinted in Heyns and Stefiszyn (n 33).

46 VY Mudimbe *The invention of Africa: gnosis, philosophy, and the order of knowledge* (1988) 106.

47 JS Mbiti *African religions and philosophy* (1969) 147-148.

48 J Kenyatta *Facing Mount Kenya* International and Pan-American Copyright Conventions 155-156.

49 D Etone *The Human Rights Council: the impact of the Universal Periodic Review in Africa* (2020) 9.

50 As above.

51 Uwazuruike (n 43).

52 CM Silungwe 'On "African" *legal theory: a possibility, an impossibility or mere conundrum?*' in O Onazi (ed) *African legal theory and contemporary problems* (2014) 17.

This is the context within which moderate cultural relativists contend that culture is amenable to reform and influence and that it is, therefore, possible to attain a common culture of universal human rights.[53] Moderate relativists seek to use culture as a tool for formulating rights in a way that bodes acceptance and implementation.[54] Etone argues that cross-cultural dialogue can in this context be harnessed 'to socialise African states through a process of acculturation, by formulating certain rights which are culturally "radioactive", such as gay rights, in a way that would be more acceptable and incrementally implemented within the African society'.[55]

This approach resonates with Ibhawoh, who makes the case for using the notion of vernacularizing human rights to bridge the universalism-relativism debate. Vernacularising human rights describes 'the process by which universal human rights norms become grounded in local communities ... the interaction between established international human rights principles and local norms to produce hybridised legal and normative frameworks for human rights protection'.[56] It is 'a deliberate process of investing universal rights with local meanings that can potentially strengthen human rights protection and contribute to the normative application of global human rights'.[57] As I have noted elsewhere, human rights research and advocacy should investigate how the vernacularisation of human rights may be made operational to mediate contentious issues such as the rights of sexual minorities.[58]

No doubt, the quest for what An-Na'im refers to as 'decolonising human rights'[59] is important. Yet, as he explains, that deconstruction cannot be a justification for violating the rights of some individuals: the decolonisation of human rights should reverse the colonial domination of the norms, institutions and processes for protecting human rights so that all aspects of the system conform with the rationale of equality of all human beings in dignity and rights.[60] While approving the universality of human rights, he challenges the understanding of the universality of human rights as the uniformity of human rights: he sees the international human rights system as inherently neo-colonial because it is premised on the uniformity of a set of norms and institutions proclaimed by a self-select group of colonial powers that presume to speak for humanity on a global scale.[61] I agree with An-

53 Etone (n 49) 10.

54 As above.

55 Etone (n 49) 11.

56 B Ibhawoh *Human rights in Africa* (2018) 225-226.

57 As above.

58 L Mute 'Protecting the mandate and autonomy of the African Commission on Human and Peoples' Rights: leveraging the roles of national human rights institutions' CIAC 2021, https://achprindependence.org/wp-content/uploads/2021/07/NHRIs-ACHPR_EN.pdf (accessed 14 September 2023).

59 AA An-Na'im *Decolonising human rights* (2021) 20.

60 An-Na'im (n 59) 20-21.

61 As above.

Na'im that the protection of human rights is a means to the end of ensuring respect for the dignity of each and every human being without any requirement or qualification other than being human.[62]

3.4 The case for respecting difference

Masolo[63] has essayed on the duplicity of agents of traditional values who in the instance of sexuality and identity dismiss gay and lesbian rights as against African values and traditions. He highlights the subjectivity of intolerance for beliefs and practices different from our own, explaining that difference and discord or similarity and agreement are representations of a very normal world. He makes the case that reason is a better way than violence to settle disputes in respect of political justice and individual morality. He queries why any person should want another one to be locked up for any amount of time or have their other entitlements unequally given to them, let alone be killed, based only on the fact that they are different. He concludes that customary norms and practices

> can be re-evaluated and subsequently modified, replaced, or discarded altogether if it is found that the values they served can be achieved differently or that the costs associated with them (such as the physical pain associated with different customary rituals) are either no longer necessary or cannot be effectively minimized at a (historically later) time when elimination or at least the minimization of pain has become a value.[64]

It is in this sense that morality is derived from people's customs, values and traditions. Morals, therefore, vary from community to community and from time to time,[65] and states must be wary of enforcing moral codes by law as unimpeachable and immutable African truths. That is why in fact the law does not criminalise all conduct that is perceived as immoral. Ngwena has indeed questioned the majoritarian political, cultural and religious voices on the continent which employ unfair democratic terms to vilify the morality of sexual minorities and to judge and sanction them. He queries the 'injustice of a dominant cultural narrative on sexuality, which is officially privileged and denies the legitimacy of benign alternative sexualities … (which) disenfranchises sexual minorities of equal citizenship but also sets them up as just targets for oppression, vilification and harm'.[66]

62 An-Na'im (n 59) 21.

63 DA Masolo *Self and community in a changing world* (2010) ch 4.

64 As above.

65 It has indeed been pointed out that African morality has in contemporary times become compromised by loss of communal living and values in preference to values of individualism and capitalism where the household has replaced the family as known in African traditional society (PO Olapegba & O Ayandele 'African identity, morality and wellbeing' in E Chitando & E Kamaara (eds) *Values, identity and sustainable development in Africa* (2022) 99).

66 C Ngwena *What is Africanness? Contesting nativism in race, culture and sexuality* (2018) ch 6.

3.5 The African Charter

On the face of it, testament to the enduring value of the norms established in the African Charter[67] in relation to sexual minorities can be inferred from instances where domestic courts have cited the Charter while making determinations on the rights of LGB persons.[68] At a more fundamental level, how does the universalist-relativist debate play out in the African Charter? What is the spirit behind the letter of the Charter?

The eminent Gambian jurist, Hassan B Jallow, recalls the wisdom that one of the fathers of the African Charter, President Leopold Sedar Senghor of Senegal, imparted on the drafters of the Charter: that the Charter be not one for the 'right of the African man'; that mankind was one and indivisible and the basic needs of man were similar everywhere; that there was neither frontier nor race when the freedoms and rights attached to human beings were to be protected; that Africa should not give up thinking for itself; that Africans should neither copy nor strive for originality for the sake of originality; that effectiveness and imagination needed to be shown; and that Africa needed to be inspired by its beautiful and positive traditions.[69]

Jallow's account of the drafting of the African Charter, in which he participated, is quite insightful. Regarding contestation around the drafting of one preambular paragraph, he recalls that there was general consensus that human rights and freedoms were universal and that caution should be exercised to avoid extracting the African from that universal setting. Yet, there were nonetheless certain aspects of human rights which were closely culture-bound, and it was important to place rights in the context of African values and traditions.[70] Jallow explains that this was the basis on which the following preambular paragraph was agreed: 'Considering the virtues of their historical traditions and the African values of civilisation which must inspire and characterise their reflections on the conception of human rights'.[71] Following more contestation, this further paragraph was agreed: 'Recognising on the one hand that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights'.[72] Jallow then concludes that while the inherent nature of fundamental rights was recognized, it was

67 African Charter on Human and Peoples' Rights OAU 1981, https://au.int/en/treaties/african-charter-human-and-peoples-rights (accessed 24 October 2023).

68 This is so in the instance of the *Gitari* cases where the High Court cited art 10 of the African Charter on the right to association (n 3) paras 79-80.

69 HB Jallow *The law of the African (Banjul) Charter on Human and Peoples' Rights (1988-2002)* (2007).

70 As above.

71 African Charter Preamble.

72 As above.

acknowledged that the reality of collective rights must necessarily involve a guarantee of fundamental human rights.[73]

I agree that this is the context within which provisions in the African Charter on the duties of individuals should be understood. As Kahn-Fogel points out, the Charter showcases African communitarian norms that, unlike other international human rights instruments, qualifies the rights it enunciates with duties which individuals owe to their families, communities and state.[74] It indeed is significant that the Charter qualifies two of the duties it establishes with a requirement for tolerance. First, it establishes that individuals have the duty to 'preserve and strengthen positive African cultural values' in their 'relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society'.[75] Second, the Charter affirms that individuals have the duty to respect and consider their fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.[76] As well, the Preamble to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) recognises that women have a crucial role in preserving African values, based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy.[77] This means positive African values must be consistent with international human rights standards, for example, on the basis of which states are mandated to end harmful traditional practices that negatively affect human rights.[78]

Ultimately, Africans both at the continental and domestic levels must do a far better job of figuring what African values entail at the normative level and how they fit into the dynamic of non-discrimination for LGB persons.

4 TOWARDS NON-DISCRIMINATION FOR SEXUAL MINORITIES – SOME STRATEGIC AND OPERATIONAL CONSIDERATIONS

This part suggests strategic and operational considerations that continental human rights mechanisms should keep in mind as they endeavour to ensure non-discrimination for sexual minorities. In

73 Jallow (n 69).

74 Kahn-Fogel (n 4).

75 African Charter art 29(7).

76 African Charter art 28.

77 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, AU 2003, https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa (accessed 15 September 2023).

78 A Johnson 'Article 17: Right to a positive cultural context' in A Rudman, C Musembi & T Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023) 365.

framing my arguments, I do not for one moment presume that I can provide watertight or holistic solutions since that in fact is not possible.

4.1 To litigate or not to litigate

As already highlighted, LGB activists have lodged anti-discrimination claims in a number of domestic courts across Africa.[79] At the continental level, only one opportunity to determine matters on LGB rights has come before the African Commission. In *Courson v Zimbabwe*[80] the author alleged violations in relation to the criminalisation of consensual adult homosexual sex in Zimbabwe, which was being enforced with the encouragement of the President and the Minister for Home Affairs. However, this communication was not considered on the merits since it was withdrawn by the author.[81]

In this regard, a fundamental question arising is whether LGB rights claimants should be constrained to wait, as it were, in the lobbies of domestic or continental human rights tribunals, while society acclimatises itself to receive their claims. A recent edited volume uses the term 'law-fare' as an analytical concept describing long-term battles over heated social and political issues, where actors on different sides employ strategies using rights, law and courts as tools and arenas.[82] This term has, however, also been used by some to connote negativity and disapproval – that an LGB or other individual would deign to participate in 'law-fare' – the way one should not become a warmonger by instigating warfare. In that sense, the question that is thrust in the face of sexual minority activism is scornful that they dare to claim their rights through litigation in the courts; and that, in any case, such litigation, even where successful, simply invites or exacerbates backlash.[83]

The question of if and when sexual minorities may institute legal proceedings to affirm their rights or push back against violations is a complex one. Following promulgation of Kenya's 2010 Constitution, LGB groups and their allies reflected deeply on whether and when to litigate. Achieving consensus was difficult, and some organisations struck out on their own to the deep chagrin of some of their peers who were apprehensive about backlash from litigation.[84] Writing about Canada, Porter aptly articulates the difficult choices that poor (or

79 See part 1 of the article.

80 *Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995).

81 As above.

82 A Jjuuko and others (eds) *Queer lawfare in Africa* (2022) 1.

83 G Warigi 'Taking gay activism to the streets could have a boomerang effect' *Nation* 22 February 2014.

84 For analysis on the use of lawfare to advance the rights of LGBTIQ persons in Kenya, see NW Orago, S Gloppen & M Gichohi 'Queer lawfare in Kenya: shifting opportunities for rights realisation' in Jjuuko and others (n 82) 107.

vulnerable) people have to make in using litigation to lodge social rights claims, when he wrote the following:[85]

> For most other groups and individuals in society, it is taken for granted that when serious infringements of human dignity occur, it is legitimate to look to the courts for redress … The discrimination that poor people suffer … is viewed as the product of individual moral failure or of legitimate political decision-making … A double burden is thus imposed on poor people as rights claimants, under which they must first defend a claim to occupy adjudicative space before their rights claims will be given a meaningful hearing. Entrenched discriminatory attitudes towards poor people reinforce the notion that they ought not to be in court in the first place, and that they inappropriately apply a human rights framework to issues of personal or moral failure, complex social policy, 'legitimate' democratic choice, or governmental largesse.

It is, I suggest, far too easy to offer oversimplified critiques that LGB litigants should not go to court since their success or indeed lack of success invites more dangers upon the community. Ultimately, I suggest, there is no good time not to go to court: How long may one wait? What guarantees must one have before they litigate? Could one ever bank a guarantee cast in the iron of a homophobe or perpetrator? In this sense, backlash from successful litigation should be contextualised as part of the necessary ongoing contestations that rights claimants experience from time to time.

4.2 To cherry-pick or not – by operation of the principle of anti-subordination

Quite often, one encounters professional colleagues who, while acknowledging that human rights are universal and unimpeachable, at the same time dismiss or denigrate the rights of LGB individuals, as I wrote in a poem, 'in a rippling puff of haze'.[86] Speaking in 2010, Mutua borrowed from the principle of anti-subordination to argue that it is futile and hypocritical for a human rights advocate to fight against one form of discrimination while at the same time supporting another.[87] Human rights activists, he noted, should stand against all forms of oppression: one may not fight sexism while supporting homophobia or racism. Human rights actors, he said, may also borrow from an instrumentalist approach by recognising that it is in their interests to protect against all human rights violations because the moment one oppressed group is vanquished the oppressor will seek out the next group, 'and this could be you'.[88]

It would be unconscionable if, say, a women's rights activist advocated for the criminalisation of homosexual sexual conduct on the

85 B Porter 'Claiming adjudicative space: social rights, equality and citizenship' in M Young and others (eds) *Poverty, rights, social citizenship and legal activism UBC Press* 2007, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470368 (accessed 15 September 2023).

86 LM Mute 'Coming out yet?' in LM Mute *Under the rubble lies my love* (2011).

87 Drawn from summary of lectures by Prof Makau Mutua on 16 February 2010 at the Palacina Conference Centre and the Alliance Française (on file with author).

88 As above. Also see M Mutua 'Sexual orientation and human rights: putting homophobia on trial' in S Tamale (ed) *African sexualities: a reader* (2011) 452.

basis of moral-based definitions while on the contrary advocating rape or defilement to be criminalised on the basis of consent-based definitions. In 2012, when KNCHR published the report of its public inquiry on sexual and reproductive health rights,[89] I recall how a leading women's rights organisation invited a member of the Commission to introduce the publication, but with the caveat that she should not speak about the inquiry's findings on sexual minorities.[90]

4.3 The power of rhetoric

Rhetoric can push back on the worst manifestations and impacts of heteronormativity. Heteronormativity focuses on the cultural, social and political institutions that codify, privilege and reward monogamous marital heterosexuality and gender conformity, and vilify and punish non-heterosexualities and perceived gender transgression.[91] The heteronormative paradigm pervasive on the continent is an uncompromising ideology that employs the 'sexual hierarchy' to typify heterosexual sex as good and homosexual sex as bad.[92] This ideology has deployed multiple tools to protect the 'norm' (read sameness) and vanquish the 'abnormal' (read difference).

Rhetoric is a double-edged sword: it has the power to affirm; it too holds the power to negate. Rhetoric can deliver sage messages; but it can also communicate crass messages that dis-inform and disempower the already vulnerable. Victims of human rights violations have to live with the consequences of the rhetoric expressed by members of tribunals before which they seek justice. Hence, human rights tribunals need to deploy rhetoric with sagacity: to affirm the most vulnerable in society – whether they be sexual minorities, persons with disabilities or indeed women.

Canny employment of wit can communicate contentious messaging more effectively than more conventional prose. Take this quite witty introduction of one of the majority opinions in the *Gitari* Court of Appeal decision, providing an eloquent summation of the arguments that anti-LGB rights opponents make:[93]

> Shorn of the scary apparitions and postulates put forward by the appellant and its supporters in the event this appeal is not allowed, such as: 'homosexuality will be legalised'; 'decadence, immorality and disease will strike our nation'; 'same sex marriages will be the order of the day'; 'sexual abuse of young people will dramatically increase'; 'murderers and other miscreants in society will be at liberty to register Associations'; 'floodgates will be opened for paedophiles'; 'Christian and

89 'Realising sexual and reproductive health rights in Kenya: a myth or reality?' KNCHR 2011, http://www.knchr.org/portals/0/reports/reproductive_health_report.pdf (accessed 12 September 2023).

90 Drawn from author's recollections.

91 Cited in A Currier & JM Cruz 'Civil society and sexual struggles in Africa' in E Obadare (ed) *The handbook of civil society in Africa* (2014) 337.

92 BK Twinomugisha 'Beyond juridical approaches: what role can the gender perspective play in interrogating the right to health in Africa?' in F Viljoen (ed) *Beyond the law: multidisciplinary perspectives on human rights* (2012) 60.

93 *Gitari* case (n 2) judgment of Waki JA.

> Islamic values will be obliterated'; 'societal moral values will be shredded'; 'cultural rights will be trampled upon'; 'there is an international conspiracy to promote gay rights'; this appeal is really about the place of our Constitution in our lives.

4.4 Vagaries of addressing claims on sexual minorities in multimember institutions

Multimember institutions tend not to confront difficult or contentious subjects head-on: they would rather prevaricate and defer difficult discussions instead of addressing them with candour, for fear of tempting institutional rapture. This indeed was my experience, both at KNCHR and the African Commission. At KNCHR, commissioners would choose the subjects they preferred to engage with, and would keep mum or stay away when otherwise unpalatable conversations were taking place. Approaches were no different at the African Commission where an air of hesitancy prevailed each time members had to address their minds on the rights of LGBTIQ persons. On a particularly memorable occasion at the 26th extraordinary session of the Commission held in 2019, commissioners sat spellbound while a number of intersex persons made a powerful and compelling case explaining the human rights violations they faced on an ongoing basis. Members of the Commission were genuinely appreciative of the information and context that the speakers provided. Still, commissioners declined to adopt a tabled resolution on the rights of intersex persons, and indeed it took at least three more years before the Commission adopted Resolution 552: Resolution on the promotion and protection of the rights of intersex persons in Africa in March 2023.[94]

Obviously, KNCHR and the African Commission were staffed by colleges of colleagues drawn from diverse ideological and regional backgrounds. Yet, statute and the human rights calling demanded that human rights should act as the lowest common denominator for commissioners and staff. This is how we explained the phenomenon in our reflective publication on a decade of KNCHR's work (2003-2011):[95]

> The Commission experienced deep internal struggles relating to its identity. At one level, commissioners and staff were in a sense supposed to be detached from their personal subjective value considerations so as to execute objectively on the institution's programmes. The truth of the matter of course was that at the end of the day, commissioners and staff were human beings with families, constituencies and personal convictions. How the institutional sphere might be balanced with the private sphere remained a matter of great pertinence … the Commission's engagement with the rights of sexual minorities was particularly difficult because of arising moral considerations or religious persuasions. Colleagues had to keep reminding each other to remain faithful to a minimum human rights agenda and not to specific personal agendas. Then again, the law that established the

94 Res 552 'Resolution on the promotion and protection of the rights of intersex persons' ACHPR 2023, https://achpr.au.int/en/adopted-resolutions/resolution-promotion-and-protection-rights-intersex-persons (accessed 16 September 2023).

95 'It's hard to be good: the work, the wins and challenges of the Kenya National Commission on Human Rights (July 2003-August 2011)' KNCHR 2012, https://www.knchr.org/Portals/0/GeneralReports/Its_Hard_to_be_Good.pdf?ver=2013-02-21-152535-707 (accessed 15 September 2023).

Commission required that commissioners should be recruited from the broadest diversities of the country. Did this mean that each commissioner should carry the agenda from his or her diversity and insist on it? Subsequently, a fair dose of pragmatism was needed to temper the idealism which on its own could never have facilitated protection and promotion of human rights.

4.5 'Otherness' narratives

Members of human rights mechanisms have quite often used 'otherness' narratives, expressed or implied in formal and informal discussions. In my experience, it was not uncommon for colleagues to fall back onto the narrative of 'the other', with phrases such as 'those people' and 'they think' or 'they want' peppering contributions on mandate-execution in relation to LGB persons.

'Otherness' narratives dismiss differences and seek to assimilate the powerless and vulnerable 'other'. As I noted in an address to a regional colloquium of judges: 'Human rights tribunals must eschew "otherness" narratives. Otherness narratives concretise heteronormative (or indeed sexist or ablest) values that disempower and dehumanise the most vulnerable in society by inviting them to agree to become assimilated by the "normal" majority.'[96]

4.6 African Commission Resolution 275 and its significance

In 2014, at the 55th ordinary session of the African Commission held in Luanda, I recall careful edits and reedits of what became 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').[97] I also recall long tense minutes when I presented the Resolution and argued for its adoption, and I was never so elated as when the Resolution was adopted unanimously, since after all I was a neophyte who had just recently joined the Commission.

Why did we adopt Resolution 275 when ordinarily the Commission was quite reticent to speak about sexual orientation and gender identity? Certainly, prior to and after 2014, the Commission raised concerns on the rights of sexual and gender minorities. Indeed, it is my argument that the African Commission has on a number of significant occasions been judicious in employing its general comments,

96 L Mute 'Justice for sexual minorities matters: keynote address at regional judicial colloquium on protection against discrimination on the basis of sexual orientation, gender identity, expression and sex characteristics and eradication of harmful SOGIE-conversion practices in Eastern and Southern Africa' Cape Town 25-27 April 2023.

97 African Commission 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', https://achpr.au.int/en/adopted-resolutions/275-resolution-protection-against-violence-and-other-human-rights-violations (accessed 14 September 2023).

guidelines, resolutions, studies, statements, communications and constructive dialogues with states towards ensuring non-discrimination for LGBTIQ persons. It affirmed that LGBTIQ persons are protected from discrimination under the African Charter in respect of their rights: to be free from torture or ill-treatment;[98] the right to redress;[99] to be protected from HIV;[100] to form associations and to assemble;[101] to exercise their right to freedom of expression and access to information;[102] to exercise economic, social and cultural rights including the right to access water;[103] the rights of intersex persons;[104] and so forth.

The inexorable hand of history, including advocacy by LGBTIQ activists,[105] had guided the Commission to the point of adopting Resolution 275. For a few Commissioners, the resolution provided the segue to enable the Commission to address human rights violations of LGBTIQ persons directly under the African Charter. This was particularly significant for me in my capacity as the Chairperson of one of the Commission's Special Mechanisms, the Committee for the Prevention of Torture in Africa.[106] Relatedly, while some commissioners were not inclined to affirm the general rights of

98 As above.

99 General Comment 4: The right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment (article 5) ACHPR 2017 para 20, https://achpr.au.int/index.php/en/node/893 (accessed 15 September 2023). Indeed, in January 2023 the Country Rapporteur of Kenya issued a statement on the death of a queer activist whose killing appeared to be a hate crime, stressing everyone's entitlement to protection of life and the integrity of person regardless of their actual or imputed sexual orientation or gender identity, https://achpr.au.int/en/news/press-releases/2023-01-07/press-statement-tragic-murder-edwin-chiloba-kenya (accessed 14 September 2023).

100 General Comment 1 on arts 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2012 para 4, https://achpr.au.int/en/node/855 (accessed 15 September 2023).

101 'Guidelines on freedom of association and assembly in Africa' ACHPR 2017 guideline 80 https://achpr.au.int/index.php/en/soft-law/guidelines-freedom-association-and-assembly-africa (accessed 15 September 2023); 'Guidelines for the policing of assemblies by law-enforcement officials in Africa' ACHPR 2017 Guideline 7.2.8, https://achpr.au.int/en/soft-law/guidelines-policing-assemblies-law-enforcement-officials-africa (accessed 15 September 2023).

102 'Declaration on principles of freedom of expression and access to information in Africa' ACHPR 2019, https://achpr.au.int/en/node/902#:~:text=The%20Declaration%20establishes%20or%20affirms,to%20express%20and%20disseminate%20information (accessed 1 September 2023).

103 'Guidelines on the right to water in Africa' ACHPR 2019 Guideline 5.2, https://achpr.au.int/en/node/904#:~:text=The%20objective%20of%20the%20Guidelines,reports%20to%20the%20African%20Commission (accessed 15 September 2023).

104 Resolution 275 (n 94).

105 See BD Nibogora 'Advancing the rights of sexual and gender minorities under the African Charter on Human and Peoples' Rights: the journey to Resolution 275' in E Durojaye, G Murugi-Mukundi & C Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa* (2021) 171.

106 For an analysis on the work of the Committee for the Prevention of Torture in Africa, see LM Mute 'Ensuring freedom from torture under the African human rights system' in M Evans & J Modvig (eds) *Research handbook on torture: legal and medical perspectives on prohibition and prevention* (2020) 227.

LGBTIQ persons under the Charter, they recognised the intersectional character of human rights as established in the Charter; and they found it acceptable to affirm, for example, that the Charter prohibited torture under all circumstances, even where it happened to LGBTIQ individuals;[107] and that states should end all acts of violence and abuse, whether committed by state or non-state actors.[108]

Did Resolution 275 make a difference in the exercise of rights by sexual and gender minorities? While the scope of this article does not allow for in-depth reflections, one of my more rewarding moments as a member of the Bureau of the African Commission, from 2017 to 2019, was when our Secretariat intimated to us that a state, Malawi, had requested the inclusion on the agenda of the 65th ordinary session of the Commission a panel on Resolution 275. The panel included representatives from the government of Malawi and the Malawi Human Rights Commission, and it discussed progress and challenges of implementing Resolution 275. Resolution 275 expectedly is also the harbinger for many more soft law instruments on LGBTIQ rights, now including Resolution 552 on the rights of intersex persons which the Commission adopted in 2023.

4.7 The dialectic around the grant of observer status of the Coalition of African Lesbians

In April 2015, at its 56th ordinary session, the African Commission (exceptionally by vote) that the Chairperson (again exceptionally) called in a public session, granted observer status to the Coalition of African Lesbians (CAL).[109] Later, in June, the Executive Council of the AU requested the Commission

> to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard, REQUESTS the ACHPR to review its criteria for granting Observer Status to NGOs and to withdraw the observer status granted to the Organisation called CAL, in line with those African values.[110]

As I have explained elsewhere,[111] the Commission deflected the withdrawal request from 2015 to 2018, reporting severally to the policy

107 Drawn from personal notes of the author.

108 Resolution 275 (n 97).

109 Exceptionally, during that grant of observer status, commissioners voted in a closed meeting by majority in favour of the grant. Yet, the Chairperson, Kayitesi Sylvie Zainabo, called another vote in a public session, which again confirmed the grant by majority vote. Later, commissioners expressed deep dissatisfaction in the unconventional way the Bureau had handled the process, which had vitiated collective responsibility and also invited undue and unnecessary public recrimination on some commissioners. Minutes of closed meeting of 2 May 2015 (on file with author).

110 Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights Doc.EX.CL/921(XXVII) para 7 Decisions and Recommendation of the 27th ordinary session of the Executive Council (7-12 June 2015, Johannesburg, South Africa) Doc. EX.CL/Dec.873-897(XXVII), https://au.int/en/decisions-0 (accessed 8 August 2023).

111 Mute (n 58).

organs of the AU that the matter was *sub judice* since two NGOs (CAL and the Centre for Human Rights) had applied for an advisory opinion on the matter before the African Court on Human and Peoples' Rights.[112] In June 2018 the Commission and the PRC undertook a joint retreat to resolve matters of mutual concern between the Commission, the PRC and states.[113] Robust and constructive engagements over two days resulted in decisions for the better execution of the Commission's human rights mandate.[114] The retreat, however, also became a forum for the PRC's leadership to browbeat the Commission specifically into withdrawing CAL's NGO observer status, and it was to the great credit of commissioners that they did not baulk in the course of the retreat under that unrelenting pressure. The Commission finally caved in when the policy organs effectively issued an ultimatum: that the withdrawal should happen no later than 31 December 2018.[115]

Ultimately, a confluence of factors resulted in the withdrawal of CAL's observer status. Internally, some of the actions by the Commission were based on the need to proceed on the basis of consensus: my sense as a member of the Bureau was that a vote on the status of CAL, such as that the Commission should call the Executive Council's bluff by not withdrawing the grant of observer status, whether won or lost, would be pyrrhic, that it would amount to a vote of confidence in the Bureau. It was a lost opportunity that the Commission did not itself file a request for an advisory opinion before the African Court, as it could have done. As a matter of strategy, the Commission did not even file submissions before the Court on the Advisory Opinion sought by the Centre for Human Rights and CAL.

112 In due course, the Court declined to issue the requested opinion, for want of jurisdiction. It is also possible that the Court did not wish to become embroiled in the minefield of expressing an opinion on an organisation covering the question of lesbian persons. See African Court on Human and Peoples' Rights *Request for Advisory Opinion by Centre for Human Rights and Coalition of African Lesbians* 002 2015 Advisory Opinion, 28 September 2017, http://www.african-court.org/en/images/Cases/Judgment/002-2015-African%20Lesbians-%20Advisory%20Opinion-28%20September%202017.pdf (accessed 14 September 2023).

113 Decision on the African Commission on Human and Peoples' Rights Doc. EX.CL/1058(XXXII) para 4, Decisions of the 32nd ordinary session of the Executive Council (25-26 January 2018, Addis Ababa, Ethiopia) EX.CL/ Dec.986-1007(XXXII), https://au.int/en/decisions/decisions-thirty-second-ordinary-session-executive-council (accessed 8 August 2023).

114 'Conclusions of the joint retreat of the Permanent Representatives' Committee of the African Union and the African Commission on Human and Peoples' Rights 4-5 June 2018, Nairobi, Kenya' (on file with author).

115 Decision on the 45th Activity Report of the African Commission on Human and Peoples' Rights.Doc. EX.CL/1127(XXXIV) para 2, Decisions of the 34th ordinary session of the Executive Council (7-8 February 2019, Addis Ababa, Ethiopia) EX.CL/Dec.1031-1056(XXXIV), https://au.int/en/decisions/decisions-thirty-fourth-ordinary-session-executive-council (accessed 8 August 2023).

Despite the gravity of this setback, the Commission had already affirmed the rights of LGBTIQ persons in its 43rd Activity Report to the Policy Organs,[116] and Commissioner Soyata Maiga, the Chairperson, had made eloquent oral responses at the 35th ordinary session of the Permanent Representatives' Committee in January 2018 on the protection of the rights of sexual *and gender* minorities under the Charter. My hope was that these affirmations would be important for foiling immediate violations while also setting the stage for actions in posterity.

Finally, on this matter, I should note that African advocates and allies for LGBTIQ rights quite often do not fully appreciate the delicate nuance that human rights bodies navigate as they seek to affirm the rights of sexual minorities. I indeed had long, difficult conversations with senior officials of international organisations expressing to us in the Bureau their great disappointment on the withdrawal of CAL's NGO observer status.

4.8 The value of high-level convenings

Finally, the value of high-level inter-institutional interactions on generic or thematic human rights issues cannot be gainsaid as forums for knowledge sharing and problem solving.[117] The African Commission participated in two trilateral thematic dialogues on sexual orientation, gender identity and intersex related issues. The other participants of the convenings were the Inter-American Commission on Human Rights (IAHRC) and United Nations (UN) human rights mechanisms. The first dialogue was hosted by the Commission in

116 The Commission indicated and clarified the following: (1) The decision on the grant of observer status was properly taken in terms of the Commission's established processes and criteria. (2) The Commission was mandated to give effect to the African Charter under which everyone is entitled to the rights and subject to the duties spelt out in the Charter, and the Commission had the duty to protect those rights in line with the mandate entrusted to it under article 45 of the Charter, without any discrimination because of status or other circumstances. (3) While fulfilling this mandate, the Commission remained alive to and mindful of the imperative not to encroach on domestic policy matters that fall outside its purview. (4) The Commission would continue to scrutinise the notion of 'African Values' within the framework of its mandate to interpret the African Charter; 43rd Activity Report of the African Commission on Human and Peoples' Rights June-November 2018 submitted to the AU policy organs in accordance with article 54 of the African Charter, https://achpr.au.int/en/documents/activity-reports (accessed 11 September 2023).

117 Engagements between the African Commission and the United Nations Special Procedures were concretised in 2012 under the Addis Ababa Roadmap; see 'Dialogue between Special Procedures Mandate Holders and of the UN Human Rights Council and the African Commission on Human and Peoples' Rights Roadmap' 17-18 January 2012, Addis Ababa, Ethiopia, https://www.ohchr.org/sites/default/files/Documents/HRBodies/SP/SP_UNHRC_ACHPRRoad_Map.pdf (accessed 12 September 2023).

Banjul in November 2015,[118] and the second was hosted by the IACHR in Washington DC in March 2018.[119] The two dialogues offered safe spaces where participating commissioners, special procedures mandate holders, and members of treaty bodies could discuss and share good practices on the quite-often difficult content and process issues they encountered in their human rights endeavours in relation to sexual and gender minorities.

The second trilateral dialogue agreed on the imperative of eradicating violence and discrimination based on sexual orientation and gender identity, and that the principle of universality was best implemented when the universal perspective was included in regional work. It explored the intersection of sexual orientation and gender identity and expression with other human rights concerns such as violence against women, the situation of human rights defenders, the rights of children, prevention of torture, killings, deprivation of liberty, freedom of expression, and economic, social and cultural rights.[120] This intersectional approach was consonant with the African Commission's approach of finding non-contentious segues for addressing human rights violations and abuses of sexual and gender minorities.

5 CONCLUSION

The case I have made in this article is that Africa cannot by dint of philosophy or law sustain an essentialist approach that insists on denying the humanity of LGB persons, an approach that disavows and disempowers some of its citizens. I have argued that African human rights mechanisms should use the continent's normative and institutional wherewithal to chart a course that protects all persons from discrimination. Moving forward, this discourse requires the African Commission to fortify its anti-discrimination framework that it has been erecting using soft law instruments and other strategies. I have shown that progressive continental and domestic human rights tribunals have had to navigate difficulties, sometimes unsuccessfully, in their bids to ensure the rights of LGB persons. I have argued that the human rights indignities and dehumanisation that LGB individuals face is the diminution of their agency as human beings. Sexual minorities must not be urged or expected to give up their agency by shelving or drawing back from making rights claims on society. Yet,

118 See 'Ending violence and other human rights violations based on sexual orientation and gender identity: a joint dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations' (2016), https://www.pulp.up.ac.za/legal-dialogues/ending-violence-and-other-human-rights-violations-based-on-sexual-orientation-and-gender-identity-a-joint-dialogue-of-the-african-commission-on-human-and-peoples-rights-inter-american-commission-on-human-rights-and-united-nations (accessed 10 September 2023).

119 See 'Joint thematic dialogue on sexual orientation, gender identity and intersex related issues final report and annexes' 26-28 March 2018, Washington DC.

120 As above.

backlash evidenced in the past decade suggests the need for continuous reflection on how LGB persons should frame their rights claims.