

Protecting LGBT+ persons in Africa from torture: Challenges, opportunities, and comparative experiences

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In many parts of the world, LGBT+ persons are subjected to torture and ill-treatment because of who they are. Litigation on these issues has been brought before various regional and international human rights courts and adjudicatory bodies, and whilst the contexts of these bodies differ, synergies between them can be explored which may help to advance the protection of LGBT+ persons. Based on this premise, on 1 July 2021, REDRESS held a webinar on the protection of LGBT+ persons in Africa from torture, as part of a new initiative to increase accountability for such discriminatory violence in African jurisdictions.³

The event followed the first decision of torture based on discrimination on grounds of sexual orientation and gender identity by any human rights court: the judgement in *Azul Rojas Marín v. Peru* issued in 2020 by the Inter-American Court of Human Rights

(IACtHR).⁴ The webinar explored the potential impact of the case of *Azul* in Africa, how the rights of the LGBT+ community have developed in the Inter-American system, the role of the African Commission (and African regional human rights system more broadly) in relation to the protection of LGBT+ persons from violence, and factors affecting advocacy and litigation on LGBT+ rights in Africa.

The experts Victor Madrigal-Borloz,⁵ Sibongile Ndashe,⁶ Ayodele Sogunro,⁷ and Gabriela Oporto⁸ were invited by REDRESS to answer these questions as part of the webinar, and valuable contributions were

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3 REDRESS, *Protecting LGBT+ Persons in Africa from Torture: Challenges, Opportunities and Comparative Experiences* [Video], available at <https://youtu.be/UF6g1Esl8Y>. See also, REDRESS, *Justice for LGBT+ Torture in Africa*, available at <https://redress.org/justice-for-lgbt-torture-in-africa/>.

- 4 IACtHR, *Azul Rojas Marín & another v Perú*, Preliminary objections, merits, reparations and costs, Judgment of 12 March 2020, Series C No. 402. See also: REDRESS, *Briefing Note: Azul Rojas Marín v Perú*, available at <https://redress.org/publication/briefing-note-azul-rojas-marin-v-peru/>
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made by other participants in the form of input and questions.

The case of *Azul Rojas Marín v. Peru* and its relevance to Africa

In the *Azul* case, the IACtHR found Peru responsible for torture and sexual violence against Azul by Peruvian police officers, treatment inflicted because of her sexual orientation and gender identity.⁹ In addition to the violence, which included anal rape using a police baton, and the homophobic insults against Azul, the IACtHR considered the context of discrimination and violence against the LGTB+ community in Peru,¹⁰ and concluded that the torture inflicted on her was motivated by stigma and discrimination against LGBT+ persons.¹¹ Indeed, the overall situation of LGBT+ persons in a certain jurisdiction is an important factor in the examination of the discriminatory purpose behind acts of violence (Oporto, 2021), and the lack of due process and inadequate investigation into cases of violence perpetrated against this community in general, were also taken into account by the IACtHR.¹²

Furthermore, the IACtHR made a connection between social stigma, violence, and impunity for violence practiced against the LGBT+ community in order to address systemic flaws (Madrigal, 2021). It stressed that discriminatory violence is made possible when there is impunity, an absence of public policy, and an exclusion of victims from the legal system (Madrigal, 2021). The Court included various non-repetition measures as part of its reparations, including data collection, the training

of law enforcement officials, prosecutors and members of the judiciary, and the adoption of a protocol to guide investigations into cases of violence against LGBT+ persons.¹³

The direct connection which the IACtHR makes between stigma, violence and impunity could be of particular importance and inspiration to activists and practitioners in Africa (Madrigal, 2021). The link drawn by the IACtHR between LGBT+ lives and human dignity is also extremely useful (Madrigal, 2021) since, as in Latin America, the African context calls for a strategy that uses the concept of human dignity to protect people, such as the LGBT+ community, which is often excluded from the protection which the legal system affords to the rest of society (Sogunro, 2021).

Despite varying circumstances within the African continent, certain factors can be identified which help or hinder domestic and regional advocacy (Sogunro, 2021). “Political homophobia” and the retention of patriarchal colonial legal systems feed the criminalisation and persecution of the LGBT+ community, leading to discrimination and violence, and impacting the way that judicial systems deal with these issues (Sogunro, 2021). In circumstances in which political homophobia controls legal and governmental systems, the police become a monitoring tool, repressing any form of expression of sexuality that is not heteronormative, and increasing the likelihood of torture and other abuses (Sogunro, 2021).

Building the momentum for successful litigation

In Latin America, as elsewhere, the interest and willingness of regional political and human rights bodies to address LGBT+ vio-

9 *Azul Rojas Marín & another v Perú*, paras. 158-167.

10 *Ibid.*, paras. 46-51.

11 *Ibid.*, paras. 164-165.

12 *Ibid.*, para. 50.

13 *Ibid.*, paras. 238-255.

lence has been the result of significant work of civil society organisations, which have raised awareness and made this kind of violence more visible (Madrigal, 2021). It was only after the issue had reached the agenda of the Organisation of American States (OAS), that the Inter-American Commission on Human Rights (IACHR) created a strategic plan of action, and the first cases of litigation started to emerge (in the last decade). In fact, the *Azul* case was the first in which the IACtHR had considered discriminatory torture (Madrigal, 2021).

In terms of regional litigation in Africa, “there will never be a time to litigate those issues unless the people who are vested in creating change create the conditions for the time to be right” (Ndashe, 2021). A strategy must be developed to engage the organs of the African human rights system (Ndashe, 2021), strengthen national human rights institutions, and build further the capacity of civil society (Sogunro, 2021). Whilst one cannot control how States will respond, civil society can advocate for a narrative that is based on State accountability (Ndashe, 2021). For this purpose, practitioners can take advantage of African Commission Resolution 275/2014, which is the first African regional instrument to tackle violence and other forms of discrimination against LGBT+ persons (Ndashe, 2021). Whilst the resolution is non-binding on States, it is built on provisions of the African Charter on Human and Peoples’ Rights and does provide support for litigation on LGBT+ violence. It aims to address discriminatory violence based on real or imputed sexual orientation and gender identity, and calls upon States to establish legislative frameworks and judicial procedures capable of protecting and responding to violence against LGBT+ persons (Ndashe, 2021).

Conclusion

The *Azul* case was the result of more than a decade of significant efforts made by different stakeholders in Latin America, with its origin in a resilient civil society that created the momentum for the successful litigation. The decision of the IACtHR has clear impact beyond Latin America, not just for being the first judgement by any human rights court on the issue of discriminatory torture based on sexual orientation and gender identity, but also because of the Court’s systemic approach and its comprehensive set of reparations intended to tackle the various root causes of this kind of violence and impunity. The experts’ discussion summarised above suggests that similar strategies could be adopted in Africa, despite the different context and variations between jurisdictions within the continent. The webinar confirmed the premise that there is space for cross fertilisation between regional human rights systems in terms of litigation, and that such a dialogue can be valuable to increase the protection of LGBT+ persons in different contexts.

References

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