

Patterns of discrimination based on sexual orientation in Africa: is there a Lusophone exception?

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ABSTRACT: This article analyses the legal developments in African Lusophone countries regarding sexual orientation and the legal-political choices made by these states about the regulation of consensual same-sex acts between adults. Under colonial rule, all Portuguese territories in Africa had sodomy laws in place. After independence, in 1975, the new countries reformed their penal codes and repealed sodomy laws, most of them shifting from criminalisation to protection of sexual orientation. Compared to the situation in other parts of the African continent, where violence against homosexuals is generalised, colonial criminalisation of consensual same-sex acts is still in force or where new laws that further criminalise sexual orientation have been adopted or are under consideration, Lusophone Africans demonstrate higher levels of acceptance of the homosexuality of their fellow citizens, and there is less hostility from the state. Starting with an analysis on international developments in human rights law and jurisprudence regarding prohibition of discrimination based on sexual orientation, this article focusses on the five African Lusophone countries, analysing the legal reforms adopted, the role played by legislative initiatives and the dialogue of states with supranational human rights mechanisms to better protect their citizens from discrimination of any kind. African Lusophone countries took a distinctive legal-political approach, not only by repealing sodomy laws but also by granting other forms of protection based on sexual orientation. They also provide a distinctive narrative regarding homosexuality in Africa, against its usual portrayal as a Western and un-African phenomenon, demonstrating a continent deeply divided on this particular human rights issue.

TITULO E RESUMO EM PORTUGUÊS:

Padrões de discriminação baseada na orientação sexual em África: existe uma exceção Lusófona?

RESUMO: Este artigo analisa os desenvolvimentos legislativos nos países Africanos Lusófonos em relação à orientação sexual e às opções jurídico-políticas efetuadas por estes, relativas à regulamentação dos atos sexuais consentidos entre adultos do mesmo sexo. Sob domínio colonial, todos os territórios portugueses em África tinham

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legislação da sodomia em vigor. Após a independência, em 1975, os novos estados reviram os seus códigos penais e revogaram as leis da sodomia, passando maioritariamente da criminalização para a proteção da orientação sexual. Comparado com a situação em outras partes do continente Africano, onde a violência contra homossexuais é generalizada, onde vigora a criminalização colonial dos atos sexuais consentidos entre adultos do mesmo sexo, ou onde tem sido proposta nova legislação que procura uma maior criminalização da orientação sexual, os cidadãos Africanos Lusófonos demonstram níveis mais elevados de aceitação da homossexualidade dos seus concidadãos e verifica-se ainda uma menor hostilidade por parte do estado. Começando por uma análise dos desenvolvimentos no direito internacional dos direitos humanos e da jurisprudência internacional, em matéria relativa à proibição da discriminação com base na orientação sexual, este artigo tem como foco os cinco países Africanos lusófonos, analisando as reformas legislativas que foram adotadas, o papel desempenhado pelas iniciativas legislativas e o diálogo dos Estados com os mecanismos supranacionais de direitos humanos para melhor proteger os seus cidadãos de qualquer discriminação. Os países Africanos Lusófonos adotaram uma distinta abordagem jurídico-política, não apenas revogando as leis da sodomia, mas também garantindo outras formas de proteção com base na orientação sexual. Estes estados fornecem uma narrativa distinta relativa à homossexualidade no continente Africano, habitualmente conotada como um fenómeno ocidental e não Africano, demonstrando um continente profundamente dividido nesta questão específica de direitos humanos.

TITRE ET RÉSUMÉ EN FRANCAIS:

Tendances de discrimination basée sur l'orientation sexuelle en afrique: existe-t-il une exception lusophone?

RÉSUMÉ: Cette contribution analyse l'évolution juridique dans les pays lusophones d'Afrique en matière d'orientation sexuelle et les options juridico-politiques proposées par ces États en matière de réglementation des actes homosexuels consentis entre adultes. Pendant la colonisation, les colonies portugaises en Afrique disposaient de lois anti-sodomies. Après l'indépendance, en 1975, les nouveaux États ont réformé leurs codes pénaux et abrogé les lois sur la sodomie, la plupart d'entre eux passant de la criminalisation à la protection de l'orientation sexuelle. Par rapport à la situation dans d'autres régions du continent africain, où la violence contre les homosexuels est généralisée, la criminalisation d'actes homosexuels consensuels héritée de la colonisation est toujours en vigueur ou alors lorsque des nouvelles lois ont été adoptées ou sont en cours d'adoption, les pays africains lusophones font montre d'une plus grande tolérance à l'égard de l'homosexualité de leurs concitoyens, et l'hostilité de l'État est moindre. En commençant par une analyse des développements du droit et de la jurisprudence au plan international relativement à l'interdiction de la discrimination fondée sur l'orientation sexuelle, cette contribution se focalise sur les cinq pays lusophones d'Afrique. Elle procède à une analyse des réformes juridiques adoptées, le rôle joué par les initiatives parlementaires et le dialogue entre les États et les mécanismes supranationaux de défense des droits de l'homme en vue de mieux protéger leurs citoyens contre toute forme de discrimination. Les pays africains lusophones ont adopté une approche juridico-politique distincte, non seulement en abrogeant les lois sur la sodomie, mais également en accordant d'autres formes de protection fondées sur l'orientation sexuelle. Ces pays déclinent également un récit distinctif sur l'homosexualité en Afrique contrairement à l'image largement répandue qu'elle est un phénomène occidental et non africain, démontrant ainsi un continent profondément divisé sur cette question particulière des droits de l'homme.

KEY WORDS: African Lusophone countries, Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe, domestic legislation, sexual orientation, decriminalisation, Universal Periodic Review

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1 INTRODUCTION

In several parts of the African continent, lesbian, gay, bisexual, transgender and intersex (LGBTI) people face a daily fight for a dignified life. They are subjected to violence, blackmail, extortion, rejection or even murder, just because they identify themselves as homosexuals or are perceived as such. This social hostility is often fuelled by laws criminalising consensual same-sex activity (sodomy laws) that are still in place in many African countries, despite being a legacy of European colonialism. This legal landscape changed dramatically when Uganda proposed, in 2009, the adoption of an anti-gay law going beyond criminalising same-sex acts. In the following years, Nigeria followed suit by proposing – and approving – a comprehensive anti-gay law, and other countries discussed similar legal initiatives (for example, Kenya in 2011).

Against this background, several voices within the African continent called for the decriminalisation of same-sex consensual activity and the respect for equality of all Africans irrespective of their sexual orientation. In 2011, Festus Mogae, former President of Botswana, strongly supported that the country should decriminalise homosexuality.¹ In the same way, former Mozambican President Joaquim Chissano wrote an open letter to African leaders calling for non-discrimination based on sexual orientation as a way to ‘unleash the full potential of everyone’.² And even former President of Nigeria, Goodluck Jonathan, who signed the Same Sex Marriage (Prohibition) Act into law in 2013, later stated that the country should revisit such law ‘in the light of deepening debates for all Nigerians and other citizens of the world to be treated equally and without discrimination and with the clear knowledge that the issue of sexual orientation is still evolving’.³

In global and regional fora there has been a growing consensus about the need to protect LGBTI people from discrimination and violence. There is an increasing awareness in some parts of the world that public expressions of what may be perceived as non-

1 ‘Botswana should decriminalise homosexuality, says former president’ *The Telegraph* 20 October 2011, <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/botswana/8839131/Botswana-should-decriminalise-homosexuality-says-former-president.html> (accessed 21 October 2019).

2 ‘An Open Letter to Africa’s Leaders – Joaquim Chissano, former President of Mozambique’ *The Africa Report* 14 January 2014 <https://www.theafricareport.com/4886/an-open-letter-to-africas-leaders-joaquim-chissano-former-president-of-mozambique/> (accessed 21 October 2019).

3 ‘Nigeria may revisit law on gay marriage – Goodluck Jonathan’ *Daily Post* 6 June 2016 <https://dailypost.ng/2016/06/06/nigeria-may-revisit-law-on-gay-marriage-goodluck-jonathan/> (accessed 21 October 2019).

heteronormative sexuality and, consequently, a different sexual orientation than heterosexual, constitute a risk to integrity and life.

In contrast to some general continental trends on laws regulating consensual same-sex acts, African Lusophone countries seem to have a different approach regarding sexual orientation. In these countries, sodomy laws inherited from the Portuguese Criminal Code (1886) have been repealed, and in some cases legal protection against discrimination based on sexual orientation has been added. This article therefore focuses on legal changes in African Lusophone countries regarding sexual orientation, as well as their trajectory from criminalisation to protection. It first explores the legal development in international human rights law regarding the recognition of sexual orientation, and then delves into the African human rights system. Finally, it analyses developments in domestic legislation in Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe, with the aim of identifying the distinctive and disruptive features of the legal-political position regarding sexual orientation adopted by these states.

2 SEXUAL ORIENTATION IN INTERNATIONAL HUMAN RIGHTS LAW

Sexual orientation may manifest itself as homosexuality, heterosexuality and bisexuality. In international and European case law, 'sexual orientation' is often invoked with reference to homosexual behaviour and same-sex relationships.⁴ For Heize, sexual orientation is related to 'real or imputed acts, preferences, lifestyles, or identities, of a sexual or affective nature, in so far as these conform to or derogate from a dominant heterosexual-normative paradigm'.⁵ Makau Mutua defines sexual orientation as 'the state and practice of emotional, sexual and romantic attraction to men, women, both genders or no gender. Sexual orientation is a human condition and is a matter of personal and social identity'.⁶ In the 2006 Principles on the application of international human rights law in relation to sexual orientation and gender identity (Yogyakarta Principles) sexual orientation is understood to refer to 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender'.⁷

The Universal Declaration on Human Rights (Universal Declaration), adopted on 10 December of 1948 by the UN General

4 K Waaldijk 'The right to relate: a lecture on the importance on "orientation" in comparative sexual orientation law' (2013) 24 *Duke Journal of Comparative and International Law* 163-164.

5 E Heize *Sexual orientation: a human right. An essay on international human rights law* (1995) 60.

6 M Mutua 'Sexual orientation and human rights: putting homophobia on trial' in S Tamale (ed) *African sexualities. A reader* (2011) 457.

7 The Yogyakarta Principles (2006) para 1.

Assembly, contains the principle of non-discrimination, which had already been affirmed in the Preamble of the UN Charter as a fundamental principle of humankind. The Universal Declaration represents the passage of fundamental rights to the international arena to become the object of international scrutiny. Although the Universal Declaration is soft law, and does not have binding force, it has become accepted as a reference for many subsequent human rights developments. The prohibition of discrimination is found in article 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This formulation – which makes no reference to sexual orientation – was followed in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted in 1966. These – and other – international human rights treaties do not explicitly contemplate sexual orientation, or gender identity,⁸ as prohibited grounds of discrimination.⁹ The main question that therefore arises in respect of those fundamental human rights treaties is to know if sexual orientation falls within the concept of ‘other status’. The prohibition of discrimination was the subject of analysis by the Human Rights Committee in its 1989 General Comment to article 2 of ICCPR:¹⁰

[N]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.¹¹

This position is in accordance with articles 1 and 2 of the Universal Declaration, and subsequent human rights treaties. While the Human Rights Committee fails to explicitly recognise in this Comment that sexual orientation is a prohibited ground of discrimination, paragraph 7 may be interpreted as giving some further protection to characteristics that are not in the text of the ICCPR:¹²

While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The position of the Human Rights Committee is clear. Any ‘distinction, exclusion, restriction or preference’ that is based on any ground falls within the understanding of discrimination. This position opens a window of opportunity for a more progressive interpretation of the norm.

8 Although the sexual orientation and gender identity are treated as interrelated, our analysis concerns only to the situation of sexual orientation.

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

10 Art 2 of ICCPR.

11 ICCPR ‘General Comment 18: Non-discrimination’ para 1.

12 ICCPR (n 11) para 7.

The Committee for Economic, Social and Cultural Rights, in its General Comment to article 12 of ICESCR asserts that 'by virtue of article 2(2) and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), *sexual orientation* and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.'¹³ According to this Committee, the enjoyment of the higher standard of physical and mental health cannot be put at risk based on the sexual orientation of the individual. Regarding the necessary efforts taken by the states for the fulfilment of the right to health, the ICESCR affirms that all measures must be done for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases'.

Some scholars are of the opinion that the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) may be interpreted in a way that covers the human rights of LGBTI people. According to Holtmaat and Post, for example, the protection of CEDAW is asymmetrical, in that it essentialises women and ignores men as potential victims of gender-based violence.¹⁴ The authors support the vision of a gender-neutral interpretation for CEDAW, which would allow the central point of discussion to change from women to all gender expressions – including transgender and intersex, for example.¹⁵

The Yogyakarta Principles affirm the obligations of states to protect the human rights of LGBTI people, taking as baseline the rights enshrined in the Universal Declaration. In 2017 a new document was adopted – Principles of Yogyakarta+10 – updating and expanding the protection of the 2007 Principles but adopting nine new principles.¹⁶ The 2017 Principles also grant protection not only to sexual orientation and gender identity, but also to gender expression and sex characteristics.

13 ICESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (art 12), para 18 (emphasis added). See also the paragraph 13 of the ICESCR General Comment 15: The Right to Water (arts 11 and 12 of the Covenant).

14 R Holtmaat & P Post 'Enhancing LGBT rights by changing the interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?' (2015) 33 *Nordic Journal of Human Rights* 322.

15 Holtmaat & Post (n 14) 323.

16 Namely, the Right to State Protection (Principle 30), Right to Legal Recognition (Principle 31), Right to Bodily and Mental Integrity (Principle 32), Right to Freedom from Criminalisation and Sanction on the Basis on Sexual Orientation, Gender Identity, Gender Expression or Sex Characteristics (Principle 33), Right to Protection from Poverty (Principle 34), Right to Sanitation (Principle 35), Right to the Enjoyment of Human Rights in Relation to Information and Communication Technologies (Principle 36), Right to Truth (Principle 37) and Right to Practice, Protect, Preserve and Revive Cultural Diversity (Principle 39).

The Human Rights Council in 2016 adopted a landmark resolution, which established an international expert on the protection against violence and discrimination based on sexual orientation and gender identity.¹⁷ This expert has an important mandate of monitoring states' implementation of legislative measures to protect people from violence and discrimination based on their real or perceived sexual orientation and gender identity. The resolution was adopted within an environment of contestation and opposition by several states. The African Group was against this resolution, arguing that the issue of sexual orientation is not a human rights issue:¹⁸

The African Group is strongly concerned by the attempts to introduce and impose new notions and concepts that are not internationally agreed upon, particularly in areas where there is no legal foundation in any international human rights instrument. We are even more disturbed at the attempt to focus on certain persons on the grounds of their sexual interests and behaviours, while ignoring that intolerance and discrimination regrettably exist in various parts of the worlds, be it on the basis of colour, race, sex or religion, to mention only a few. These attempts undermine not only the intent of the drafters and signatories to various human rights instruments, but also seriously jeopardize the entire international human rights framework as they create divisions.

The African Group's position illustrates the resistance by states to recognise sexual orientation as a prohibited ground of discrimination. Such resistance is also in force inside the African human rights system, as will become clearer below.

As Dominic McGoldrick notes, the progress in the UN human rights system was always much more contested than in the European and Inter-American regional systems.¹⁹ In these regional human rights systems, the trajectory of the inclusion of sexual orientation as a prohibited ground of discrimination has specific traces reflecting the different regional contexts.

In Europe, the European Convention on Human Rights (ECHR) of 1950 does not grant explicit protection based on sexual orientation. The European system was put under pressure to deal with the issue at an early stage, and the Council of Europe (CoE) made its first recommendation in 1981. In this document, the CoE asked member states who still had laws criminalising consensual same-sex activity to repeal those laws in order to avoid discrimination against homosexual individuals.²⁰ In 2000, the CoE called for all member states to include sexual orientation as a prohibited ground of discrimination in national legislation, and to repeal any laws targeting consensual homosexual activity.²¹ Concerning the European Court on Human Rights, there is a vast case-law regarding sexual orientation as prohibited ground of

17 HRC Resolution 32/2 (2016).

18 Statement of the African group on the presentation of the annual report of the United Nation human rights council 71 session of the United Nations general assembly, 4 November 2016, para 9.

19 D McGoldrick 'The development and status of sexual orientation discrimination under international human rights law' (2016) 16 *Human Rights Law Review* 617.

20 CoE, Recommendation 924 (1984), Discrimination against homosexuals.

21 CoE, Recommendation 1474 (2000), Situation of lesbians and gays in Council of Europe Member States.

discrimination. Oddný Arnardóttir concludes that the legal developments in the European Human Rights Court jurisprudence framed LGBTI persons as being located inside the concept of vulnerable groups under article 14.²² In the Charter of Fundamental Rights of the European Union (EU Charter), which entered into force with the Lisbon Treaty in 2009, sexual orientation is a prohibited ground of discrimination under the scope of article 21:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Article 21(1) of the EU Charter is the only European treaty provision that explicitly grants equal protection based on sexual orientation but fails by omitting other factors such as gender identity. Article 21 of EU Charter also lacks an open-ended clause such as 'other status' or 'other situation'.

In the Inter-American human rights system, sexual orientation has over the last decade gained increasing attention from political leaders. Although the American Convention on Human Rights, similarly to other international human rights treaties, does not grant specific protection based on sexual orientation, the Organization of American States (OAS) has adopted resolutions and additional treaties addressing the subject. In 2008, the OAS Assembly adopted a resolution about violence perpetrated against individuals based on their sexual orientation and gender identity.²³ In 2013, it adopted the Inter-American Convention Against All Forms of Discrimination and Intolerance,²⁴ which provides that 'discrimination may be based on nationality; age; sex; sexual orientation; gender identity and expression'.²⁵ The Inter-American Court on Human Rights delivered, in 2012, its first judgment on this issue. In this case, *Atala Riffo and daughters v Chile*, the Court said that

it is always necessary to choose the alternative that is most favourable to the protection of the rights enshrined in said treaty, based on the principle of the most favourable to the human being.²⁶

The Court understands the American Convention as a 'living instrument'.²⁷ It states also that the article is not an exhaustive regarding prohibited grounds of discrimination, and finds that 'any

22 O Arnardóttir 'Vulnerability under article 14 of the European Convention on Human Rights. Innovation or business as usual?' (2017) 4 *Oslo Law Review* 163.

23 AG/Res.2435 (XXXVIII-O/08), *Derechos Humanos, Orientación Sexual e Identidad de Género*, available online at https://www.oas.org/dil/esp/AG-RES_2435_XXXVIII-O-08.pdf (accessed 10 October 2019).

24 This treaty is not yet in force: It has 12 signatures, but only Uruguay has ratified it, as of 2018. See http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance_signatories.asp#Uruguay (accessed 10 October 2019).

25 See art 1(1), Inter-American Convention Against All Forms of Discrimination and Intolerance (2013).

26 *Atala Riffo and Daughters v Chile* IACHR (24 February 2012) para 84.

27 A Paúl 'Examining *Atala-Riffo and Daughters v Chile*, the first Inter-American case on sexual orientation, and some of its implications' (2014) 7 *Inter-American and European Human Rights Journal* 58.

other social condition' is broad enough to include sexual orientation and that any 'right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation'.²⁸

These developments reflect the well-established protection of LGBTI persons within the European system, and a growing incorporation of sexual orientation as a prohibited ground of discrimination in the Inter-American human rights system. However, the African human rights system, the youngest of the three well-established regional human rights system, is quite different from the developments in the UN, European and American contexts.

3 SEXUAL ORIENTATION IN AFRICAN UNION LAW

In the African continent, issues pertaining to minority sexual orientation are very sensitive and complex. The cultural arguments of the alleged unAfrican, unnatural and unbiblical nature of homosexuality pose difficulties in debating the human rights of LGBTI person in Africa. As Sylvia Tamale points out, this political and religious discourse is based on several fallacies. Firstly, Africa is presented as a culturally homogenous unit, without any cultural diversity.²⁹ Moreover, Africa is presented as heterosexual and rejecting other expressions of sexuality. This argument portrays Africa wrongly as culturally homophobic.³⁰ In several African societies, the issue of homosexuality is also perceived as part of behaviour or conduct and not as part of an inborn identity. As Susan Haskins states, '[t]he idea of homosexuality as an inborn, life-long orientation is very much a product of the West'.³¹ Haskins reinforces the idea stating that a 'homosexual is therefore a person who commits same-sex acts, not a person with an orientation'.³² Several African states criminalise 'unnatural' offences or 'vices against nature'; and these laws are used to punish consensual same-sex acts. But, viewed historically, the criminalisation of homosexual practices is a product of the European colonialism. John McAllister states that '[t]he roots of contemporary

28 *Atala Riffo and Daughters v Chile* IACHR (24 February 2012) para 93.

29 'Homosexuality in not un-African' *Al Jazeera* 26 April 2014, available online at <http://america.aljazeera.com/opinions/2014/4/homosexuality-africamuseveniugandanigeriaethiopia.html> (last visited 11 July 2019). E Chitando & P Mateveke 'Africanizing the discourse on homosexuality: challenges and prospects' (2017) 9 *Critical African Studies* 127.

30 A Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 267.

31 S Haskins 'The influence on Roman laws regarding same-sex acts on homophobia in Africa' (2014) 14 *African Human Rights Law Journal* 397.

32 Haskins (n 31) 398.

African homophobia are nineteenth-century European prudery and racist fantasies of ‘primitive’ black sexuality [...]’.³³ According to the 2019 annual report of ILGA, 32 African countries have provisions in their penal codes criminalising consensual same-sex sexual acts between adults.³⁴ The maintenance of such laws in place constitutes a challenging situation for the African human rights system.

African Union law, as the ‘the body of treaties, resolutions and decisions that have direct and indirect application to the member states of the African Union’,³⁵ gives little space to the debate of the prohibition of discrimination based on sexual orientation. It is not clear whether such debate has occurred during the drafting of the African Charter on Human and Peoples’ Rights (African Charter) but it seems rather unlikely. Adopted in 1981 under the aegis of the Organization of African Unity, the African Charter is the most relevant African human rights treaty and aims to provide an African imprint of international human rights law. The prohibition of discrimination is enshrined in article 2 of the African Charter in the following terms:

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 any status.

The African Charter adopts a form of formulation that seems open to a progressive interpretation, when it prescribes that rights under the African Charter shall be entitled without discrimination ‘of any kind’. The formulation suggests a non-exhaustive list, whereby other unenumerated personal characteristic may be the subject of protection under the African Charter, assuming an interpretation close to the *Atala Riffo* case. This understanding is shared by Rachel Murray and Frans Viljoen, who argue that sexual orientation must be regarded as a prohibited ground of discrimination, as it falls under ‘any status’ of article 2.³⁶ The authors recall that the UN Human Rights Committee in *Toonen v Australia* highlighted the fact that ‘sex’ in article 2 of the ICCPR was broad enough to accommodate sexual orientation as a prohibited ground of discrimination. This is another possibility for a more expansive interpretation of the African Charter and respecting the principle of the most favourable treatment of the human being.

The African Charter does not grant a ‘right to privacy’, a fundamental human right that was central for the development and consolidation of human rights of LGBTI people in the European human rights system.³⁷ The African treaty brings some innovations to

33 J McAllister ‘LGBT activism and “traditional values”: promoting dialogue through indigenous cultural values in Botswana’ in T Stanford, F Simenel, K Mwachiro & V Reddy (eds) *Boldly queer: African perspectives on same-sex sexuality and gender diversity* (2014) 43.

34 L Mendos ‘State Sponsored Homophobia 2019’, ILGA Report, 197.

35 O Amao *The African Union law: the emergence of a sui generis legal order* (2018) 21.

36 Murray & Viljoen (n 9) 91.

37 P Johnson ‘Homosexuality and the African Charter on Human and Peoples’ Rights: What can be learned from the history of the European Convention on Human Rights?’ (2013) 40 *Journal of Law and Society* 263.

international law, in particular the rights of peoples' and individual duties. It is under the chapter on individual duties that another potential ground for non-discrimination, as set out in article 28 states, emerges:

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed to promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 28 imposes a positive obligation on individuals to mutually respect and tolerate difference in order to promote good relations with other citizens. This perspective is in line with traditional African philosophies, like Ubuntu, or Umunthu, but this provision lacks legal enforcement.

The African Commission on Human and Peoples' Rights (African Commission) has made slow but steady progress towards the protection of sexual and gender minorities on the continent. Mandated to promote, protect and interpret the human and peoples' rights enshrined in the African Charter,³⁸ the Commission has taken some steps towards the protection of sexual and gender minorities in Africa. Despite that, as we will see, its work on this sensitive issue had come at a very high price to this human rights body.

In 2011 the African Commission adopted the Guidelines and Principles on Economic, Cultural and Social Rights under the African Charter in Human and Peoples' Rights. These Guidelines aim to clarify the scope of protection and obligations of states under their international commitments for socio-economic rights. These Guidelines in their introduction give an understanding that prohibited grounds of discrimination

(...) include but are not limited to race, ethnic groups, colour, sex, gender, sexual orientation, language, religion, political or any other opinion, national and social origin, economic status, birth, disability or other status.

The understanding of the Commission is that sexual orientation is *de facto* a prohibited ground of discrimination under the African Charter. As we pointed out before, there is no reference to gender identity, although 'gender' itself is a prohibited ground. Taking in consideration that civil and political, and socio-economic rights in the African Charter have the same legal protection, it is possible to affirm with certainty that sexual orientation is a prohibited ground of discrimination in respect of all human rights enshrined in the African Charter. The Commission goes even further in the Guidelines, by recognising LGBTI people as vulnerable and disadvantaged groups under the African Charter:

Vulnerable and disadvantaged groups are people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights. Vulnerable and disadvantaged groups include but are not limited to (...) lesbian, gay, bisexual, transgendered and intersex people (...).

This was the most relevant recognition by the African human rights system of sexual orientation as a prohibited ground of discrimination, as well as the existence of a less favourable treatment to LGBTI people.

38 Art 45, African Charter.

In 2014 the Commission adopted Resolution 275, the only resolution so far entirely devoted to the protection of sexual and gender minorities in Africa. Resolution 275 recalls the prohibition of discrimination enshrined in article 2 of the African Charter and shows concern for the human rights violations based on 'actual and imputed sexual orientation or gender identity'.³⁹ In 2016, the Commission engaged in a joint dialogue with the Inter-American Commission on Human Rights in which the two bodies agreed to collaborate on the thematic issue of sexual orientation and gender identity.⁴⁰

The Commission received its first complaint concerning sexual orientation discrimination (*William A Courson v Zimbabwe*) in 1994. In it, the complainant alleged that the criminalisation of sexual acts between consenting adults in private, which was in force in domestic legislation of Zimbabwe, constituted a violation of fundamental human rights enshrined in the African Charter. The complainant took as reference the Human Rights Committee case *Toonen v Australia* to point out that the criminalisation of same-sex activity was an unreasonable interference with the right to privacy. Unfortunately, the case was discontinued by the applicant and the Commission did not proceed with it.⁴¹

In 2002, in the communication *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the Commission stated, in an *obiter dictum*, that the sexual orientation is a prohibited ground of discrimination under article 2 of the African Charter:

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights. (...) The 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.⁴²

Although the decision does not bind states, it formally recognises sexual orientation as a ground on which people may suffer discrimination and disadvantaged treatment from the law.

The African Commission in 2015 granted observer status to a South African based NGO named Coalition of African Lesbians (CAL). When it in June 2015 had the opportunity to consider the Commission's activity report containing this decision, the AU Executive Council requested the Commission to 'take into account fundamental African values, identity and good traditions and to withdraw the Observer Status granted to NGOs which may attempt to impose values contrary

39 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.

40 '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' (2016) 23.

41 Communication 136/94, *William A. Courson v Zimbabwe*.

42 Communication 245/02, *Zimbabwe Human Rights NGO Forum v Zimbabwe*.

to African values'.⁴³ A request to the African Court on Human and Peoples' Rights to deliver an advisory opinion on the meaning of the term 'considered' in article 59(3) of the African Charter should be interpreted,⁴⁴ stalled the process. However, after the Court had dismissed the case for lack of standing, the Executive Council reiterated its demand, and eventually the Commission complied.⁴⁵ This sequence of events, and the Commission's reversal of its decision to grant observer status to CAL, has caused grave concerns to be raised about the ability of the Commission to continue performing its mandate as autonomous and independent human rights body.

4 SEXUAL ORIENTATION LAW IN DOMESTIC LAW OF AFRICAN PORTUGUESE SPEAKING COUNTRIES

The African Portuguese Speaking Countries (PALOP)⁴⁶ – Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe – have a distinguished legal approach concerning sexual orientation. Having all been under Portuguese colonial rule for more than four centuries, these countries share a common colonial past. The first criminalisation of homosexuality in Portugal was introduced in the Criminal Code of 1852, in the form of 'indecent assault' (article 931). António Cascais states that the law was not designed for targeting homosexuals, but that it was used to prosecute them in the public sphere, as the archives of the Judiciary Police, in Lisbon, reveal.⁴⁷

The subsequent Portuguese Penal Code of 16 September 1886 (PPC), which was adopted without any substantive adjustment in the five countries, introduced an 'sodomy' offence for those engaging in 'vices against nature'.⁴⁸ Article 70 of the PPC, as reformed in 1954,

43 Ex.CL/887(XXVII) *Decision on the thirty-eighth activity report of the African commission on human and peoples' rights* (2015) para 7.

44 *Request for an Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians* (Advisory Opinion 2/2015).

45 Ex.CL/1015(XXXIII) *Decision on the report on the joint retreat of the permanent representatives' committee and the African commission on human and peoples' rights* (2018).

46 The PALOP is a Portuguese acronym to designate the African Portuguese-speaking countries and does not constitute any formal organisation. See generally F Arenas *Lusophone Africa: beyond independence* (2011) and P Chabal 'The post-colonial state in Portuguese-speaking Africa' (1992) *Portuguese studies* 189-202. The PALOP are part of the Community of Portuguese-speaking countries – CPLP – and organisation created in 1998, which include also Brazil, Portugal, Timor-Leste and more recently, Equatorial-Guinea. Although CPLP is not a human rights organisation, the respect for international human rights standards is a prerequisite for it membership. About CPLP, see E Sanches *The community of Portuguese language speaking countries: the role of the language in a globalizing world* (2014).

47 A Cascais 'A homossexualidade nas malhas da lei no Portugal dos séculos XIX e XX' (2016) 26 *International Journal of Iberian Studies* 96.

48 Art 71(4), Portuguese Penal Code 1886, amended in 1954.

defined a set of measures – compulsory internment in an asylum, forced agricultural labour, limited freedom, or even ban on the exercise of professions – for a vast group of people who represented a threat to the society, namely ‘vagrants’, ‘mendicants’, ‘prostitutes’, ‘ruffians’, and homosexuals. In respect of homosexuality, the PPC adopted restrictive wording in respect of those who usually engage in vices against nature. Before the reform of 1954, a Law Decree no. 35:042 (October 1945), inserted in article 256 (vagrants) the duty of the criminal police to scrutinise homosexuals.⁴⁹ This surveillance was of a proactive nature, as the police was obliged to control suspicious places.⁵⁰

Within the broader African landscape, the PALOP countries present a disruptive picture, as all of them no longer criminalise ‘vices against nature’. These countries reformed domestic legislation that progressed from decriminalisation of consensual same-sex acts to protection or sexual orientation, in line not only with the recent recommendations of the African human rights system, but also with United Nations human rights commitments and standards. The PALOP countries achieved independences in 1975,⁵¹ by virtue of the 1974 revolution in Portugal that ended the dictatorship and started the third wave of democratisation in the world.⁵² Legal reform in the PALOP countries was a slow process. The PALOP countries inherited the Portuguese civil law legal system; they kept several inherited laws from the colonial period; and Portuguese law was preserved in transitional constitutional provisions. Despite several legal reforms taking place after independence, the legal systems of these countries have always been closely influenced by contemporary Portuguese law.⁵³

In 1993 Guinea-Bissau became the first PALOP country to adopt a new, autochthonous penal code, followed by Cape Verde (2004), São Tomé and Príncipe (2012), Mozambique (2015), and more recently, by Angola (2019). The dialogue with international human rights forums was decisive for the legal reforms that took place in the PALOP countries in recent years, with the Universal Period Review (UPR) of the Human Rights Council exerting an important but unequal influence. Regarding the African human rights system, Lusophone African states have in general had poor engagement with the regional mechanisms of supervision.⁵⁴ The possible influence of the developments in the African system only benefitted legal reform in Angola, as will appear from the discussion below, where an alphabetically ordered analysis of these countries is provided.

49 V Faveiro *Código penal português anotado* (1952) 438.

50 A Cascais (n 47) 107.

51 P Oliveira ‘Decolonization in Portuguese Africa’ in *Oxford Research Encyclopedia of African History* (2017).

52 About the third wave of democratisation, see generally S Huntington *Third wave. Democratization in the late twentieth century* (1993), and S Haggard & R Kaufman ‘Democratization during the third wave’ (2016) 19 *Annual Review of Political Science* 125-144.

53 D Vicente ‘O lugar dos sistemas jurídicos lusófonos entre as famílias jurídicas’ (2009) 36 *Revista brasileira de direito comparado* 87.

54 A Baldé ‘O Sistema Africano de Direitos humanos e a experiência dos Países Africanos de Língua Oficial Portuguesa’ (2017) 200.

4.1 Angola

In so far as human rights matters are concerned, Angola is a country of contrasts. After gaining independence from Portugal in 1975, the country was until 2002 devastated by a civil war and political instability.⁵⁵ Despite an authoritarian regime being installed, the country ratified several international human rights treaties.⁵⁶ In 2019, Freedom House qualified Angola as ‘not free’ regarding civil liberties and political rights.⁵⁷ The United Nations Development Programme places the country in position 147 out of 189 in the 2018 Human Development Index (HDI).⁵⁸ The country has an estimated population of around 30 million inhabitants.⁵⁹

The Angolan Constitution, as reformed in 2010, grant generously protect the fundamental rights of citizens, and prohibits discriminatory treatment and practices.⁶⁰ This general principle was transposed onto the country’s Penal Code, when the legislature rejected criminalisation of consensual same-sex activity in favour of protection of sexual orientation. The Angolan legislature repealed the Penal Code inherited from Portuguese colonisers that was obsolete and inadequate to the present demands of the Angolan society. On 23 January 2019, the Parliament of Angola approved a new Penal Code,⁶¹ as the culmination of a process that started in 2004 when it installed a Commission for the Reform of Justice and Law, created under the Presidential Order N. 124/12, 27 November 2004, with the mandate to draft a new Penal Code. The text of the Penal Code approved in 2019 is surprisingly progressive regarding protection based on sexual orientation. In the new Angolan Penal Code (APP), sexual orientation is recognised as an aggravating circumstance in respect of several types of crimes, namely: article 71 (determination of penalty measure); article 172 (threat); article 214 (discrimination);⁶² article 215 (insult); article 216 (defamation); article 225 (aggravation), related to crimes against the respect due the deceased;⁶³ article 382 (incitement to

55 See P Jerónimo *Report on citizenship law: Angola* (2019) 4.

56 Eg CCPR and CESCR in 1992, and the African Charter on Human and Peoples’ Rights in 1990.

57 See <https://freedomhouse.org/report/freedom-world/2019/angola> (accessed 30 July 2019).

58 See <http://hdr.undp.org/en/countries/profiles/AGO> (accessed 30 July 2019).

59 See <https://data.worldbank.org/country/angola> (accessed 28 July 2019).

60 P Jerónimo ‘Os direitos humanos em Angola’ in P Jerónimo (ed) *Os Direitos Humanos no Mundo Lusófono. O Estado da Arte* (2015) 18 - 19.

61 R Garrido ‘Recent SOGI developments in Angola and an overview on other African Lusophone countries’ in Mendos (n 34) 97.

62 The article 214 introduces a legal protection against discrimination in the access to a job or protection of the employee from being discriminated based on his/her sexual orientation, article 214(1) and (2).

63 Article 223 (attempt on the integrity of mortal remains) and article 224 (profanation of funeral location).

discrimination);⁶⁴ and article 284 (crimes against humanity).

Article 71 of the APP, which relates to the factors that determine the penalty, states as follows (emphasis added):

1. Without prejudice to the provisions of paragraph 3 of the preceding article, the only aggravating circumstances are that the perpetrator has committed the crime:
(...)
- c) on grounds of race, color, ethnicity, place of birth, sex, sexual orientation, physical or mental illness or disability, belief or religion, political or ideological beliefs, social condition or origin or *any other forms of discrimination*.

Under article 71(1)(c) of the APP, sexual orientation has the same legal force as other factors, the majority of which have already been consecrated in the Angolan 2010 Constitution and in international human rights treaties. One can thus conclude that the Angolan legislature had in mind a broadening of existing protection against discrimination, not only because it included new factors that had not been the subject of legal codification prior to the APP, but also because the clause ‘any other forms of discrimination’ denotes a progressively expanding view on the part of the legislature.

Chapter III of the APP is dedicated to crimes against the freedoms of people, article 172 – the crime of threat – defines a penalty of imprisonment of up to one year for those who make a threat against the ‘physical integrity, freedom and sexual auto determination’ of another person. Article 127(3) states that if such threat was based on – among other factors – sexual orientation, the penalty is aggravated. Under article 127(4), the same principle applies if the threat targets a group of persons. The report of the preliminary draft of the Penal Code states that the criminal proceeding depends on the complaint of the offender.⁶⁵

The crime of discrimination is mostly related to the protection of the rights of workers and access to good or services. Article 214 of the APP states:

1. A penalty of up to 2 years imprisonment or a fine of up to 240 days may be imposed on those who, because of race, colour, ethnicity, place of birth, sex, sexual orientation, illness or physical or mental disability, or impediment, belief or religion, political or ideological beliefs, condition or social origin or any other forms of discrimination:
 - a) refuse a contract or employment;
 - b) refuse or condition the supply of goods or services;
 - c) prevent or condition the exercise of another person’s economic activity;
 - d) punish or fire a worker.

The same penalty is applied to discrimination targeting a collective person, such as associations. According with the report of the preliminary draft of the Penal Code, the crime of discrimination has been inspired by article 161 in the Cape Verde Penal Code (2004). The

64 The incitement to hate, acts of violence, or the foundation of organisation that incite discrimination against a person or a group or persons based, among other, on sexual orientation (art 382(1), (2) and (4), respectively).

65 Angola ‘Report preliminary draft Angolan Penal Code’ 50.

report states that the crime of discrimination ‘has as its paradigm article 161 of the Cape Verde Penal Code, but it was understood to include in the Preliminary draft “sexual orientation” as a factor of discrimination. Factor that is not invented. Exists and is producer of unjust damage’.⁶⁶

Article 215 (insult) of the APP foresees a penalty of up to six months imprisonment or a fine to those who ‘by any means of expression or communication, and with the intent to offend another person, offend in your honour, good name or consideration’. If the insult is based on the sexual orientation of the person, the penalty doubles, both in respect of imprisonment and fine. A similar approach is adopted in article 216 (defamation).

In the section dedicated to the crimes against the respect due to the dead, article 225 aggravates the penalty in articles 223 (attack on the integrity of remains) and article 224 (desecration of funeral place), in the following terms:

If the perpetrator commits the crimes set forth in the preceding articles [223 and 224] on the grounds of the belonging or non-belonging, true or alleged, of the deceased person to (...) sexual orientation, (...) the penalty is aggravated by one third in its minimum and maximum limits.

Incitement to discrimination is also an aggravated offence if based on the sexual orientation of the person or group. Article 382(1) provides that those who

in a meeting, public place or by any means of publicizing or communicating with the public, incites hatred against a person or group of people because of its (...) sexual orientation, (...) for the purpose of discriminating against them, is punished with imprisonment from 6 months to 6 years.

Article 382(2) foresees the same punishment for those who incite violence against a person or group of people based on sexual orientation. Article 382(4) states that those who create an organisation, or takes part in an organisation, for the purpose of inciting discrimination, hate or violence against a person or group based, among other factors, on the sexual orientation of the person or persons, is subject to a penalty of imprisonment from 2 to 8 years.

Finally, article 384 – crimes against humanity – takes in consideration the seriousness of the crime. It states:

A penalty of imprisonment of 3 to 20 years may be imposed if a more serious penalty is not imposed by virtue of another legal provision, on a person who, in the context of a widespread or systematic attack on a determined population or in the context of an armed, international or internal conflict, or during the military occupation of a state, territory or part of territory, commits the following acts against protected persons:

...

- g) persecution on the grounds of political, ideological, racial, ethnic, social, cultural or nationality, gender, religion, disease or physical or mental disability or sexual orientation.

In other words, the APP understands sexual orientation as a reason for persecution, both as part of a systematic attack and in the context of armed conflict. In this unique recognition of the sensitivity of the issue,

the APP goes far beyond of the protection granted by the Rome Statute of the International Criminal Court (1998), which Angola has signed, but not ratified.

The APP is, therefore, ground-breaking regarding the protection of the inequalities and vulnerabilities resulting from the sexual orientation of Angolan citizens. This position of the Angolan legislature is in line with the state's international commitments to the United Nations and the African Union.

The UPR is a mechanism of dialogue between states within the ambit of the United Nations Human Rights Council regarding their human rights commitments, and it is a forum in which some states seems to have an openness to deal with controversial issues. As Cowell and Milon state, '[b]y promoting a dialogic approach, the UPR process offers an alternative to what could potentially be a confrontational and antagonistic process of attempting to enforce politically controversial human rights norms'.⁶⁷ In the first UPR cycle, the national report of Angola (2010) had no provisions about the protection on the basis of sexual orientation. As part of this review, Belgium asked that Angola repeal the 'sodomy' law and enshrine respect for non-discrimination.⁶⁸ France recommended that Angola should 'ensure that articles 70 and 71 of the Penal Code are not construed and applied so as to criminalise homosexuality'.⁶⁹ Those recommendations were made when the 'sodomy' law was still in force. In 2014, during the second UPR cycle, the approach of Angola was different. Its national state report stated that the Angolan Constitution (in article 23(2)) protects the right to privacy of individuals, and affirmed that no legal discrimination based on sexual orientation exists in the country, in the following terms: 'Intimacy between adults is a matter of individual freedom and Government is *not are unaware* of any cases of legal prohibition or discrimination on the basis of sexual orientation'.⁷⁰ On that occasion, only the Netherlands asked Angola for the measures adopted to end violence based on sexual orientation and gender identity. The Angolan experience highlights that the UPR can be an important tool for the decriminalisation of consensual same-sex acts,⁷¹ even if the recommendations made during the review are of a non-binding nature.⁷²

67 F Cowell & A Milon 'Decriminalisation of sexual orientation through the Universal Periodic Review' (2012) 12 *Human Rights Law Review* 346.

68 See https://lib.ohchr.org/HRBodies/UPR/Documents/Session7/AO/ADVANCE QUESTIONSANGOLA_ADD.2.pdf (accessed 30 July 2019).

69 A/HRC/14/11, 18.

70 A/HRC/WG.6/20/AGO/1, para 143 (emphasis added); while the English version is ambiguous, and clearly incorrect, the French ('n'a connaissance d'aucune' and Spanish versions ('no tiene conocimiento') convey the government's intent clearly, namely, that it was not aware of any legal prohibition based on sexual orientation.

71 Cowell & Milon (n 67).

72 For a general discussion on the effectiveness of the UPR in domestic legal reforms, see the works of F Cowell 'Understanding the legal status of universal periodic review recommendations' (2018) 7 *Cambridge International Law Journal*; D Etone 'Theoretical challenges to understanding the potential impact of the

The year 2014 seems to have been a turning point in Angola's position towards sexual orientation. In May 2014, the African Commission adopted, in Luanda, Resolution 275 concerning violence and other human rights violations based on real and imputed sexual orientation and gender identity. The approach of Angola towards the African human rights system also changed. Under the African Charter, states are obliged to submit a national report about the implementation of human and peoples' rights under the African Charter. The sixth Angola's report, covering the period of 2011 to 2016, for the first time gave some attention to the issue of human rights and sexual orientation in the country. The national report states that '[t]here are no codes in Angola, which punish the consensual same-sex relations between adults. There is no record of conviction of people for being LGBTI. The draft Law that approves the Criminal Code contains rules dealing with discrimination on the ground of sexual orientation'.⁷³ Although the report places such analysis under article 3 of the Protocol on the Rights of Women in Africa, which denotes some misunderstanding of the issue of sexual orientation – as the due place for its analysis is under article 2 (non-discrimination) of the African Charter – it is important, in any case, to highlight the initiative of Angola to affirm the non-discrimination of sexual orientation in its national legal framework. In June 2018 the Angola association, Iris, the only Angola NGO working on human rights of LGBTI people in the country, was legally registered by the government.⁷⁴ This is an important step taken by Angolan authorities, taking into consideration that several African countries refuse the register of organisations of this nature, and in some cases litigation is the only option for such NGOs.⁷⁵

4.2 Cape Verde

Cape Verde is a small archipelago located in West Africa. The country is often held up as an example of democracy and rule of law on the continent. For example, Freedom House ranks the country quite highly as far as political rights and civil liberties are concerned.⁷⁶ In 2018, the HDI placed the country at 125 out of 189 countries – the highest of all African states.⁷⁷ The country has a good index of social tolerance and acceptance towards homosexuality, as evidenced by an Afrobarometer

universal periodic review mechanism: revisiting theoretical approaches to state human rights compliance' (2019) 18 *Journal of Human Rights*; N Scensson 'The Universal Periodic Review: a study on the effectiveness of the United Nations human rights council's monitoring mechanism' (2015) 8 *Vienna Journal on International Constitutional Law*.

73 Angola 'Sixth and seventh report on the implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Protocol on the Rights of Women in Africa' (2017) 47.

74 See <https://www.mambaonline.com/2018/06/21/angola-registers-its-first-lgbt-affirming-civil-rights-group/> (accessed 11 October 2019).

75 As in Kenya and Botswana.

76 See <https://freedomhouse.org/report/freedom-world/2018/cape-verde> (accessed 26 July 2019).

77 See <http://hdr.undp.org/en/countries/profiles/CPV> (accessed 28 July 2019).

survey which identified the country as the most tolerant African country in this respect.⁷⁸

Regarding the legal framework and sexual orientation, the country adopted a new Penal Code in 2004 and repealed the criminalisation of the offence of ‘vices against nature’. It was the second PALOP country to do so, after Guinea-Bissau (1993). Meanwhile, no mention was made of the necessity of protecting sexual orientation in the Penal Code of 2004. The draft code was made by Jorge Carlos Fonseca,⁷⁹ a prominent Cape Verdean jurist who graduated from the Law Faculty of the University of Lisbon (Portugal), and who later became the President of Cape Verde.

In 2015 another reform of the Penal Code (in the form of Law-Decree 04/2015) introduced significant amendments to the law. In the Preamble of Law-Decree 04/2015, the Cape Verdean legislature expanded the definition of aggravated homicide to include circumstances related to sexual orientation and gender identity, in the following terms:⁸⁰

The penalty will be imprisonment of 15 to 30 years, when the circumstances of the case reveal a marked degree of illegality of the fact or guilty of the agent, and the murder is committed:

(...)

- e) For racial, religious or political hatred or *due to sexual orientation and gender identity* of the victim.

The Cape Verdean legislature demonstrates concern for the vulnerability of people based on their sexual orientation and gender identity. It is the only PALOP country that grants some protection to gender identity, specifically. The amendments introduced by Cape Verde are in line with the international human rights commitments of the country, as it has ratified the ICCPR and ICESCR in August 1993. Regionally, Cape Verde ratified the African Charter on Human and Peoples’ Rights in June 1987. The engagement of Cape Verde with the African human rights system is very limited, as the state only submitted one national report to the African Commission since 1987.

Under the UPR, Cape Verde adopted a minimalist approach to sexual orientation. In the first (2008) and second (2013) cycles, the national report of Cape Verde was silent regarding sexual orientation. Only in 2018, in its third cycle, did the national report mention the need for the media to abstain from discrimination based on sexual orientation.⁸¹ No questions were addressed to Cape Verde regarding the need to take political measures to prohibit discrimination based on sexual orientation. The state affirmed the efforts made to prevent discrimination based on sexual orientation and gender identity,⁸² although such measures are not clearly stated in the document of the

78 Afrobarometer ‘Good neighbours? African express high levels of tolerance for many, but not for all’ (2016) 12.

79 J Fonseca *Elementos para o estudo do código penal de Cabo Verde* (2004).

80 Art 123 (emphasis added).

81 See A/HRC/WG.6/30/CPV/1 (2018) 8.

82 See A/HRC/39/5/Add.1 (2018) 3.

national plan.⁸³ Despite the importance of the UPR as a forum of dialogue in which Cape Verde is engaged, it seems not to have had a strong influence in the country's political choices regarding sexual orientation.

4.3 Guinea-Bissau

Guinea-Bissau, located in West Africa, achieved independence in November 1974, after a ten year's liberation war against Portugal.⁸⁴ The country experienced several *coup d'états* since the 1980's. Despite this political instability, the country soon started a process of legal reforms to repeal all colonial legislation. In 1993, the country adopted new criminal legislation.

The Penal Code of Guinea-Bissau repealed the colonial sodomy law and no other criminalisation of consensual same-sex activity between adults was adopted. The country shifted, then, from criminalisation to decriminalisation. Although it is possible to affirm that some legal transplant⁸⁵ has occurred from the Portuguese Criminal Code of 1982 (adopted after the 1974 revolution) – for example, the wording of the crime of rape is identical in both Codes – the truth is that the Portuguese law criminalised, at the time, 'homosexual act with minors'⁸⁶ and that was not adopted by the Guinean legislature. Despite that, in 2005 the country adopted legislation granting health care for people suffering from HIV with no discrimination based on any ground.⁸⁷

In international human rights fora, Guinea-Bissau was questioned during the second cycle of the UPR (2015) about legislative developments regarding the equality and protection from discrimination based on sexual orientation.⁸⁸ To these questions, Guinea-Bissau replied that the issue was not the subject of public debate and, therefore, it is not a priority for the government. Despite this argument, the state recognised discrimination based on sexual orientation and gender identity as 'a matter of concern for the country',⁸⁹ and reaffirmed that the Constitution guarantees the equality of all citizens and no legal criminalisation was in place.

83 See <https://www.icieg.cv/images/phocadownload/PNIG-Final-completo.pdf> (accessed 12 October 2019).

84 C Kohl 'National integration in Guinea-Bissau since independence' (2010) 20 *Cadernos de Estudos Africanos* 87.

85 There are other legal areas in which the dialogue between Portugal and former colonies, although the African states took its own path, in particular of a socialist inspiration. See F Simões 'Portuguese-speaking Africa and the lusophone legal system: all in the family?' (2017) 76 *African Studies* 91.

86 Article 207 of the Portuguese Penal Code (1982).

87 F Dramé *et al* 'Gay men and other men who have sex with men in West Africa: evidence from the field' (2013) 15 *Culture, Health & Sexuality* 11.

88 Questions made by Slovenia and Spain, although the Spanish delegation questioned about legislative measures for decriminalisation of 'homosexual relations'.

89 See A/HRC/29/12 para 12.

4.4 Mozambique

After the independence from Portugal, a devastating civil war engulfed Mozambique. That event dramatically shaped the legal and political landscape in the country,⁹⁰ and the political and juridical choices of the state, regarding sexual orientation are of a complex nature. The country has a poor record in terms of development-related ranking as captured in the HDI, achieving position 180 out of 189 in 2018.⁹¹ Concerning freedoms, the country is ranked as ‘partially free’.⁹² The Afrobarometer survey found out that Mozambicans are mostly tolerant towards sexual diversity.⁹³

As Emerson Lopes points out, one of the main particularities of the country is the ‘lack of uniformity in the Mozambican legal system with respect to the rights of sexual minorities’.⁹⁴ Despite this scenario, the Mozambican legislature in 2007 adopted progressive labour legislation in the form of granting the protection of the rights of workers in article 4(1) of Law 23/2007, as follows:

The interpretation and application of the rules of this law obey, among others, the principle of the right to stability in employment and the workplace, changing circumstances and non-compliance with discrimination on grounds of sexual orientation, race or HIV/AIDS.

The Labour Law was adopted while the colonial law criminalising ‘vices against nature’ was still in force. The repeal of the colonial Penal Law criminalising consensual same-sex activity was one of the recommendations made during the first cycle of the UPR, in 2011.⁹⁵ In 2015, Mozambique adopted a new criminal code, and as part of this process the ‘sodomy’ law was repealed. However, the legislature missed the opportunity to go beyond mere decriminalisation, towards anti-discrimination. The new legislation failed to grant protection against discrimination based on sexual orientation, as the Mozambican legislature followed neither the path previously adopted in the Labour Law, nor the UPR recommendations received in 2011. To those, the Mozambican state added that ‘its Constitution makes no reference to sexual orientation [and] the country is confronted with profoundly entrenched cultural and religious habits’.⁹⁶ Culture is, therefore, mobilised to the arena of human rights to legitimise the lack of an affirmative action to the state on the sensitive issue of homosexuality. It is also added that ‘homosexuality is not criminalised’ in the country,

90 See P Jerónimo *Report on citizenship law: Mozambique* (2019).

91 See <http://hdr.undp.org/en/countries/profiles/MOZ> (accessed 28 July 2019).

92 See <https://freedomhouse.org/report/freedom-world/2018/mozambique> (accessed 28 July 2019).

93 Afrobarometer (n 78) 12.

94 E Lopes ‘The legal status of sexual minorities in Mozambique’ in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 185.

95 Made by France, Spain and the Netherlands.

96 ‘Report of the Working Group on the Universal Periodic Review: Mozambique’ A/HRC/17/16 (2011) 12.

pointing that the criminalisation of ‘vices against nature’ is not a law that discriminates based on sexual orientation.

The lost opportunity in the new penal code of 2015 was underlined by some states under the second cycle of the UPR (2016) that noted that Mozambique failed to protect people from discrimination based on the sexual orientation or gender identity.⁹⁷ Mozambique took note, but did not accept the recommendations calling for legal and political measures to protect LGBTI people. To those, Mozambique affirmed, once again, that no discrimination based on sexual orientation is in force in the country.⁹⁸

The case of registering an NGO that works directly with human rights of LGBTI people – LAMBDA Mozambique – was another subject of discussed in 2016, as the state has failed to register this organisation since 2008.⁹⁹ The case was also the subject of several recommendations under the UPR, and to those the Mozambican state replied that ‘there is no discrimination in Mozambique for the recognition of civil society organisations. In the case of the recognition of LAMBDA and other similar associations, the position of Mozambique is that non registration of these associations does not imply a discriminatory practice. Internal consultations with the relevant administrative services and other mechanisms are underway’.¹⁰⁰ Despite this refusal of registration, the activity of LAMBDA is not constrained by government authorities. As Zenaida Machado states, this NGO works ‘freely, but not legally’.¹⁰¹

In 2017, the Constitutional Council – a court-like body – pronounced the unconstitutionality of the law of associations, on which the state based its rejection to register LAMBDA.¹⁰²

4.5 São Tomé and Príncipe

The small archipelago of São Tomé and Príncipe, located in the Gulf of Guinea, has a population of around 200,000 inhabitants. Freedom House ranks the country as having a good records pertaining to political rights and civil liberties.¹⁰³ It is a small economy, with a poor HDI ranking, at around position 143 out of 189 countries.¹⁰⁴ With Cape

97 ‘Report of the Working Group on the Universal Periodic Review: Mozambique’ A/HRC/32/6 (2016).

98 ‘Matrice of recommendations’ (2016) 8.

99 See <http://rajatorrent.com.lambdamoz.org/index.php/recursos/brochuras/8-registe-lambda/file> (accessed 1 August 2019).

100 ‘Matrice of recommendations’ (2016) 8.

101 ‘Dispatches: Mozambique’s double speak on LGBTI rights’ 25 January 2016 <https://www.hrw.org/news/2016/01/25/dispatches-mozambiques-double-speak-lgbt-rights> (accessed 21 October 2019).

102 See <https://www.hrc.org/blog/mozambiques-recent-ruling-moves-lgbtq-organization-closer-to-legal-recognition> (accessed 2 August 2019).

103 See <https://freedomhouse.org/report/freedom-world/2015/s-o-tom-and-principe> (accessed 2 August 2019).

104 See <http://hdr.undp.org/en/countries/profiles/STP> (accessed 2 August 2019).

Verde, it shares a high level of social tolerance and acceptance towards homosexuality, as the Afrobarometer survey found that people of São Tomé expresses a level of tolerance that is above the average of the countries studied.¹⁰⁵ The archipelago is the third African Lusophone country that appeared above the average (21%) of those studied by Afrobarometer, with near half of the respondents (46%) demonstrating a good tolerance towards homosexuality.¹⁰⁶

The legal recognition of sexual orientation in São Tomé took place in 2008, when it adopted the first ordinary law criminalising domestic and familiar violence. Article 2 of Law 11/2008 states:

Every woman, man, child, regardless of class, ethnicity, sexual orientation, profession, culture, educational level, age and religion, enjoys the fundamental rights inherent to the human person, being assured the opportunities and facilities to live without violence, to preserve their physical and mental health and their moral, intellectual and social integrity.

The country adopted a new penal code in 2012, repealing the law criminalising consensual same-sex activity. That was a recommendation made to the country in 2011, during the first UPR cycle.¹⁰⁷ The new legislation aggravates the penalty of the qualified homicide when motivated by hatred against the sexual orientation of the victim. Article 130 of the Penal Code states:

1. If the death is caused in a circumstance that reveals a special objection or perversity of the agent, the penalty is the imprisonment of 14 to 20 years.
2. The particular objectionability or perversity referred to in the preceding paragraph may reveal, inter alia, the fact that the staff member:

(...)

(d) be determined by racial, religious or political hatred, or generated by the color, ethnic or national origin, sex or sexual orientation of the victim.

São Tomé and Príncipe moved from criminalisation to protection in its new Penal Code. The state engaged in active dialogue during the first cycle of UPR, accepting the recommendations made to repeal the criminalisation of same-sex activity.¹⁰⁸

The same law criminalises, in article 178, 'homosexual acts with adolescents'. This provision was a legal transplant from former article 175 of the Portuguese Penal Code (1995).¹⁰⁹ Such disposition of homosexual acts with adolescents constitutes a form of discrimination based on sexual orientation, as article 177 of the Penal Code criminalises the sexual acts with adolescents, when 'copulation, anal or oral intercourse' took place, irrespectively the gender of the minor, and punishable with imprisonment up to 3 years or fine up to 300 days. In article 178, the legislature does not define 'homosexual acts of relevance' with minors but gave a less severe punishment of imprisonment up to 2 years or fine up to 200 days.

105 Afrobarometer (n 78) 12.

106 Afrobarometer (n 78) 12.

107 Recommendations made by Norway and France. See 'Report of the Working Group on the Universal periodic Review - São Tomé and Príncipe' A/HRC/17/13 (2011) 13-14.

108 Cowell & Milon (n 67) 347.

109 Repealed in 2007.

As articles 177 and 178 seem to cover the same legal good, which is the minor's sexual freedom and self-determination, the São Toméan legislature defines a less severe penalty and fine for the crime of homosexual acts with adolescents. Article 178 also stipulates that a person who acts in a way of aiding or abetting the commitment of the homosexual acts by the minor is also punishable under the law. São Tomé and Príncipe should repeal article 178 of the Penal Code as it constitutes discrimination based on sexual orientation, and article 177 gives an enough scope to accommodate all crimes committed against the sexual determination of minor with a more adequate penalty and fine.

5 CONCLUSION

This article analyses the legal developments of African Union law and domestic criminal law of the African Lusophone countries regarding the prohibition of discrimination based on sexual orientation. Remaining as a complex human rights issue and despite developments in international human rights law, there is strong reluctance to deal with the topic, due its political, cultural and religious dimensions. The article sheds some light on the legal developments under United Nations and African Union law, but also presents an in-depth analysis of African Lusophone countries' domestic legislation regarding sexual orientation and human rights standards. The article further presents a distinctive narrative contradicting the rhetoric of homosexuality as being unAfrican or a western imposition, as the African Lusophone countries, as well as South African and recently Botswana, are examples of states that prohibits discrimination of its citizens regardless of their sexual orientation, as such ground constitutes a negative condition that puts this citizens at risk of vulnerably and several human rights violations.

The first conclusion to be drawn from this discussion is that African states individually and collectively have displayed strong resistance against affirming the prohibition of discrimination based on sexual orientation. Despite the efforts by the African Commission to recognise sexual orientation as a human rights issue, and the broad protection granted by the African Charter in its articles 2 and 28, the Commission has faced resistance from other AU bodies. The experience of African Lusophone countries shows that, despite the cultural sensibility of the issue of sexual orientation, at least some African states are willing to fulfill their international human rights obligations by protecting the rights of sexual minorities. These countries may play an important role in the AU human rights system by reaffirming the independence of the African Commission on human and peoples' rights and pushing for the development of African human rights law to protect all African citizens from discrimination on any grounds. The African Commission should also adopt an approach to invite African states to repeal sodomy laws from their penal codes and ensure that no discrimination, including discrimination based on sexual orientation, is tolerated under the African Charter.

The second conclusion is that domestic legislation related to sexual orientation in African Lusophone countries goes far beyond the protection under the regional human rights system. These countries underwent legal reforms after their independence from Portugal and repealed colonial sodomy laws. The crime of ‘vices against nature’ was repealed, but other criminalisation was adopted to replace it. That was the legal-political choice of these independent African countries. Despite the cultural sensibility of the subject, Angola, Cape Verde, and São Tomé and Príncipe provided for aggravated sentence for the crime of murder if motivated by the sexual orientation of the victim, in formal recognition by the legislature of the negative treatment that LGBTI people are subject to. The Angolan legislature adopted the most protective approach of the PALOP states. As those countries inherited a legal system from Portuguese colonisation based on civil law, and legal transplants from Portuguese law occurred since their independence, the legal developments in Portugal – decriminalisation of same-sex consensual acts and the prohibition of discrimination based on sexual orientation in the Portuguese Constitution (2004) – may have played a crucial role in the initiatives of African Lusophone legislatures. Despite that, these states exercised their discretion to accommodate these developments, which reveal a sensitivity of PALOP legislatures to the need for protecting citizens from all forms of discrimination.

Finally, a third conclusion is that the dialogue within global and regional African human rights fora is beneficial for a more protective approach by the states to sexual orientation. The UPR was of central importance for legal reforms in São Tomé and Príncipe. Other states also engaged in positive dialogue with peers, such as Guinea-Bissau, which recognised that sexual orientation was a human rights issue, although it still was not ready for legal reform in the area. For Mozambique, the dialogue was not useful, as the state refused to act on all sexual orientation-related recommendations. The state used cultural arguments to avoid a more protective approach in its legislation. Domestically, Mozambican authorities persist in disallowing the registration of an NGO that advocates for the human rights of sexual minorities. This case reveals the tension between international law and domestic sensitivities to dealing with this controversial human rights topic.