



Global South Symposium on SOGIE and ESCR

A reflection on evolving laws and jurisprudence in Africa

Date: 13 - 14 December 2021

Time: 10h00 – 16h00 (SAST) daily

1. Background

Despite progress in recent years, the majority of countries in Africa continue to criminalize and discriminate against lesbian, gay, bisexual, trans, intersex, and queer (LGBTIQ+) persons in different ways.¹ With the exception of South Africa, gay marriage is not legal in any African country and less than half of the countries on the continent have legalized same-sex relationships. In most instances of criminalization, the criminal and penal laws derive from colonial legacy laws that criminalize same-sex relationships under provisions that prohibit “sodomy” and “carnal knowledge against the order of nature”.² In other instances, a growing trend of newly enacted laws criminalize same-sex marriage, expressions of same-sex affection, transgender identity and expression, as well as association and advocacy for or in support of LGBTIQ+ issues.³ In some of these countries, courts have not offered much support in the protection of the rights of those found to be contravening the “homophobic laws”, and in some circumstances they have resorted to reliance on technicalities, in making their decisions.⁴ Consequently, homophobic social attitudes, discrimination, and even violence have remained openly or tacitly supported by the state, thus heightening the dangers that LGBTIQ+ persons face in Africa.

Furthermore, many cases where the rights of LGBTIQ+ persons have been violated do not make it to courts as there are significant barriers to access to justice for such persons. Nevertheless, some progress has been recorded through judgements from a number of African courts that have been very progressive in their reasoning and have upheld human rights above majoritarian constructs of morality and culture.

¹ A Jjuko ‘The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges’ in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 261.

² A Gupta ‘This alien legacy: The origins of “sodomy” laws in British colonialism’ (2008) 26 – 27.

³ Jjuko (note 1 above) 261 - 262.

⁴ For example, the Nigerian case of *Teriah Joseph Ebah v Nigeria* (Suit No FHC/ABJ/CS/197/2014).

For example, in South Africa⁵ and Botswana⁶, courts have declared laws criminalizing consensual same-sex sexual acts as unconstitutional, while in Uganda and Kenya courts have, in specific cases, sanctioned government officials for violating the dignity of LGBTIQ+ persons.⁷

As a key part of their mandate, the International Commission of Jurists and the Centre for Human Rights have always advocated for the respect and protection of human rights of LGBTIQ+ persons, including through decriminalization of consensual same-sex relationships and the advancement of advocacy for Sexual Orientation, Gender Identity and Expression (SOGIE) issues.⁸ The goal is to have a continent that fully respects equally rights of all human beings regardless of their sexual orientation or gender identity and expression, in accordance with international human rights law and standards.

On the other hand, poverty and socio-economic deprivation are endemic across Africa and research suggests that many conflicts and unrest on the continent are fueled by sentiments of socio-economic neglect by governments of various African states.⁹ This level of socio-economic deprivation exists despite the fact that most African countries have voluntarily signed up to international and regional human rights treaties that obliges them to respect, protect and fulfil the economic, social and cultural rights of their populace, including but not limited to the African Charter on Human and People's Rights. The neglect of economic, social and cultural rights is, however, not a new problem. Age-old disagreements on the nature of and the propriety of judicial enforcement of economic, social and cultural rights have existed since the adoption of the Universal Declaration of Human Rights. These disagreements eventually resulted in the adoption of two separate covenants (ICCPR and ICESCR) even though the initial plan was to transform the rights contained in the UDHR into a single binding human rights treaty. These disagreements during the negotiations and the subsequent adoption of two separate covenants has filtered down to national legal systems with most national constitutions on the continent guarantee and elaborate list of civil and political rights that are accompanied by judicial enforcement mechanisms, while economic, social and cultural rights have usually been relegated to unenforceable directive principles of state policy. This despite the fact that international human rights law has now developed to accept and require the full justiciability of ESCR domestically.¹⁰

⁵ National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC).

⁶ *Letsweletse Motshidiemang v The Attorney-General* Suit No MAHGB-000591-16 (unreported).

⁷ *Kasha Jacqueline v Rolling Stone* (Misc. Cause No. 163 of 2010); *RM vs Attorney* (Petition 705 of 2007).

⁸ For more information on ICJ's SOGIE work, refer to <https://www.icj.org/sogi-casebook-introduction>; On the work of CHR see <https://www.chr.up.ac.za/sogiesc-unit>

⁹ Nancy Annan 'Violent Conflicts and Civil Strife in West Africa: Causes, Challenges and Prospects' (2014) 3 Stability: International Journal of Security & Development, art 3.

¹⁰ International Commission of Jurist, Adjudicating economic, social and cultural rights at national level: A practitioner's guide (2014) <https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-Publications-Practitioners-guide-2014-eng.pdf>.

The adoption of new constitutions in Africa starting from the early 1990s has resulted in a gradual shift in constitutional guarantee, with some constitutions guaranteeing a limited list of economic, social and cultural rights, and more recent constitutions guaranteeing a full list of justiciable economic, social and cultural rights provided for under international and regional human rights treaties. The increasing recognition of economic, social and cultural rights as legal rights which imposes judicially enforceable obligations on governments has not, however, dissipated the challenges faced in the judicial enforcement of these rights, with some courts even refusing to exercise judicial authority even where they have express jurisdiction to do so.¹¹

On the other hand, judicial officers taking up the mantle of adjudicating economic, social and cultural rights are not always sure of the appropriate remedies to ensure the effective realization of these rights. It is also true that in many jurisdictions, even without express constitutional or legislative guarantee of justiciable economic and social rights, lawyers and judges have found creative ways of protecting these rights indirectly through the enforcement of civil and political rights. Courts have, for instance, provided protection for the right to health through the right to life. While there is increasing legal recognition of and judicial enforcement of economic, social and cultural rights, the COVID-19 pandemic has shown that concerted efforts need to be extended towards realization of these rights.

From an intersectional perspective, the linkages between sexuality and Economic, Social and Cultural Rights (ESCR) issues have to be emphasized. Indeed, these linkages are embodied in the Yogyakarta Principles and Yogyakarta Principles Plus 10¹² as well as the jurisprudence of the Committee on Economic, Social and Cultural Rights. It is therefore clear that the extent of an individual's access to and enjoyment of socioeconomic rights has an impact on the extent of their ability to fully realize their claims to sexual rights, particularly through self-esteem, opportunities for privacy, freedom of expression, body autonomy, health rights, sex education, and opportunities for mobilization and access to justice. In this regard, economic circumstances determine the extent to which social biases including the policing of bodies, the normalization of gender stereotypes, and the criminalization of nonconforming attitudes and actions around sexuality and sexual rights can affect sexual and gender minorities. Conversely, negative social attitudes, stigma, criminalization and discrimination against sexual and gender minorities also contribute to violations of their ESCR by preventing easy and uninhibited access to a full range of basic services protected by ESCR in international law.¹³

¹¹ Danwood Chirwa and Lilian Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (2016)

¹²The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (the 'Yogyakarta Principles') are a set of legal principles on the application of international law to human rights violations based on sexual orientation and gender identity and formulated by experts from 25 countries in November 2006. Although the Yogyakarta Principles are not a treaty, the eminent composition of the drafting panel, the reliance on its text by several states, and its adoption by the United Nations Human Rights Council compel its observance as 'soft law'.

¹³ See for instance International Commission of Jurists, *Living with dignity: Sexual orientation and gender identity based human rights violations in housing, work and public spaces in India* (2019) <https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports->

2. Objectives

In view of the disparity of outcomes in judicial reasoning across the continent on SOGIE and ESCR, this symposium will bring together judges, lawyers, researchers and human rights defenders from across Africa to share ideas on good practices and lessons learned when dealing with these cases. The Symposium will bring together judges, lawyers, human rights defenders and researchers from across Africa to share ideas on good practices on the adjudication of both SOGIE and ESCR related cases on the African continent. Presenters and participants will have the opportunity to review and comment on perspectives on selected SOGIE and ESCR cases, and discuss national and regional challenges in these areas in order to understand, advance and grow a progressive jurisprudence that respect, protects, promotes and fulfils human rights, departing from colonial-era constructions of state and society in Africa.

3. Participants and Methodology of symposium

The symposium will be open to the public and held online, webinar style, and participants will be expected to register, after which they will receive a link to the event.

Each of the two days will have two keynote addresses (one on SOGIE and one on ESCR) followed by two different panels on each day. On the second, the SOGIE and ESCR discussions will happen during the first session, in two separate breakout rooms, and the second session on day 2 will be reserved for an intersectional discussion on both topics.

4. Key questions to be discussed during the symposium.

- Why are SOGIE and ESCR human rights principles not being sufficiently advanced through judicial decisions across Africa?
- How can the conflict between majoritarian ideals and perceptions and progressive adjudication in line with international human rights law and standards be resolved?
- What strategic litigation and advocacy could human rights defenders undertake to realize both SOGIE and ESCR rights in Africa?
- Can these advances in the realization of SOGIE and ESCR rights be realized in the absence of democratic gains, development of a culture of constitutionalism and consolidation of the rule of law?

5. Sessions

SOGIE Keynote 1: A steady march to progress: A reflection on recent developments in SOGIE litigation and adjudication in Africa

SOGIE Keynote 2: Domestic interventions through Resolution 275 of the African Commission: Opportunities and challenges for courts and litigants

SOGIE Panel 1: Queering the judiciary in Africa: Navigating difference and diversity under the doctrine of precedent

SOGIE Panel 2: Litigating to advance SOGIE rights in Africa: Prospects and Pitfalls (Focus on South Africa, Botswana, Kenya, and Uganda)

ESCR Keynote 1: Recent developments in judicial enforcement of economic, social and cultural rights in Africa: Where are we headed?

ESCR Keynote 2: Enforcement of economic, social and cultural rights: what role for international courts and human rights monitoring mechanisms?

ESCR Panel 1: Legal culture and the judicial enforcement of economic, social and cultural rights – What is the role of international human rights law and transformative constitutionalism?

ESCR Panel 2: Judicial remedies and the effectiveness of economic, social and cultural rights adjudication, what lessons have we learnt so far?

Intersectional Panel: Poverty and transgressive sexuality in Africa: What are the common connections of criminalization and discrimination?

6. Programme

The programme will commence at 10:00 AM SAST. Below is the proposed programme agenda:

DAY 1

Time	Discussion	Speaker
	SESSION 1 (SOGIE)	
10h00 – 10h05	Opening Remarks	Moderator
10h05 – 10h15	Overview of SOGIE in Africa	<<speaker>>
10h15 – 10h45	Keynote address on SOGIE	<<keynote speaker>>
10h45 – 11h15	Refreshment's break	
11h15 – 12h00	Panel discussion 1	<<panelists>>
12h00 – 12h20	Q & A session	<<moderator>>
12h20 – 12h30	Closing remarks	
12h30 – 14h00	Lunch break	
	SESSION 2 (ESCR)	
14h00 – 14h05	Opening remarks	Moderator
14h05 – 14h15	Overview of ESCR in Africa	<<speaker>>
14h15 – 14h45	Keynote address on ESCR	<<keynote speaker>>
14h45 – 15h30	Panel discussion 2	<<panelists>>
15h30 – 15h50	Q & A session	<<moderator>>
15h50 - 16h00	Closing remarks	

DAY 2

Time	Discussion	Speaker
	SESSION 1 (ESCR & SOGIE)	
10h00 – 10h05	Opening Remarks	Moderator
10h05 – 10h15	Topics 2 on ESCR & SOGIE in Africa	<<speakers>>
10h15 – 10h45	Keynote addresses on ESCR & SOGIE	<<keynote speakers>>
10h45 – 11h15	Refreshment's break	
11h15 – 12h00	Panel discussions	<<panelists>>
12h00 – 12h20	Q & A session	<<moderators>>
12h20 – 12h30	Closing remarks	
12h30 – 14h00	Lunch break	
	SESSION 2 (intersectional discussion)	
14h00 – 14h05	Opening remarks	Moderator
14h05 – 14h15	Introduction of intersectional topic	<<speaker>>
14h15 – 14h45	Keynote address intersection between ESCR & SOGIE	<<keynote speaker>>
14h45 – 15h30	Panel discussion	<<panelists>>
15h30 – 15h50	Q & A session	<<moderator>>
15h50 - 16h00	Closing remarks	

For a discussion on any of the above aspects, please contact;

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