

STRATHMORE LAW JOURNAL

VOLUME 2, NUMBER 1, AUGUST 2016



Strathmore University

Press

Strathmore Law School
Madaraka Estate, Ole Sangale Road
P.O. Box 59857 00200
Nairobi - KENYA
Tel. + 254-703-034601
editor.sup@strathmore.edu
www.press.strathmore.edu
www.law.strathmore.edu
Twitter: @strathmorelaw

The sexual minority rights conundrum in Africa: Contextualising the debate following the Coalition of African Lesbians' application for observer status before the African Commission

ƒ Osogo Ambani*

Although the African human rights legal system boasts of many treaties,¹ the most relevant in the context of sexual minority rights² is the African Charter on Human and Peoples' Rights (African Charter),³ which agreement enjoys near unanimous ratification by members of the African Union (AU).⁴ As Vincent Nmeielle justly noted, 'the African Charter is the primary normative instrument of the African human rights system.'⁵ It thus may easily be regarded as the 'regional bill of rights.'

The African Charter recites almost all the entitlements enunciated by the international bill of rights.⁶ In fact, a casual glance at the content of the African

¹ Other major treaties of the African Union include: *Convention Governing Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45; *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003, CAB/LEG/66.6; and *African Charter on the Rights and Welfare of the Child*, 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

² By sexual minority rights is usually meant, lesbian, gay, bisexual, transsexual, and intersex (LGBTI) rights.

³ 27 June 1981, 1520 UNTS 217.

⁴ Murray R and Viljoen F, 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' 29 *Human Rights Quarterly* (2007), 87.

⁵ Nmeielle VOO, *The African human rights system: Its laws, practice, and institutions*, Martinus Nijhoff, the Hague, 2001, 84. Cees Flinterman and Catherine Henderson agree with Nmeielle that 'in Africa, the protection of individual and collective human rights is centered on the African Charter on Human and Peoples' Rights.' See, Flinterman C and Henderson C, 'African Charter on Human and Peoples' Rights' in Hanski R and Suksi M, *An introduction to the international protection of human rights: A textbook*, 2ed, Institute for Human Rights, Turku, 1999, 387.

⁶ *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171; and *International Covenant on Economic, Social*

* LLD (Cand), LLM (UP), LLB (UoN), Lecturer, Strathmore Law School.

Charter and the Universal Declaration of Human Rights (UDHR) does not show any real rift.⁷ Ouguergouz was therefore spot-on when he wrote that,

[t]he two documents contain a comparable catalogue of rights including not only the civil and political rights dear to the liberal tradition, but also the economic, social and cultural rights, which are, if anything, socialist in spirit.⁸

Because the African Charter carries all generations of human rights, it may properly be described as a montage of human rights. It is, in fact, this aspect that makes the treaty original.⁹ Part of the rich catalogue of rights in the African Charter is a non-discrimination clause identical to the one in the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic Social and Cultural Rights (CESCR). This cardinal provision reads:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.¹⁰

There is also provision for an equal protection stipulation entailing that ‘every individual shall be equal before the law’ and ‘every individual shall be entitled to equal protection of the law.’¹¹ Compliance with the Treaty is monitored by twin institutions, the African Commission on Human and Peoples’ Rights (African Commission)¹² and the African Court on Human and Peoples’ Rights (African Court).¹³ The African Commission has the mandate to promote human and peoples’ rights and ensure their protection in Africa.¹⁴ The role of the African Court is to complement the Commission’s protective mandate.¹⁵

and Cultural Rights, 16 December 1966, 993 UNTS 3, together with the relevant Optional Protocols constitute what has come to be known as the ‘International Bill of Rights’. See Eide A, ‘Economic, social and cultural rights as human rights’ in Eide A, Krause C and Rosas A (eds), *Economic, Social and cultural rights: A textbook*, Martinus Nijhoff, Dordrecht, 1995, 21. See, also, Narayan P, ‘Somewhere over the rainbow: International human rights protections for sexual minorities in the new millennium’ 24 *Boston University International Law Journal* (2006), 327.

⁷ Ouguergouz F, *The African Charter on Human and Peoples’ Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa*, Martinus Nijhoff, the Hague, 2003, 55.

⁸ Ouguergouz, *The African Charter on Human and Peoples’ Rights*, 55-56.

⁹ Ouguergouz, *The African Charter on Human and Peoples’ Rights*, 57.

¹⁰ Article 2, *African Charter on Human and Peoples’ Rights*, 27 June 1981, 1520 UNTS 217.

¹¹ Article 3, *African Charter on Human and Peoples’ Rights*.

¹² Established at Article 30, *African Charter on Human and Peoples’ Rights*.

¹³ Established by Article 1, *Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights*, 10 June 1998, OAU/LEG/MIN/AFCHPR/PROT (1) Rev. 2.

¹⁴ Article 30, *African Charter on Human and Peoples’ Rights*.

¹⁵ Article 1, *Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights*.

The African Charter, which is an attempt at an African cultural fingerprint of human rights,¹⁶ makes no reference to lesbian, gay, bisexual, transgender and intersex (LGBTI) rights.¹⁷ Moreover, the African Charter does not protect the right to privacy, which, in the United Nations (UN),¹⁸ European¹⁹ and Inter American legal systems,²⁰ has inspired recognition of LGBTI rights by international tribunals.²¹ However, Rachel Murray and Frans Viljoen have suggested a dynamic interpretation of the African Charter to cure the exclusion of the right to privacy.²² According to this counsel, flowing from the view that sexual attraction to persons of the same sex is integral to one's personality, and an intrusion of that aspect constitutes a violation of the inherent human dignity, the right to privacy could be inferred from related entitlements such as the right to life and human dignity.²³

Regard could also be had to the fact that the omission of the right to privacy from the expansive menu of the African Charter was for reasons unrelated to sexual minority rights as the issue did not feature in the *travaux préparatoires* of the continental treaty.²⁴ Since disregard for sexual minority protection was not a basis for the exclusion of the right to privacy, wrote Murray and Viljoen, it would be dishonest to use its non-articulation as a ground for disdaining homosexuals.

¹⁶ Maguire S, 'The human rights of sexual minorities in Africa' 35 *California Western International Law Journal*, 1(2004), 43, where it is stated: 'Those states that drafted and signed the African Charter sought to stamp an African cultural fingerprint on their regional human rights instrument.' See, generally, Mutua M, 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' 35 *Virginia Journal of International Law* (1995), 339.

¹⁷ Murray and Viljoen, 'Towards non-discrimination on the basis of sexual orientation', 88.

¹⁸ In *Toonen v Australia*, CCPR Comm.No. 488/1992 (31 March 1994) the Human Rights Committee held it undisputable "that adult consensual sexual activity in private is covered by the concept of 'privacy'".

¹⁹ In the watershed decision, *Dudgeon v United Kingdom*, ECtHR Judgement of 22 October 1981, the European Court of Human Rights sided with Dudgeon and declared the continued criminalisation of homosexual acts in the United Kingdom (Northern Ireland to be particular) a violation of the European Convention. The judges argued, *inter alia*, that penalisation of homosexual acts violates the right to respect for private life, including sexual life, within the meaning of Article 8, para 1, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222.

²⁰ In *Karen Atala Riffó and Children v Chile*, IACtHR Judgment of 24 February 2012, the Inter American Court of Human Rights ruled against the respondent State for denying a lesbian couple the legal capacity to have the custody of children from one of the partner's previous marriage. The regional judicial institution declared this denial a violation of the petitioner's right to equality, non-discrimination and privacy arguing, *inter alia*, that sexual orientation and gender identity (SOGI) is included in the protected ground 'other social condition' under Article 1, *American Convention of Human Rights*, 21 November 1969, 1144 UNTS 123.

²¹ See, Maguire, 'The human rights of sexual minorities in Africa', 50, where it is stated: "The right to privacy has not evolved in Africa as it has in other legal systems, where it has served as the centrepiece of much LGBT activism."

²² Murray and Viljoen, 'Towards non-discrimination on the basis of sexual orientation', 90.

²³ Murray and Viljoen, 'Towards non-discrimination on the basis of sexual orientation', 90.

²⁴ Murray and Viljoen, 'Towards non-discrimination on the basis of sexual orientation', 89.

Murray and Viljoen also argued that the inclusion of the right to privacy in subsequent treaties of the AU like the African Charter on the Rights and Welfare on the Child²⁵ and domestic constitutions²⁶ is an indication that the region may not necessarily be averse to the protection of privacy.

The African Charter also contains an open moral compass in the form of a limitation clause that subjects the enjoyment of rights and freedoms to ‘the rights of others, collective security, *morality* and common interest.’²⁷ The broad nature of this clause creates the likelihood that arguments in favour of equality and non-discrimination on the ground of sexual orientation or even gender identity would be too weak to withstand counter-arguments based on *morality* or common interest.²⁸ This position is more compelling in the wake of widely-held perceptions that same-sex intercourse and orientation are contrary to traditional African mores as well as Christian and Islamic teachings, to which most Africans adhere and which the African Charter loudly emphasises.²⁹ In its Preamble, the African Charter calls upon States Parties to consider the virtues of their historical tradition and values of African civilisation in characterising the concept of human and peoples’ rights.³⁰ This ‘clarion call’ is converted into a provision obliging States to promote and protect morals and traditional values recognised by the community.³¹

It is therefore open for African countries to defend their strong opposition to emerging principles of sexual minority rights on the point of cultural relativism. The concept of cultural relativism appreciates that world traditions differ greatly and that the processes leading to universal consensus on human rights principles occasionally results in painful compromises that relegate certain specific cultural items.³² Cultural relativism therefore views universal human rights

²⁵ Article 10, *African Charter on the Rights and Welfare on the Child*, provides: ‘No child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.’

²⁶ Article 31, *Constitution of Kenya* (2010), for instance, provides: ‘Every person has the right to privacy, which includes the right not to have – (a) their person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed.’

²⁷ Article 27(2), *African Charter on Human and Peoples’ Rights*.

²⁸ Persad XBL, ‘Homosexuality and death: A legal analysis of Uganda’s proposed anti-homosexuality Bill’ 6 *Florida A&M University Law Review*, 1 (2012), 155. Emphasis added.

²⁹ Murray and Viljoen, ‘Towards non-discrimination on the basis of sexual orientation’, 93.

³⁰ Para 4, Preamble, *African Charter on Human and Peoples’ Rights*.

³¹ Article 17(3), *African Charter on Human and Peoples’ Rights*.

³² See, generally, Donnelly J, ‘Cultural relativism and universal human rights’ 6 *Human Rights Quarterly*, 4 (1984), 400-419.

principles as defeaters of regional specificities, which may be religious, cultural or moral. Since ‘human rights have no fixed and predetermined meaning’ and are ‘given concrete meaning in very different contexts’, a strong case has been made for the accommodation of variant regional particularities through the making of concessions so long as the core principles of human rights are upheld.³³ Against this backdrop, African countries may demand the indulgence of the international community for the accommodation of their unique cultural, religious and moral values on sexuality. They could ground such petition on the belief now prominent on the continent that homosexual orientation is ‘unAfrican,’ ‘unreligious,’ immoral and a conception of the Western worldview.

African countries keen on disregarding sexual minority rights may also find solace in the language of duties prominent in the ‘regional bill of rights.’ A point has in fact been made that ‘the heavy emphasis on duties to family and society could create a heavier burden on those attempting to establish privacy rights and other legal protections for sexual minorities under the Charter.’³⁴ Article 18 (paragraphs 1 and 2) of the African Charter on the right to family states:

1. The family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical health and moral needs.
2. The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.³⁵

There is an additional individual duty to uphold positive African cultural values in the course of relations with other members of society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society.³⁶ These, together with the duty to preserve and strengthen social and national solidarity,³⁷ could grant ‘governments free rein to restrict personal rights, simply by declaring that the state’s solidarity is threatened.’³⁸ Further, the African Charter does not specifically protect the right to marry or to establish a family.³⁹ Perhaps, this could be ‘presumed in the recognition of the family as the basic unit of society.’⁴⁰

³³ Viljoen F, *International human rights law in Africa*, 2ed, Oxford University Press, Oxford, 2012, 8.

³⁴ Wilets JD, ‘International human rights law and sexual orientation’ 18 *Hastings International and Comparative Law Review*, 1 (1994), 62.

³⁵ Emphasis added.

³⁶ Article 29(7), *African Charter on Human and Peoples’ Rights*.

³⁷ Article 29(4), *African Charter on Human and Peoples’ Rights*.

³⁸ Flinterman and Henderson, ‘African Charter on Human and Peoples’ Rights’, 390.

³⁹ Nmehielle, *The African human rights system*, 132.

⁴⁰ Nmehielle, *The African human rights system*, 132.

Despite the many structural hurdles discussed above, the African Commission appears to be succeeding in developing jurisprudence in favour of sexual minority rights. In its inaugural reference to sexual orientation in 2002, the African Commission affirmed that equality and non-discrimination are the basis for human rights in Africa, noting that;

[T]he aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or *sexual orientation*.⁴¹

Through the 2014 *Resolution on protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity*, the African Commission added its harmony to the voices that have condemned the increasing incidences of violence and other human rights violations targeted at sexual minorities.⁴² The regional treaty-body decried the situation of systematic attacks on sexual minorities by state and non-state actors, including murder, rape, assault, arbitrary imprisonment and other forms of prosecution of persons, and called for the protection of human rights defenders engaged in advocacy around sexual minority rights.

While discharging its promotional mandate, the African Commission, in its *Concluding observations and recommendations on the 5th periodic report of the Federal Republic of Nigeria on the implementation of the African Charter*,⁴³ rebuked the state party for enacting criminal law⁴⁴ with

[t]he potential to engender violence against persons on grounds of their actual or imputed orientation, and also to drive this group of persons vulnerable to HIV/AIDS underground, thereby creating an environment which makes it impossible to effectively address the HIV pandemic in the state.⁴⁵

Ironically, Uganda, which about the same time passed one of the most draconian criminal laws against sexual minorities, the Anti-Homosexuality Act

⁴¹ *Zimbabwe Human Rights NGO Forum v Zimbabwe*, ACmHPR Comm. 245/02, 21 Activity Report, para 169. Emphasis added.

⁴² ACmHPR, *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*, 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014.

⁴³ 57th Ordinary Session, 4-18 November 2015, Banjul, The Gambia.

⁴⁴ *Same Sex Marriage (Prohibition) Act*, 2014 (Federal Republic of Nigeria).

⁴⁵ Para 81, *Concluding observations and recommendations on the 5th periodic report of the Federal Republic of Nigeria on the implementation of the African Charter*, ACmHPR, 57th Ordinary Session, 4-18 November 2015, Banjul, The Gambia.

(AHA) 2014,⁴⁶ escaped the African Commission's criticism.⁴⁷ Not even the African Commission's constructive dialogue with Kenya aroused debate on the issue of LGBTI rights.⁴⁸ A possible explanation for the haphazard treatment of the subject might be that sexual minority rights are yet to find a stable place in the African Commission's jurisprudence and its reporting procedures. Although the African Commission included 'sexual orientation' as one of the protected grounds of discrimination in the *Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights*,⁴⁹ it would appear, its practice has yet to settle, at least going by the review of recent reports.

That sexual minority rights are still problematic in Africa is further illustrated by the drama surrounding the Coalition of African Lesbians' (CAL) application for observer status before the African Commission.⁵⁰ At first, in 2010, the African Commission declined to grant observer status to CAL, reasoning that its objectives, which include protection of sexual minorities, offended the AU Constitutive Act and the African Charter.⁵¹ In an interesting twist of events, in April 2015, the African Commission rescinded its earlier ruling and granted CAL observer status.⁵² However, this historic decision met with another obstacle merely two months later. The AU Executive Council, while reviewing the activities of the African Commission for the year 2015, requested it to withdraw ob-

⁴⁶ Within six months of its enactment, the Constitutional Court of Uganda declared the AHA unconstitutional on the technical ground that Parliament did not summon the requisite quorum at the time of its passage. See, *Oloka-Onyango & 9 Others v Attorney General*, Constitutional Petition No 8 of 2014.

⁴⁷ Uganda presented its 5th periodic report during the 54th Ordinary Session of the African Commission held in Banjul, The Gambia, between 22 October 2013 and 5 November 2013. The Concluding observations and recommendations on the 5th periodic state report of the Republic of Uganda (2010-2012) (Adopted at the 57th Ordinary Session of the African Commission on Human and Peoples' Rights) make no reference to the question of sexual minority rights.

⁴⁸ See, Republic of Kenya, *Combined 8th-11th periodic report on the African Charter on Human and Peoples' Rights*, November 2014.

⁴⁹ Para 1(d), *Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights*.

⁵⁰ Viljoen, *International human rights law in Africa*, 266. It is important to note that in 2009, the African Commission had granted observer status to Alternatives Cameroun which deals with public health matters including of sexual minorities. See, Viljoen, *International human rights law in Africa*, 267. The Coalition for African Lesbians first applied for observer status in 2008. For further discussion, see, Viljoen F, 'Norms, case law and practices of sexual orientation and gender identity in the African human rights system' in *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 the United Nations*, Pretoria University Law Press, Pretoria, 2015.

⁵¹ Viljoen, *International human rights law in Africa*, 266.

⁵² See, Viljoen F, 'Norms, case law and practices of sexual orientation and gender identity in the African human rights system', 41.

server status granted to CAL.⁵³ Echoing the common sentiments held by influential political leaders in Africa, the AU Executive Council requested the African Commission to ‘take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values.’⁵⁴

Following this directive, the Centre for Human Rights and the CAL approached the African Court seeking an advisory opinion regarding the ‘extent to which the AU political organs may direct the Commission to adopt a particular interpretation of the African Charter.’⁵⁵ As Africa looks forward to a decisive judicial verdict on this aspect, it is clear the judicial and political organs of the AU are reading from two contradictory scripts. The CAL incident shows that although the quasi-judicial organ in the African regional system (the African Commission) may be ready and willing to protect certain aspects of sexual minority rights, the political organs are not. How this heated debacle is resolved is likely to shed light on the future of sexual minorities in Africa.

⁵³ Decision on the thirty-eight activity report of the African Commission on Human and Peoples’ Rights, Doc.EX.CL/921 (XXVII).

⁵⁴ Decision on the thirty-eight activity report of the African Commission on Human and Peoples’ Rights, Doc.EX.CL/921 (XXVII).

⁵⁵ *Request for Advisory Opinion by the Centre for Human Rights (CHR) University of Pretoria and the Coalition of African Lesbians*, ACtHPR No. 002/2015. See, also, Viljoen F, ‘Norms, case law and practices of sexual orientation and gender identity in the African human rights system’, 41.