

**15
OCT
2024**

Litigating SOGIE rights in the African Human Rights Mechanisms

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Time: 9.00 am to 11.00 am (GMT)
**Venue: Jawara International
Conference Centre(Hybrid)**

Concept Note



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This concept note:

- **Explains the purpose of the expert advisory and its location within ISLA's programmes;**
- **Provides the context of SOGIE issues in Africa;**
- **Explains ISLA's justification for transitioning to regional SOGIE litigation; and**
- **Outlines the working methods and the background thoughts and questions that will inform the discussion.**

1. INTRODUCTION: ISLA'S MANDATE

Established in 2014, ISLA is a feminist pan-African organisation focused on the strategic litigation of women's human rights and sexual rights both at national levels and within the African human rights system. Our work is based on the belief that strategic litigation is an immensely powerful tool for social change because it helps to reframe the understanding of entitlements before the law and challenges the legal discourse. ISLA seeks to gain ground by creating domestic and regional jurisprudence in women's human rights and sexual rights; strengthening the capacity of litigators and NGOs on the continent; and conducting rigorous research.

ISLA's work methodology is to set itself as an anchor that works with partner organisations in different countries to provide them with tailor-made support aimed at capacitating them with the necessary skills and expertise required in instituting strategic litigation cases domestically and before regional and international human rights systems. Ultimately, through ISLA's capacity

strengthening work with its partners and its resources, ISLA aims to help foster legal systems that adequately protect rights and develop a body of feminist jurisprudence that protects as well as advances the progressive development of women's rights.

ISLA's approach prioritises responding to human rights violations based on sexuality, broadly, and sexual orientation and gender identity and expression (SOGIE), specifically. Through this work, ISLA supports litigation efforts to develop jurisprudence and hold states and non-state actors accountable for SOGIE-based human rights violations. In particular, ISLA aims to promote the articulation of progressive standards and the development of jurisprudence before domestic courts and the African regional human rights system.

2. KEY PRINCIPLES IN OUR LITIGATION WORK

Expert Advisory Meetings form part of ISLA's capacity strengthening efforts, allowing us to stay informed about developments and emerging trends. These meetings also provide valuable

guidance from experts and tap into the expertise of ISLA's partners, offering insights into events and dynamics unfolding across various countries worldwide throughout the African continent. The objective of these meetings is to seek input from this wide range of sources on the key issues, including standards that require development or elaboration through litigation. The meetings are also intended to specifically advise on appropriate issues and approaches for litigation, methodologies that ISLA might employ in pursuing litigation of these issues and identifying ways in which ISLA might support work on its thematic areas of focus, mindful of its mandate and expertise.

The following principles inform our work and should be taken into consideration as we develop this project: ISLA aims to:

- Collaborate with lawyers who are working on similar issues globally, regionally, and nationally to develop jurisprudence before the African human rights system and national courts.
- Focus on the development of

important principles, relevant across the board to SXR

- Build upon issues in which we have existing experience and expertise – for example working with the procedural nuances of the regional bodies.¹
- Work collaboratively with civil society and avoiding duplicating work undertaken more effectively by others; and
- Engage in out of court advocacy to shift the public narrative that is necessary if the litigation is to have an effective role in changing society.²

3. PROJECT INTRODUCTION AND WORKING METHODS OF EXPERT ADVISORY

Sexual rights are amongst the most contested categories of human rights, with persistent attacks, threats, and risks for those who enjoy or seek to enjoy these rights and for those who defend

these rights. At the heart of sexual rights is the right to bodily autonomy and as such, sexual rights address issues related to the right to decide on matters related to one's body, sexuality, reproductive health, and choices. The range of issues that fall within the scope of sexual rights is wide and include the right to abortion, sex work, comprehensive sexuality education and maternal health, amongst others. Sexual orientation, gender identity and expression (SOGIE) are one set of issues within the sexual rights frameworks. All people have a sexual orientation and gender expression and/or identity. Those whose rights are often under attack in this regard include those in same sex relationships, those who do not conform to the gender norms of society, which are based in the gender binary, and people who are intersex.

Within the broader category of sexual rights, there has been a concerted attack by States, corporates, social, religious and traditional institutions on rights related to SOGIE. In some cases, the

1 Given that admissibility criteria – for example, standing issues, victim status and exhaustion of domestic remedies – often provide severe obstacles for litigation, we believe we have a role in litigating to ensure that these procedural matters are approached with flexibility by human rights bodies.

2 ISLA is currently working with National Arts Festival [NAF], Center for the Study of Race Gender and Class [RGC] at the University of Johannesburg and GALA to develop a Charter for the Arts sector to work as a Model to protect women who speak up against their perpetrators.

attacks emanate from human rights institutions. The human rights that are violated on a daily basis include those to bodily autonomy, privacy, the right to be free from discrimination, the right to freedom of association, freedom from violence perpetrated by State and non-State actors and the right to be protected from harassment, inhumane and degrading treatment.

While the imperative to decriminalise same-sex sexual conduct remains in many countries, these interventions are not the most successful or useful immediate strategies in many African contexts and may not be the strategies prioritised by the affected LGBT+ communities. Indeed, more important short to medium-term legal interventions may be required to challenge the conditions that make it possible for state and non-state actors to violate human rights on the basis of SOGIE. This in turn makes it possible for actors to perpetrate the extensive list of violations faced by these communities and groups, whose rights are not acknowledged, and indeed actively resisted and denied in the case of SOGIE.

ISLA collaborates with other organisations on various sexual rights issues and currently engages in strategic litigation specifically concerning sexual orientation, gender identity, and expression due to the imperative to advance these rights. Moreover, these rights face significant challenges from state and non-state actors, and opposition to them persists even within otherwise progressive spheres and movements. Our decision to prioritise this issue is also informed by longstanding partnerships and the expressed needs of these groups and movements for legal advocacy in safeguarding these rights.

ISLA invests in strategic litigation in concerning these conditions to uphold and enforce the rights most frequently infringed upon. ISLA's litigation strategies are grounded on research and analysis of priorities of the communities and movements which are most affected, and respond, and will continue to respond, to the needs articulated by these communities.

In September 2024, a group of experts drawn from legal academia and human rights law practice, encompassing a diverse array of individuals possessing

a profound comprehension of the underlying issues and legal mechanisms, engaged in intensive facilitated discussions resulting in an Expert Advisory Report on Litigating SOGIE Cases before the African Human Rights Court.

4. OBJECTIVES OF THE MEETING

Expert Advisory Meetings are strategic responses to discuss litigating the first regional SOGIE case in the context of the above mentioned challenges. This meeting is a follow up to an ongoing strategy consultation process whose overall objective is to strengthen ISLA's capacity – and that of our partners – to effectively conduct strategic litigation on sexual rights issues within regional courts.

These advisory meetings form part of ISLA's capacity strengthening efforts, allowing us to stay informed about developments and emerging trends. These meetings also provide valuable guidance from experts and tap into the expertise of ISLA's partners, offering insights into events and dynamics unfolding across various

countries worldwide throughout the African continent. The objective of these meetings is to seek input from this wide range of sources on the key issues, including standards that require development or elaboration through litigation. The meetings are also intended to specifically advise on appropriate issues and approaches for litigation, methodologies that ISLA might employ in pursuing litigation of these issues and identifying ways in which ISLA might support work on its thematic areas of focus, mindful of its mandate and expertise.

As ISLA progresses towards regional litigation on SOGIE issues, it is currently developing two cases from Ghana and Malawi with the intention of bringing them before the African Court. ISLA is convening this Expert Advisory Meeting to seek expert guidance on the strategic, legal, and socio-political ramifications of initiating the first SOGIE cases within African regional mechanisms. This meeting represents a pivotal stage in ISLA's continuous endeavour to utilise strategic litigation as a potent tool for effecting social change and justice, particularly concerning LGBTQ+ rights

within the African human rights framework.

We consistently strive to increase our own capacity on SOGIE issues to refine and reinforce our methods and perspectives.

More specifically, we invite the participants to:

- Develop a collective understanding of issues and developments in national and regional SOGIE rights litigation, encompassing both global and African contexts.
- Offer nuanced insights into the wider socio-political landscape surrounding SOGIE issues across various regions worldwide, including the transformative effects of advocacy endeavours outside the courtroom on the advancement of SOGIE rights.
- Share expertise that will assist ISLA in comprehensively assessing the potential socio-political repercussions of initiating the inaugural SOGIE cases with African regional mechanisms.

5. LITIGATING LGBTIQ+ CASES BEFORE THE AFRICAN REGIONAL MECHANISMS: A CONTEXTUAL BACKGROUND

1. LGBTIQ+ Criminalisation and Violations in Africa

Much of Africa is experiencing a rise in homophobia, which is often portrayed as a rejection of neo-Western influence on sexuality. As of today, there are 32 of 54 African countries that criminalise consensual same-sex sexual conduct between men (note that some countries have not criminalised the conduct between women) including the prohibition of non-heteronormative gender identity and expression.

Since the mid-1990s, African countries have witnessed varying legal battles over LGBTIQ rights, with courts, constitutional changes, and legislative proposals becoming central arenas. These developments

have spurred contrasting directions among nations regarding queer rights. Currently, Africa demonstrates a mixed landscape of advancements and setbacks in LGBTIQ+ rights. For instance, in 2005, Uganda's Parliament amended its Constitution to ban same-sex marriages, whereas a year later, in 2006, South Africa legalised same-sex marriage.³ In some African countries' homosexuality was never criminalised⁴, while in recent decades other countries have decriminalised homosexuality.⁵

However, other countries have taken a different path. Some nations have introduced or enforced stricter penalties for homosexual acts, criminalising a wider range of activities, including advocacy and dissemination of information related to LGBTIQ+.⁶ Enforcement and criminalisation of laws varies widely across countries: some rigorously apply these laws

with criminal charges, trials, and imprisonment; others use them as tools for frequent harassment of LGBTIQ+ individuals, often for extortion and unlawful detentions without formal charges; meanwhile, some countries aim to enhance existing penal codes, while others are pursuing the introduction of new legislation in this regard.

The criminalisation of same-sex relationships represents a human rights violation against LGBTIQ+ individuals in Africa. However, there are numerous other forms of human rights abuses based on SOGIE rights that are prevalent across the continent. These include the refusal to register LGBTIQ+ NGOs, discrimination in housing, employment, education, and healthcare settings, unlawful arrests and detentions, malicious prosecutions, state-sponsored homophobia, violence and harassment targeting LGBTIQ+ individuals, forced

3 Adrian Jjuuko et al (eds), *Queer Lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (PULP, 2022).

4 Adrian Jjuuko et al (n 4) 6: "...homosexuality was never criminalised: Benin, Burkina Faso, Cote d'Ivoire, Democratic Republic of Congo (DRC), Djibouti, Equatorial Guinea, Madagascar, Mali, Niger, and Rwanda"

5 Adrian Jjuuko et al (n 4) 7: Guinea-Bissau decriminalised in 1993, Cape Verde in 2004, Sao Tome and Principe in 2012; Mozambique in 2015; and Angola in 2021; South Africa in 1998; Lesotho 2012; the Seychelles in 2016; Botswana in 2019; and Gabon in 2020.

6 Adrian Jjuuko et al (n 4) 7.

marriages, sexual assault directed at LGBTIQ+ people, lack of legal recourse for violations suffered, and raids on LGBTIQ+ gatherings and establishments. Moreover, human rights defenders (HRDs) frequently face targeting due to their advocacy on LGBTIQ+ issues, whether challenging the state directly or merely through association or support of these communities. Additionally, HRDs are often unjustly charged with fabricated offenses, such as the fictitious crime of “promoting homosexuality”.

In several African nations, political campaigns often exploit anti-gay sentiments to rally electoral support. Politicians capitalise on homophobic biases, framing homosexuality as a threat to ‘traditional values’, African identity, and societal norms, including notions of masculinity and patriarchal family structures. Homosexual individuals and their supporters are portrayed as agents of moral corruption, accused of influencing and endangering children and youth, and perceived as undermining the social

cohesion and national identity.⁷ Anti-queer rhetoric serves as a powerful political tool across Africa, deflecting attention from internal issues like corruption and economic challenges by portraying homosexuality as a Western imposition that undermines African traditions and values. This narrative not only shields leaders from international scrutiny but can also be leveraged to gain political advantage domestically.⁸

2. The African Regional Human Rights System

2.1. The African Charter and the African Commission on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights, established in 1986, has progressively interpreted the African Charter in a dynamic manner. Despite gaining credibility through innovative jurisprudence expanding the charter’s rights coverage, the Commission has largely neglected the issue of

7 Adrian Jjuuko et al (n 4) 9.

8 Adrian Jjuuko et al (n 4) 9.

sexual orientation. This oversight is significant given ongoing violations against gays and lesbians across Africa.⁹

The African Commission on Human and Peoples' Rights (the ACHPR) is tasked with interpreting and overseeing the application of the African Charter. The African Charter's preamble highlights the essential nature of freedom, equality, justice, and dignity in realizing the legitimate ambitions of the African peoples, emphasizing that fundamental human rights are inherent to human beings rather than being granted by the document itself. This principle suggests that the existence of a right is not contingent upon its explicit mention within the African Charter. This perspective is reinforced by the Articles 2 and 3, which assure all individuals freedom from discrimination and equal protection under the law.

Specifically, Article 2 declares that every individual has the right to enjoy the freedoms and rights specified in the charter without any form of discrimination, listing several grounds including race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or any other status. This phrasing implies that the list of discrimination grounds is not exhaustive. Hence, even though "sexual orientation or gender identity" is not explicitly mentioned, it falls within the Charter's scope. Similarly, in the case of *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the African Commission highlighted that Article 2 of the African Charter aims to guarantee equal treatment of individuals regardless of nationality, gender, race or ethnic origin, political opinion, religion or belief, disability, age, or sexual orientation. However, competing local and global values are arguably growing in Africa, challenging these rights.¹⁰

9 Rachael Murray & Frans Viljoen (2007) '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(1), 86-111.

10 A Rudman (2015), 'The protection against discrimination based on sexual orientation under the

In many parts of the world, including several African nations, LGBTIQ+ individuals have been systematically excluded from the promise of safety, empowerment, and equality. Despite facing disproportionately high levels of violence and discrimination, their rights have not been explicitly addressed in the core documents of the United Nations and African human rights frameworks. Advocates for LGBTIQ+ rights often encounter indifference, resistance, and even hostility when urging States to protect these rights or hold them accountable for violations.

2.1.1. Resolution 275 of the African Commission on Human and Peoples' Rights

The African Commission's stance on safeguarding the rights of LGBTIQ+ individuals has markedly evolved over the past decade. A pivotal development occurred during the 55th Ordinary Session of the African Commission from April 28

to May 12, 2014, with the adoption of Resolution 275. This resolution draws upon key provisions of the African Charter – Articles 2, 3, 4, and 5 – which guarantee freedom from discrimination, equality, life, and dignity respectively. Resolution 275 condemns and calls upon States to end violence, persecution, and other human rights violations against individuals based on their sexual orientation or gender identity. It specifically calls on States to enact and enforce appropriate laws that prohibit and punish violence targeting LGBTIQ+ persons, ensure thorough investigations and diligent prosecution of such crimes, and provide remedies for victims.

Despite pockets of progress after the adoption of Resolution 275, setbacks persist. Several countries have intensified punitive measures against LGBTIQ+ individuals. For instance, Uganda's Anti-Homosexuality Act of 2023 not only criminalises same-sex relations but also includes provisions for the

African human rights system' 15 African Human Rights Law Journal, 1-27.

death penalty for certain categories of offenders. Similarly, in Kenya, a proposed Bill seeks to outlaw consensual same-sex activity and related practices. Furthermore, the African Commission's rejection of observer status for three LGBTIQ+ rights organisations underscores ongoing challenges. The Commission cited that sexual orientation is not explicitly protected under the African Charter and deemed such rights contradictory to African values, despite its own Resolution 275 advocating for the protection of LGBTIQ+ individuals.

2.1.2. The African Court

The African Court on Human and Peoples' Rights (African Court) was established through a protocol to the African Charter in 2004. Like the ACHPR, the Court is mandated to interpret the African Charter but unlike the ACHPR, it can provide binding decisions on State parties to its Protocol. A distinctive feature of the African Court is that individuals may only submit petitions directly if their state has

accepted individual applications through a declaration under Article 34(6) of the Court's Protocol. To date, only eight countries—Burkina Faso, Malawi, Mali, Ghana, Tunisia, Gambia, Niger, and Guinea Bissau—have made such a declaration and maintained it, significantly narrowing the pathway for individuals to bring cases directly to the Court. Without this declaration, individuals must first approach the African Commission who may then refer the case to the African Court if the affected state has failed to comply with the African Commission's recommendations.

3. ISLA and Regional Litigation

ISLA recognises the importance of regional courts as platforms for challenging injustices and promoting sexual rights. Through the strategic deployment of our litigation, we aim to influence regional jurisprudence in a way that fosters a more inclusive and equitable legal landscape. This approach recognises that local courts do not exist in a vacuum and

that regional and international legal developments can shape and inform domestic legal understandings and outcomes. Through strategic litigation, ISLA will utilise the recognition of regional courts as effective avenues for seeking redress, particularly in cases where exhaustion of local remedies is impractical, ineffective, or discriminatory.

ISLA's transitional focus to litigating SOGIE issues at the regional level is also motivated by the need to develop jurisprudence on ACHPR norms, such as Resolution 275, which condemns violence against individuals based on their SOGIE, by bringing cases before the ACHPR and the African Court. This transition to regional litigation will enable us to make more contributions to the growth of SOGIE advocacy in Africa through the development of human rights law in Africa and promote the recognition and protection of the rights of the community from a broader field.

While the ACHPR previously

commenced a gradual but significant shift towards recognizing and addressing SOGIE-related rights and litigation culminated in the adoption of Resolution 275 in 2014, recent actions by the ACHPR seem to retract from its earlier commitments to SOGIE-related rights. This trend undermines the ACHPR's credibility and questions its autonomy, as it seems to be aligning its stance with the conservative views of certain AU member states and the Executive Council.¹¹ For instance, because the African Charter does not explicitly mention "sexual orientation or gender identity" the ACHPR has leaned towards an interpretation implying that it is not mandated to protect these SOGIE-related rights.¹²

This retrogressive interpretation reflects is influenced by political pressures and ignores the African Charter's broad non-discrimination principles under Article 2 and also contradict the ACHPR's own previous positions, such as Resolution 275, which condemns violence against individuals based on their SOGIE. In

11 <https://achprindpendence.org/banjul-civil-society-joint-declaration/>.

12 <https://theconversation.com/lgbtq-rights-african-union-watchdog-goes-back-on-its-own-word-197555>.

addition to the political issues, the regional human rights system also faces internal constraints that impact its capacity to promote and protect SOGIE-related rights effectively, particularly a lack of comprehensive understanding or acknowledgment of the nuances related to sexual orientation and gender identity by the persons tasked with upholding the mandates of the mechanism.

6. KEY QUESTIONS FOR DISCUSSION AND DEVELOPMENT

The overarching themes of the in-depth seminar are as follows:

1. Strategic Engagement with the African Court

Evaluating the Court's jurisprudence and understanding regional legal nuances is pivotal to identifying strategic opportunities for impactful litigation and navigating political and cultural sensitivities. Strategic engagement with the African Court in SOGIE cases is important for advancing human rights, promoting equality,

addressing legal gaps, and empowering marginalised communities within the African regional context and beyond. We invite participants to reflect on the most effective methods and considerations for approaching the African Court, for example through judicial discourse and training or sensitisation of personnel on SOGIE issues prior to litigation.

2. Preventing Unfavourable Legal Precedents

In litigating SOGIE rights in Africa, it is crucial to carefully strategise to prevent the unintended establishment of detrimental legal precedents. ISLA aims to adopt strategies that prioritise litigation aimed at achieving positive legal outcomes without inadvertently reinforcing discriminatory practices or interpretations. Thus, ISLA's litigation efforts should be part of a broader advocacy strategy that seeks to shift societal norms and attitudes towards greater acceptance and equality for LGBTIQ+ individuals in Africa. Preventing unfavourable legal precedents in the context of SOGIE rights requires a deep understanding

of legal, social, and cultural landscapes in African countries. It is important to identify and engage with key stakeholders, both within and external to the LGBTIQ+ community, who are instrumental in the litigation process. This includes building alliances and understanding the perspectives of various parties involved. Our concern here is to consider what strategies are available to ensure that ISLA's litigation efforts do not inadvertently result in the establishment of detrimental legal precedents.

3. Beyond Legal Arguments (SOGIE Advocacy in Conservative African Context)

In pursuing SOGIE cases in conservative Africa environments, it is essential to adopt a holistic approach that extends beyond legal arguments. Understanding and navigating the non-legal aspects – particularly political and societal factors – are critical for effective advocacy and litigation outcomes. By addressing cultural and political dimensions alongside legal arguments, advocates can navigate

conservative environments more effectively, foster societal change, and advance the recognition and protection of SOGIE rights in Africa. We ask participants to reflect on the non-legal aspects of the litigation process, such as the political and societal factors, that are crucial in navigating SOGIE cases in conservative environments, including understanding the influence of cultural norms and political dynamics on legal outcomes.

4. Counteracting Anti-Rights Actors: Lessons from US and Latin America

We encourage participants to also analyse the impact of anti-rights groups (such as Alliance Defending Freedom) and extract lessons from similar legal battles in jurisdictions like U.S. and Latin America. By closely studying these cases, ISLA can identify common tactics, evaluate successful resistance strategies employed by pro-rights advocates and develop proactive measures to counteract the strategies of anti-rights actors. Drawing on these experiences will equip ISLA with the necessary insights

to effectively navigate and mitigate the influence of anti-rights actors.

5. Navigating Political Landscapes

We would like participants to reflect on strategies necessary to address the complex political contexts surrounding LGBTIQ+ rights in Africa and how these political forces can significantly impact legal advocacy. This includes, navigating how political dynamics, such as governmental policies, cultural attitudes, and societal perceptions, shape and influence attitudes towards LGBTIQ+ rights across different African countries. It is important to assess how the prevailing political climates in these regions can either create opportunities or pose challenges for advancing legal protections and advocacy efforts for LGBTIQ+ individuals. This includes evaluating potential risks associated with advocacy initiatives, considering factors like legal frameworks, public opinion, and the potential backlash from conservative or influential political entities.

7. EXPECTED OUTCOMES AND OUTPUTS

At the end of this consultation meeting, it is expected that this group will provide input for a strategic coherent response that is able to sufficiently guide lawyers keen on litigating SOGIE cases before the African regional mechanisms.

- The expected outputs of this event are as follows:
- Reflections on the the report compiling the insights captured during the Expert Advisory Meeting; and
- A proposal for a strategy on litigating SOGIE cases before the African regional mechanisms