

BREAKING BARRIERS: EXAMINING THE PROGRESS OF FAMILY RIGHTS FOR LESBIAN COUPLES IN KENYA UNDER THE MAPUTO PROTOCOL

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Abstract

This chapter critically examines the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in relation to advancing family rights for lesbian couples. While certain provisions demonstrate progressiveness, drawing on the inclusive definition of 'women' under article 1(k), others remain heterosexist, homophobic and queer-blind. The absence of express mention of 'sexual orientation or gender identity' represents a significant gap. This chapter uses an interpretive and comparative approach, including a desktop review of the Maputo Protocol, other relevant laws and policies, and a Kenyan case study. It incorporates queer theory, queer intersectionality, and gay and lesbian rights theory to unpack the concept of family and family formation. Drawing lessons from the Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Resolution 275 of the African Commission on Human and Peoples' Rights, and Sustainable Development Goal 10, a comparative analysis is conducted to shed light on potential strategies for advancing family rights for lesbian couples in Kenya. The chapter underscores the need for the adoption of a queer-sensitive resolution by African states to reflect the rights of lesbian couples more specifically and implement the Maputo Protocol generally. In addition, this chapter proposes the adoption of a dedicated resolution or protocol to address these rights more comprehensively. The chapter emphasises the urgency for Kenya to reform its discriminatory laws and create a more inclusive legal framework to safeguard family rights for lesbian couples.

Keywords: *Maputo Protocol, lesbian family rights, Yogyakarta Principles, sexual orientation, gender identity, resolution 275, SDGs, LGBTQIA+, Kenya*

1 Introduction

Non-heteronormative families encompass various forms of relationships that diverge from the conventional heterosexual nuclear family. These can include same-sex couples in committed relationships, families with both adopted and biological children being raised by gay or lesbian

parents and any other familial structure that falls outside the boundaries of traditional heterosexual norms (queer).¹

Discrimination against lesbian couples and their families, as is the focus of this chapter, involves various forms of interference, such as hindering adoption processes, revoking parental rights based on gender affirmation, and denying the recognition of a family bond between same-sex partners.² These discriminatory actions undermine the inherent value and worth of lesbian couples. However, the principles of equality, non-discrimination, and dignity are, as argued in this chapter, globally recognised as fundamental human rights that should be upheld regardless of sexual orientation or gender identity.³

Lesbian couples not only face discrimination based on their sex and gender but also due to their sexuality.⁴ The institution of marriage, often being heteronormative in nature, grants privileges primarily to heterosexual relationships while habitually denying full legal recognition to homosexual relationships.⁵ This chapter argues that safeguarding the rights of non-heteronormative families in the African human rights system requires addressing systemic challenges and intersectional barriers. In this context, family rights encompass the right to establish a family, state support, the best interests of children, non-discrimination, and privacy.⁶

This chapter focuses on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol or Protocol) and how its provisions may advance or limit the family rights of lesbian couples. The Protocol aims to eliminate discrimination and harmful practices against women. While it includes provisions related to family rights, such as marriage, divorce, inheritance, and the protection of

1 B Ryder 'Equality rights and sexual orientation: Confronting heterosexual family privilege' (1990) 9 *Canadian Journal of Family Law* 39 47; cited by DT Vollmer 'Queer families: An analysis of non-heteronormative family rights under the African human rights system' LLD dissertation, Stellenbosch University, 2017 (on file with the author) 11.

2 L Hodson 'Family values: The relationship of same-sex relationships in international law' (2004) 22 *Netherlands Quarterly of Human Rights* 33 45; cited and discussed by Vollmer (n 1) 11.

3 As above.erro

4 A Carroll & LR Mendos *International lesbian, gay, bisexual, trans and intersex association* (2017) 68-72; cited and discussed by Vollmer (n 1) 42-43.

5 As above.

6 As above.

women in distress, among others, it does not explicitly address the rights of lesbian couples. Consequently, its provisions are mostly general and queer-blind, and while lesbians are ‘women’ for purposes of the Protocol, this chapter argues that the Protocol ought to expressly address sexual orientation and gender identity (SOGI). A queer reading of the Maputo Protocol reveals it was mainly designed to cover heteronormative family rights.⁷ This is indicative of the situation on a continent where only South Africa legally recognises lesbian couples’ family rights.⁸ Thus, this chapter argues that legal reforms are urgently needed, including the adoption of a resolution that protects queer family rights.

Following this introduction, section 2 addresses the theoretical framework. Section 3 highlights the concept of family and family formation. Section 4 entails a queer reading and, thus, a critical analysis of the provisions of the Maputo Protocol relevant to the protection of the family rights of lesbians and lesbian couples. Section 5 uses Kenya as a case study to reflect on the progress of family rights for lesbian couples. Section 6 presents an analysis of the Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), African Commission on Human and Peoples’ Rights (African Commission) Resolution 275, and the United Nations (UN) Sustainable Development Goal (SDG) 10 relevant to the Kenyan position. Section 7 provides conclusions and recommendations.

2 The interplay between gender, sexual orientation, and power dynamics

The analysis in this chapter is guided by two theories: gay and lesbian rights theory and queer theory. These two theories explore the interplay between gender, sexual orientation, power dynamics, and the rights of lesbians.⁹ Gay and lesbian rights theory promotes the rights of gay men

7 Vollmer (n 1) 259.

8 Human Rights Campaign: Marriage Equality Around the World <https://www.hrc.org/resources/marriage-equality-around-the-world> (accessed 14 December 2024).

9 GA Yep(a) ‘Gay, lesbian, bisexual, and transgender theories’ in SW Littlejohn & KA Foss (eds) *Encyclopaedia of communication theory* (2009) 425; GA Yep(b) ‘Queer theory’ in Littlejohn & Foss *ibid* 817.

and lesbian women.¹⁰ It gives voice to their lives, experiences, struggles, and contributions.¹¹ It also asserts that sexuality and gender are social constructs that vary within specific historical and cultural contexts.¹² It focuses on rights discourse, which revolves around identity politics.¹³ This encompasses political and rights discussions focused on identifiable characteristics or identities, including 'homosexual,' 'transsexual,' 'transgender,' 'gay,' or 'lesbian.'¹⁴ Gay and lesbian rights theory enables a broad redefinition of the concept of 'family' to encompass, for example, the families of lesbian couples. Its discourse of liberation aims to challenge the oppressive nature of heterosexism.¹⁵

Queer theory emphasises and recognises the socially constructed nature of sexual orientation, gender identity, and the concept of 'family,' aiming to identify and challenge any heteronormative assumptions that may be present. Particular focus is given to the concept of heterosexism, which is an 'ideological system that denies and stigmatises any non-heterosexual experience, behaviour, identity, relationship, or community'.¹⁶ Unpacking the concept of 'family' and heterosexism is essential to understanding the hurdles of advancing family rights for lesbian couples in the Kenyan context.

In this regard, Vollmer argues that "Queer" is a destabiliser in queer theory'¹⁷ referring to a position that, as stated by Yep, is 'at odds with the normal, the culturally legitimate, and the socially dominant'.¹⁸ Craig avers that gay and lesbian rights theory aims to secure equality and anti-discrimination measures for individuals identifying as gay and lesbian.¹⁹ Walters, in turn, argues that queer theory broadens this focus to include diverse non-heteronormative sexual identities and expressions

10 E Craig 'Converging feminist and queer legal theories: Family feuds and family ties' (2010) 28 *Windsor Yearbook of Access to Justice* 209 213 cited and discussed by Vollmer (n 1) 37.

11 Yep (n 9a) 818.

12 Yep (n 9b) 421.

13 M Garber 'The return to biology' in I Morland & A Willox (eds) *Queer theory* (2005) 54 67.

14 Garber (n 13) 67.

15 Vollmer (n 1) 45.

16 Yep (n 9a) 425; cited by Vollmer (n 1) 44.

17 Vollmer (n 1) 45.

18 Yep (n 9b) 819; cited and discussed by Vollmer (n 1) 45.

19 E Craig 'Converging feminist and queer legal theories: Family feuds and family ties' (2010) 28 *Windsor Yearbook of Access to Justice* 209 213; cited in Vollmer (n 1) 37.

of people that struggle to self-identify.²⁰ Queer is, therefore, genderless.²¹ This is in contrast with the concept of 'identity politics' referred to in gay and lesbian rights theory, as mentioned above. This highlights the necessity for a more inclusive framework that extends beyond traditional identity politics to include diverse non-normative sexual identities and expressions, challenging and aiming to reform the existing norms and legal structures that restrict equal rights for lesbian couples.²² Fineman's discussion promotes a redefinition of familial legal recognition beyond traditional heterosexual norms. This supports broader inclusivity and legal reforms that protect the rights of lesbian couples.

Queer intersectionality further acknowledges the multiple layers of discrimination faced by lesbian couples based on sexual orientation, gender identity, race, and more.²³ It explores how these intersecting identities affect family rights and the challenges lesbian couples face in seeking equality and recognition.²⁴ It examines the 'hegemony of heterosexuality', which privileges heterosexual relationships and establishes norms.²⁵ This reinforces heterosexuality as the norm and stigmatises other sexual orientations. The discourse of privileging heterosexuality thus contributes to 'normalisation', a process of constructing and reproducing societal standards. This 'normalisation' is viewed, by queer theorists, as a form of social violence.²⁶ Walters argues that queer theory exposes the social violence of 'normalisation' and 'heteronormativity'.²⁷ Heteronormativity refers to the structures of knowledge, practical orientations, cultural narratives, and social institutions that construct heterosexuality as privileged, morally correct, coherent, and stable.²⁸ Queer theory exposes how heteronormativity marginalises, erases, disempowers and oppresses homosexuality, creating 'sexual others'.²⁹

20 SD Walters 'From here to queer: Radical feminism, postmodernism, and the lesbian menace (or, why can't a woman be more like a fag?)' (1996) 21 *Signs* 844; cited and discussed by Vollmer (n 1) 40.

21 As above.

22 Garber (n 13) 67; cited in Vollmer (n 1) 38.

23 Vollmer (n 1) 37-50.

24 Vollmer (n 1) 37-50.

25 Vollmer (n 1) 40.

26 Vollmer (n 1) 40.

27 Walters (n 20) 21; cited and discussed in Vollmer (n 1) 40.

28 As above.

29 Yep (n 9b) 819.

Queer theorists further challenge the concept of marriage as the foundation of 'family'.³⁰ It challenges the privileged status of heterosexual marriage and reimagines family structures, questioning the superiority of the traditional nuclear family and promoting alternative configurations.³¹ This challenges the conventional definition of family based on heterosexual marriage, advocating for legal recognition and protection of diverse family configurations such as lesbian couples. In essence, queer theory aims to reimagine and challenge existing power structures within legislation, human rights instruments, the judiciary, and the legal system, while gay and lesbian rights theory serves as a mechanism to advocate for and safeguard the rights of sexual minorities.³²

3 Conceptualisation of 'family' and 'family formation'

Family is arguably a complex and ever-evolving concept that varies across cultures.³³ Traditional definitions often limit it to heterosexual couples and biological or legally adopted children. However, contemporary, such as queer perspectives, acknowledge diverse family forms.³⁴ In recognising family rights for lesbian couples, it is crucial to challenge and expand traditional notions to be inclusive of same-sex relationships and non-traditional structures.³⁵

Ryder examines the challenges faced by non-heteronormative families within legal systems that heavily favour heterosexuality.³⁶ He highlights the extensive legal framework established to support the idealised concept of the heterosexual family, consisting of numerous laws, regulations, and judicial decisions.³⁷ This pervasive legal architecture reinforces the notion that only one form of family is legitimate, thereby marginalising and stigmatising those who do not conform to these norms. Non-heteronormative families are thus constructed as deviant and excluded from the legal and ideological constructs that shape societal perceptions

30 As above.

31 As above.

32 As above.

33 E Okon 'Towards defining the "right to a family" for the African Child' (2012) 12 *African Human Rights Law Journal* 373 377.

34 Okon (n 33) 377.

35 As above.

36 As above.

37 As above.

of family and provide them with protection.³⁸ Valdes further explores how the intertwined legal and social constructs of sex, gender, and sexual orientation, rooted in hetero-patriarchal values, conflate in ways that hinder legal responses to sex and gender discrimination.³⁹ He stresses the need for their deconstruction to foster legal and social reforms that effectively protect the rights of women and sexual minorities.

Heteronormativity prioritises biology in forming families, favouring biological parents over non-biological ones.⁴⁰ Non-heteronormative families challenge this model and are labelled 'families of choice'.⁴¹ Wilson proposes that LGBTQ individuals form families that defy the conventional understanding of 'family'.⁴² Weeks and others criticise the so-called 'erosion of the family' critique.⁴³ They argue that 'family' is not what a family is but rather that they 'do family type things'.⁴⁴ This suggests a function-focused approach. Consequently, this broadens the definition and notion of a 'normal' or 'traditional' family, making it open to interpretation. This highlights the socially constructed nature of 'family', indicating these definitions are not fixed but rather 'situational'.⁴⁵ This arguably breeds the need to consider 'family' through an intersectional lens.⁴⁶

Okon suggests that 'where parent(s) or care-givers intend to permanently uphold their responsibilities of providing emotional, psychological, socialisation, financial and educational care for a child, they create a unit (family)'.⁴⁷ Okon argues that parents under the 'parental-function' model should be considered legally obligated to

38 As above.

39 F Valdes 'Queers, sissies, dykes and tomboys: Deconstructing the conflation of "sex", "gender" and "sexual orientation" in Euro-American Law and Society' (1995) 83 *California Law Review* 344-377

40 Vollmer (n 1) 56.

41 AR Wilson 'With friend like these: The liberalization of queer family policy' (2007) 27 *Critical Social Policy* 50 50.

42 Wilson (n 41) 50.

43 Vollmer (n 1) 58.

44 As above.

45 As above.

46 L de Reus, A Few & L Blume 'Multicultural and critical race feminisms: Theorizing families in the third wave' in VL Bengtson, AC Acock, KR Allen, P Dilworth-Anderson & DM Klein (eds) *Sourcebook of family theory and research* (2005) 447 448.

47 Okon (n 33) 377.

care for the child, whether biologically related or adoptive.⁴⁸ Lastly, Okon contends that it is inadequate to define the family solely based on its structure and form; instead, the essence of a family should be determined by the functions and interactions exhibited by parents in their relationships with one another.⁴⁹ Vollmer proposes adopting a 'function-focused' approach or model that considers the roles and functions performed by individuals within a social unit. Both parents and children contribute to the functions of the family, leading to the recognition of their collective unit as a 'family.'⁵⁰ Oswald and others similarly suggest that '[f]amily is best understood as something we do.'⁵¹ This approach shifts the attention away from procreation, biologism and structural aspects.⁵² On the other hand, a relationship-focused approach argues that rather, it is the relationships between family members that determine its existence.⁵³ However, Vollmer argues that 'emphasising the functions individuals perform within a social unit through a "function-focused" approach, subsumes non-heteronormative families under an inclusive conceptualisation of "family".'⁵⁴ The relationship-focused approach is further weakened when the state does not legally recognise same-sex and other non-heteronormative relationships.⁵⁵ This chapter argues that family formation methods like adoption easily fall within a function-focused approach. Consequently, when two lesbians in a same-sex relationship assume the roles and responsibilities of parents toward a child, they should be recognised as 'parents', thereby establishing the institution of family.⁵⁶ The parents also fulfil the function of being a 'spouse' or 'partner' to each other, reinforcing the familial bond.⁵⁷

Moreover, the law plays a significant role in shaping and influencing families and their structures, for instance, by regulating marriage. Consequently, it determines which familial forms are recognised and afforded specific rights and responsibilities. As commented on in the

48 Vollmer (n 1) 66.

49 As above.

50 As above.

51 As above.

52 As above.

53 Vollmer (n 1) 65-68.

54 Vollmer (n 1) 68.

55 As above.

56 As above.

57 As above.

introduction, this often reflects a heterosexist bias.⁵⁸ This chapter, therefore, argues that reform of heterosexist marriage laws is vital to protect lesbian family rights.

Tamale explores how African views on SOGI shape family formation in Africa, emphasising the need to recognise the diversity and complexity of African sexualities.⁵⁹ She challenges simplistic views and calls for a nuanced understanding that considers historical, social, and political influences on family structures and gender roles. Tamale advocates for research that transcends Western-centric approaches to authentically represent African lived experiences. This suggests that understanding sexualities in Africa requires a deep engagement with the continent's varied cultures and histories. Tamale's work depicts a broader appreciation of how African cultures and societal norms shape family structures and queer identities.

Mutua reviews the significant legal and societal hurdles that queer Africans face when trying to assert their family rights and identities.⁶⁰ He highlights how deep-seated homophobia, stemming from colonial legacies and cemented by current legal and cultural norms, obstructs the recognition and protection of queer families in Africa. Advocating for a transformative approach, Mutua calls for dismantling heteronormative frameworks within family law and societal views to ensure legal and societal acknowledgement of queer family formations. These challenges entrenched discriminatory structures and laws against queer families.

4 Critical analysis of the protection of diverse family rights under the Maputo Protocol

4.1 Introduction

As briefly set out in the introduction, the Maputo Protocol is an essential regional human rights instrument specifically focused on the rights of women in Africa. It addresses various aspects of women's rights,

58 Vollmer (n 1) 69-70

59 S Tamale 'Researching and theorising sexualities in Africa' in S Tamale (ed) *African sexualities: A reader* (2011)

60 M Mutua 'Sexual orientation and human rights: Putting homophobia on trial' in S Tamale (ed) *African sexualities: A reader* (2011) 452-462

including family rights. In this and the following sub-sections, the specific provisions of the Maputo Protocol that are relevant to the protection of the family rights of lesbian couples are analysed. This analysis engages with the progressiveness or otherwise of these provisions in recognising and protecting the family rights of lesbian couples within the African context.

As a point of departure, the Preamble to the Maputo Protocol specifically refers to article 2 of the African Charter on Human and Peoples' Rights (African Charter). The principle of non-discrimination laid out in article 2 encompasses a wide range of protected grounds, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, or other status. This comprehensive, open-ended list reflects a commitment to combating various intersecting forms of discrimination in line with queer intersectionality. Notably, there is no specific mention of 'sexual orientation' or 'gender identity' as a protected ground in article 2 of the African Charter. However, article 2 encompasses 'any other status'. This includes sexual orientation as a protected characteristic, as was noted, albeit in *obiter dictum*, in *Zimbabwe Human Rights NGO Forum v Zimbabwe*.⁶¹ Here, the African Commission noted that 'other status' in article 2 of the African Charter includes 'sexual orientation'.⁶² This stands in stark contrast to the later statements by the African Union (AU) Executive Council in 2015 and 2022, in relation to the observer status of the Coalition of African Lesbians, that 'sexual orientation' is not a right recognised by the African Charter.⁶³

The Preamble moreover stipulates that women's rights are 'inalienable, interdependent, and indivisible'.⁶⁴ Inalienability implies that women's rights cannot be taken away. Interdependence recognises that the enjoyment of one right often relies on the realisation of other

61 (2006) AHRLR 128 (ACHPR 2006).

62 (2006) AHRLR 128 (ACHPR 2006) para 169.

63 Decision of the AU Executive Council on the 38th Activity Report of the African Commission, EX.CL/Dec.887 (XXVII) para 7, in EX.CL/Dec.873-897(XXVII), 27th ordinary session 7-12 June 2015, Johannesburg South Africa; African Commission on Human and Peoples' Rights Final Communiqué of the 73rd Ordinary Session of the African Commission on Human and Peoples' Rights 20 October – 9 November 2022, Banjul, The Gambia <https://achpr.au.int/index.php/en/news/final-communiques/2022-11-18/final-communique-73rd-ordinary-session> (accessed 11 December 2024).

64 Maputo Protocol, Preamble.

rights. Indivisibility stresses that all human rights are interrelated and equally important.⁶⁵ This underscores the need for a holistic approach to gender equality and women's empowerment, emphasising that women's rights, including those of lesbians, should not be addressed selectively or as secondary but rather integrated across all legal, policy, and practical frameworks to ensure equal access to and enjoyment of their human rights.

4.2 Harmful practice and gender-based violence

Article 1(g) provides that 'harmful practices' means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education, and physical integrity. It acknowledges the necessity of protecting women and girls, including lesbians, from practices that infringe upon their fundamental rights. For lesbians, these may involve discriminatory laws and policies against same-sex relationships and families. It is crucial to evaluate the actions African countries have taken to address and eradicate harmful practices targeting lesbian couples. This involves assessing the presence and structure of legal frameworks, policies, and programs, a process underscored by queer theorists, as well as examining the enforcement and effectiveness of these measures. Concerningly, while reporting on commitments to human dignity and sexual orientation, Lesotho, for example, admitted its laws do not provide special protection to non-heteronormative sexual orientations or gender identities despite acknowledging the societal discrimination and persecution they face.⁶⁶

Articles 1(j) and 4 moreover highlight the importance of addressing violence against women, including those within same-sex relationships. It acknowledges that violence can occur in various forms: physical, sexual, psychological, and economic, and can affect women regardless of their sexual orientation or gender identity. For lesbian couples, violence within the family context can manifest in similar ways as in

65 The Office of the High Commissioner for Human Rights: 'What are human rights?' <https://www.ohchr.org/en/what-are-human-rights#:~:text=All%20human%20rights%20are%20indivisible,economic%20C%20social%20and%20cultural%20rights>. (accessed 17 July 2024).

66 The Kingdom of Lesotho Combined 2nd to 8th Periodic Report under the African Charter on Human and Peoples' Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa' (2018) para 342.

heterosexual relationships. Lesbians face intimate partner violence (IPV) from their lesbian partners at rates comparable to or higher than the general population, with unique challenges due to their SOGI.⁶⁷ The fear of being outed and societal rejection adds complexity to IPV among lesbian couples, often involving psychological abuse such as the threat of being outed. This highlights the need for more inclusive family support systems and legal frameworks that recognise and protect against the distinct forms of violence in LGBTQ+ communities, crucial for safeguarding lesbian couples' family rights. Abusive laws and policies that discriminate against lesbians result in various forms of harm against lesbians, such as psychological (as in their well-being), physical (in the sense of torture), sexual (such as rape) and economic harm (for instance, through job losses).⁶⁸

The violence in lesbian relationships between lesbian partners is often exacerbated by societal homophobia and discrimination, which restricts access to support and legal protections.⁶⁹ This is more pronounced in Africa, where legal and social frameworks fail to protect against violence in same-sex relationships, thereby complicating efforts to address such violence.⁷⁰ Tallis and others address the often under-reported issue of IPV in lesbian relationships in South Africa, highlighting how societal and police trivialisation of such incidents contributes to a reluctance among victims to seek help.⁷¹ This stresses the need for further research to fully understand the prevalence, dynamics, and impacts of IPV in lesbian relationships and advocate for community-wide initiatives to foster safe spaces for discussion and support for survivors.

The African Commission has highlighted concerns about violence and human rights abuses against individuals due to their actual or perceived non-heteronormative sexual orientation or gender identity. Citing the right to human dignity, among others, the Commission has called on

67 TNT Brown & JL Herman 'Intimate partner violence and sexual abuse among LGBT people: A review of existing research' (2015) *UCLA School of Law Williams Institute* 8-9

68 Human Rights Watch 'We'll show you you're a woman': violence and discrimination against black lesbians and transgender men in South Africa, 2011, <https://www.hrw.org/sites/default/files/reports/southafrica1211.pdf> (accessed 9 April 2024).

69 Brown & Herman (n 67) 17-20

70 As above.

71 V Tallis, T Jean-Pierre & T Madi 'When the personal remains personal. Intimate partner violence in lesbian relationships' (2020) 34 *Agenda* 71-77.

states to terminate all violence against sexual minorities and to enact laws that protect them.⁷² In doing so, the African Commission acknowledges that such violence infringes on the right to human dignity.⁷³ The implementation of articles 1(j) and 4 also involves specifically examining efforts made by African countries to address violence against women within lesbian couple relationships.

4.3 Non-discrimination, marriage, and family rights

Article 2 of the Maputo Protocol addresses the obligation of states parties to combat discrimination against women and promote gender equality through legislative, institutional, and other measures. Under article 2(1) (a), states parties are encouraged to include the principle of equality between women and men in their national constitutions and other legislative instruments if it has not already been done. This signifies the commitment to ensure equal rights and opportunities for *all* women.⁷⁴ Article 2(1)(b) emphasises the need for states parties to enact and effectively implement legislative or regulatory measures that specifically target and address discrimination against women. This includes measures aimed at prohibiting and curbing all forms of discrimination, particularly harmful practices that endanger the health and well-being of women. What has been referred to by some authors as corrective rape is a good example of such harmful practices.⁷⁵ By enacting and enforcing

72 African Commission 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 (2014) ACHPR/Res.275 (LV) 2014.

73 A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 23-24.

74 A Rudman, CN Musembi & TM Makunya *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a commentary* (2023).

75 CEDAW Committee 'Concluding observations on South Africa' (5 April 2011) UN Doc CEDAW/C/ZAF/CO/4 39-40; cited by Vollmer (n 1) 150. 'Corrective rape' is a contested and sensitive term used to describe the act of raping individuals, particularly lesbians and gays, with the misguided intent of 'correcting' their sexual orientation. It implies that something needs to be 'corrected', which reinforces harmful biases and misconceptions. See, Institute for Security Studies 'Classifying "corrective rape" as a hate crime in South Africa' (2011) <https://issafrica.org/iss-today/classifying-corrective-rape-as-a-hate-crime-in-south-africa> (accessed 11 December 2024).

such measures, states can create a legal framework that protects women's rights and hold those accountable who perpetuate discrimination.

The Protocol's traditional framing of marriage in article 6(e), (h) and (i) furthermore denotes common legal and societal views in many African nations at its adoption in 2003, focusing on heterosexual unions.⁷⁶ A queer reading of article 6(d) reveals that the language of the Maputo Protocol does not easily protect same-sex marriages or partnerships.⁷⁷ The provision uses words like 'man and a woman' to describe a marriage. This approach highlights the persistent legal and social hurdles faced in acknowledging same-sex unions in Africa.⁷⁸ This indicates a shortfall in protection, highlighting the conflict between the Protocol's aims to protect the rights of all women and the lived experiences of many African lesbian women. Currently, only South Africa has robust same-sex marriage protection laws.⁷⁹

In the same vein article 7 emphasises the importance of ensuring equal rights for *women* and *men* during separation, divorce or annulment of marriage. Provision (c), which highlights the reciprocal rights and responsibilities of parents towards their children, is indeed progressive in emphasising the best interests of the children as paramount.⁸⁰ However, the interpretation of the 'best interest' principle can be contentious. For instance, in the case of *Karen Atala and Daughters v Chile*, the Inter-American Court of Human Rights (IACHR) overturned a domestic court's decision that had deemed it in the best interest of the children not to live with their lesbian mother, underscoring the importance of avoiding discriminatory practices based on sexual orientation.⁸¹ Related to this is article 13 which importantly recognises that the primary responsibility

76 F Viljoen & S Ayodele 'The promotion and protection of sexual and gender minorities under the African regional human rights system' in AR Ziegler, ML Fremuth & BE Hernández-Truyol (eds) *The Oxford handbook of LGBTI Law* (2024) 2-4.

77 However, see Vollmer (n 1) 285 where the author argues that the purpose of the Protocol would be defeated, if it were to be interpreted by the African Court or African Commission to restrict marriage and family rights for LGBTQ individuals.

78 KE Hull 'Same-sex marriage: Principle versus practice (2019) 33 *International Journal of Law, Policy and the Family* 51-74.

79 Global Citizen '6 Countries in Africa that have legalized same-sex relationships in the past 10 years', 2021, <https://www.globalcitizen.org/en/content/countries-legalized-same-sex-relationships-africa/> (accessed 10 April 2024).

80 Maputo Protocol, art 7(c); see also Vollmer (n 1) 265-273.

81 *Karen Atala and Daughters v Chile* IACHR (23 July 2008) Ser L/Doc 22 Rev 1 paras 116-118.

for raising and developing children rests with both *parents*⁸², highlighting that parenting is a social function rather than strictly biological or gender-based. This provision can support a functional definition of family and parenting, affirming that lesbian couples who meet the roles and responsibilities of parents can be recognised as families.⁸³ This is vital for promoting inclusivity and ensuring that all families, regardless of structure, receive equal rights and opportunities. It challenges traditional views that define families solely through heterosexual partnerships and acknowledges the diversity of family forms.

Regarding provision (d), which mentions the right to an equitable sharing of joint property,⁸⁴ heterosexist and homophobic laws and policies may hinder the application of this provision for non-heteronormative marriages. This reflects the broader issue of legal recognition and protection of same-sex relationships and the need for comprehensive legal reforms to address discriminatory practices in accordance with queer theory.⁸⁵

Similarly, article 20, which addresses the rights of widows, typically assumes a traditional heterosexual marriage, potentially excluding lesbian couples in countries without legal recognition for same-sex relationships. This provision grants certain rights and protections that may not automatically apply to lesbian partners, particularly concerning guardianship and custodianship of children after a partner's death.⁸⁶ This discrepancy underscores the need for explicit legal recognition and protection of same-sex relationships and families to ensure that lesbian couples can access the same rights and benefits as heterosexual couples, thereby removing legal and societal barriers.

Finally, article 21, which also presumes a traditional heterosexual marriage by specifically referring to a 'husband' and a 'widow', may not encompass same-sex couples due to its language. In areas without legal recognition of same-sex relationships, lesbian couples often struggle to access rights and benefits associated with inheritance. The provisions meant to ensure equitable inheritance from a husband or rights to reside in the matrimonial home generally do not apply to same-sex partnerships.

82 Maputo Protocol, art 13(1).

83 Okon (n 33) 377.

84 Maputo Protocol, art 7(d).

85 Yep (n 9b) 819; cited in Vollmer (n 1).

86 Maputo Protocol, art 20.

Therefore, the legal recognition and protection of same-sex relationships are essential to extend equal inheritance rights to all couples, including lesbian couples.

4.4 Access to justice and education

Article 8 calls for the reform of existing discriminatory laws and practices.⁸⁷ This is a significant step towards promoting and protecting the rights of lesbian couples who face violence due to homophobic and heterosexist laws and practices. This provision creates an opportunity for addressing discriminatory practices that impact family rights for lesbian couples. It could be the point of departure for a progressive and inclusive approach towards ensuring equality and combating discrimination against lesbians.

In support, article 12 highlights the transformative role of education in breaking down stereotypes, fostering respect, and building inclusive societies. It emphasises the importance of eliminating discriminatory stereotypes from textbooks, syllabuses, and media, which is crucial for enhancing understanding and acceptance of diverse sexual orientations and gender identities. According to Kepros, educational reforms are key to developing a more inclusive and tolerant society.⁸⁸

Integrating gender sensitisation and sexual and human rights education across all educational levels, including teacher training, is a vital step toward fostering respect, equality, and understanding. Educating students about SOGI from an early age raises awareness, challenges discriminatory norms, and fosters empathy and acceptance. This approach helps dismantle stereotypes, correct misconceptions, and promote an inclusive society where everyone's rights and dignity, including those of lesbian couples, are respected. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Committee pointed out a deficiency in age-appropriate education on sexual and reproductive health rights, noting that cultural resistance is sometimes to blame.⁸⁹

87 Maputo Protocol, art 8(f).

88 LR Kepros 'Queer theory: Weed or seed in the garden of legal theory' (1999-2000) 9 *Law and Sexuality Rev Lesbian and Gay Legal Issues* 279 282.

89 CEDAW Committee 'Concluding observations on the combined eighth and ninth periodic reports of Uganda' (1 March 2022) UN Doc CEDAW/C/UGA/

5 Family rights of Kenyan lesbian couples

5.1 Legal framework on the rights of lesbian couples

Against the background of the provisions of the Maputo Protocol, as discussed above, this section demonstrates that Kenya's legal framework is still characterised by heterosexist and heteronormative provisions that continue to marginalise lesbian couples.⁹⁰ Nevertheless, as discussed further below, a recent decision of the Kenyan Supreme Court has the potential to catalyse the start of the process towards decriminalisation of same-sex sexual relations in Kenya in line with the provisions of the Maputo Protocol.

The Kenyan Penal Code has long categorised same-sex acts as 'unnatural offences' and 'against the order of nature' and are punishable by imprisonment for a term of fourteen years.⁹¹ Same-sex acts are also classified as acts of 'gross indecency', which are punishable by imprisonment for up to five years.⁹² This despite article 27 of the Constitution of Kenya, 2010, which prohibits discrimination based on sex.⁹³ The Supreme Court of Kenya recently held that the term 'sex' as a protected ground under article 27 includes sexual orientation.⁹⁴ This decision, as mentioned above and further discussed below, is a significant milestone in the fight for the protection of the rights of lesbians in Kenya.

Article 45 of the Constitution of Kenya stipulates that '[e]very adult has the right to marry a person of the opposite sex'.⁹⁵ This provision outlaws lesbian marriages, which is furthermore mirrored in the Marriage Act, 2014, which does not recognise same-sex marriages.⁹⁶ The Children Act (2022) stipulates that '[t]he Court shall not make an adoption order

CO/8-9 para 37. In Uganda, a court successfully overturned a government decision to remove comprehensive sexuality education (CSE) from the school curriculum: *Center for Health, Human Rights and Development (CEHURD) v Attorney General and Family Life Network* High Court of Uganda Miscellaneous Cause 309 of 2016.

90 Z Nyoni 'The struggle for equality: LGBT rights activism in sub-Saharan Africa (2020) 20 *Human Rights Law Review* 582-601.

91 Penal Code Cap 63 Laws of Kenya, sec 162.

92 Penal Code Cap 63 Laws of Kenya, sec 165.

93 Constitution of Kenya 2010, art 27(4).

94 *NGOs Co-ordination Board v EG* [2023] KESC 102 (KLR) para 79.

95 Constitution of Kenya 2010, art 45 (2).

96 Section 3 stipulates that 'Marriage is the voluntary union of a man and a woman ...'

in favour of an applicant or joint applicants if the joint applicants are not married to each other.’⁹⁷ These laws are explicitly discriminatory and reinforce societal stigmatisation, marginalisation and exclusion of lesbian couples. They clearly violate article 8(f) of the Protocol, which calls for states to reform existing discriminatory laws, as discussed above. In this regard, it is obvious that in Kenya, under the current legislation, lesbian couples cannot (legally) have families of their own because they do not have the legal capacity to marry or adopt children. This exclusion prevents them from enjoying the legal benefits and protections that come with marriage, like inheritance rights, healthcare decision-making, and spousal benefits, as set out in section 4 above.

5.2 Gitari I and II

Two recent cases, *NGOs Co-ordination Board v EG (Gitari I)*⁹⁸ and *EG v Attorney General (Gitari II)*,⁹⁹ could profoundly affect the protection of family rights for lesbian couples in Kenya. In *Gitari I*, the court was tasked with determining the legalisation of registration of NGOs advocating for LGBTQI rights and their freedom of association.¹⁰⁰ The court stated that ‘the use of the word “sex” under Article 27(4) of the constitution ... refers to the sexual orientation of any gender’.¹⁰¹ It added that ‘the word “including” under the same article is not exhaustive and comprises “freedom from discrimination based on a person’s sexual orientation”’.¹⁰² The court held that ‘an interpretation of non-discrimination which excludes people based on their sexual orientation conflicts with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination’.¹⁰³ The court, moreover, indicated that to permit discrimination based on sexual orientation would be against such constitutional principles.¹⁰⁴

97 Children Act 2022, sec 186(6)(d).

98 Petition 16 of 2019 [2023] (KLR).

99 Petition 150 and 234 of 2016 (Consolidated), pending determination at the Court of Appeal.

100 As above para 49.

101 Petition 16 of 2019 [2023] (KLR) para 79.

102 As above.

103 As above.

104 As above.

This decision is pivotal as it confirms that the non-discrimination clause of the Kenyan Constitution protects against discrimination based on sexual orientation. It recognises sexual orientation as a legitimate identity, asserting that discrimination on this basis is unconstitutional. This ruling challenges laws that discriminate against gay and lesbian associations and potentially support a broader definition of family that includes diverse relationships, such as those of lesbian couples. It moreover supports the call to eliminate discrimination against women, including lesbians, under Article 2 of the Maputo Protocol.

Further, the court in *Gitari I* stipulated that ‘LGBTIQ NGOs have a right to freedom of association, including registration.’¹⁰⁵ Registration of NGOs means that they can advocate for lesbian, gay, bisexual, transgender, queer or questioning, intersex, asexual, and more (LGBTQIA+) rights, including family rights. This is a progressive step in recognising the rights of lesbian couples. This decision aligns with the principles of equality and non-discrimination under the Protocol.¹⁰⁶ It is a positive step towards safeguarding the rights of lesbians. The court further added that the Kenyan Constitution requires the state to uphold national values and principles of governance, such as the protection of the marginalised.¹⁰⁷ It confirmed that article 21(3) obligates states to address the needs of vulnerable groups within society, including members of minorities and marginalised communities.¹⁰⁸ The court also held that the right to freedom of association is ‘inherent in everyone irrespective of whether the views they are seeking to promote are popular or not’.¹⁰⁹

Though the Constitution may not explicitly mention sexual orientation or gender identity as protected categories, the court’s interpretation extends principles of equality and non-discrimination to encompass LGBTQ individuals.¹¹⁰ This aligns with the Protocol’s call for states to address vulnerable groups’ needs, including those of minorities and marginalised communities.¹¹¹ In a diverse society, the validity of opinions should not hinge on their popularity. This perspective challenges

105 Petition 16 of 2019 [2023] (KLR) para 72.

106 Maputo Protocol, art 2

107 Petition 16 of 2019 [2023] (KLR) para 70.

108 As above.

109 As above.

110 Petition 16 of 2019 [2023] (KLR) para 79.

111 Maputo Protocol, art 24(a).

the idea that only mainstream opinions merit respect and protection. Human rights must extend to everyone, regardless of whether their views or identities conform to societal norms. Thus, this decision represents progress in protecting lesbian family rights, aligning with the Maputo Protocol's principles of non-discrimination, equality, and the protection of human rights for all individuals.¹¹²

In *Gitari II*, the constitutionality of sections 162(a)(c) and 165 of the Penal Code was challenged.¹¹³ The petitioners also sought an order 'directing the State to formulate policies and adopt practices prohibiting discrimination based on sexual orientation and gender identity or expression in the health sector'.¹¹⁴

The court found 'no tangible evidence had been given to support the allegations of discrimination against LGBTQ+ communities'.¹¹⁵ This was despite the fact that human rights violations against LGBTQ+ communities occur every day.¹¹⁶ The court further questioned how decriminalising same-sex relationships would relate to 'the values, principles and purposes of the Constitution'.¹¹⁷ This notwithstanding the fact that constitutional values and principles should be interpreted in a way that promotes equality, non-discrimination, and the protection of minority rights in accordance with the provisions of the African Charter and Maputo Protocol,¹¹⁸ and not rely on cultural 'values' that perpetuate discrimination.¹¹⁹ The court added that during the Constitution-making process, a recommendation was made to outlaw same-sex marriage.¹²⁰ The court recognised that article 45(2) of the Kenyan Constitution only recognises marriage between adult persons of the opposite sex. Consequently, decriminalising same-sex relations would contradict article 45(2).¹²¹ The court also relied on section 3(1) of the Marriage Act, which defines marriage as the voluntary union of a man and a woman.¹²²

112 Maputo Protocol, art 2.

113 Petition 150 & 234 of 2016 (Consolidated) para 1.

114 Petition 150 & 234 of 2016 (Consolidated) para 2.

115 Petition 150 & 234 of 2016 (Consolidated) para 299.

116 Petition 150 & 234 of 2016 (Consolidated) paras 3, 4, 5, 6, 7, 8.

117 Petition 150 & 234 of 2016 (Consolidated) para 385.

118 Maputo Protocol, art 2, 8 and 24.

119 S Tamale 'Confronting the politics of nonconforming sexualities in Africa' (2013) 56 *African Studies Review* 31.

120 Petition 150 & 234 of 2016 (Consolidated) para 390.

121 Petition 150 & 234 of 2016 (Consolidated) para 396.

122 Petition 150 & 234 of 2016 (Consolidated) para 397.

Courts can interpret and challenge laws in line with human rights standards.¹²³ They should go beyond enforcing discriminatory laws and support legal reforms to protect sexual minorities' rights. The protocol is emphatic that states should take action to reform existing discriminatory laws in order to protect the rights of women.¹²⁴ The High Court was called upon to act on this provision, and it failed to protect family rights for the LGBTQIA+ community.

The court in *Gitari II* failed to incorporate the provisions of the Protocol that call for equality and non-discrimination, as discussed above. The decision of the court reveals that it was more focused on relying on homophobic laws to deliver its analysis rather than to interrogate the efficacies and constitutionality of these laws. On the other hand, the court in *Gitari II* delved into the intricacies of LGBTQ+ rights protection and formulated vital questions with regard to Kenya's current laws and policies.

6 Drawing lessons through a comparative analysis

This section analyses the Yogyakarta Principles,¹²⁵ Resolution 275¹²⁶ and SDG 10¹²⁷ as key instruments in addressing lesbian family rights. Yogyakarta Principles specifically address family rights for the LGBTQIA+ community; Resolution 275 is the only AU instrument that expressly addresses LGBTQIA+ rights, while SDG 10 addresses legal reforms of discriminatory laws. Together with the Maputo Protocol, they arguably offer vital recommendations on how Kenya should address family rights for lesbian couples.

6.1 Yogyakarta principles

The introduction to the Yogyakarta Principles stipulates that,

123 Constitution of Kenya, 2010 art 23 and 165.

124 Maputo Protocol, art 8.

125 International Commission of Jurists (ICJ) *Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity* (2007).

126 ACHPR/Res.275(LV)2014.

127 Sustainable Development Goals 'Goal 10' <https://sdgs.un.org/goals/goal10> (accessed 9 July 2024).

All human beings are born free and equal in dignity and rights ... [a]ll human rights are universal, interdependent, indivisible and interrelated. Sexual orientation and gender identity are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse.

Principle 24 focuses on the right to found a family without discrimination based on sexual orientation or gender identity. It acknowledges the diverse forms that families can take and emphasises the importance of ensuring equality for all families.¹²⁸ The principle outlines several state obligations. First, states should enact legislative, administrative, and other measures to ensure access to adoption and assisted procreation without discrimination based on sexual orientation or gender identity. This includes access to donor insemination and other assisted reproductive technologies.¹²⁹ Furthermore, states are urged to recognise and respect the diversity of family forms, including those that are not defined by descent or marriage. They should ensure that no family is subjected to discrimination based on the sexual orientation or gender identity of its members. This applies to social welfare, public benefits, employment, and immigration.¹³⁰

The principle also emphasises the best interests of the child as a primary consideration in all decisions concerning children. It states that the sexual orientation or gender identity of the child or any family member should not be considered incompatible with the best interests of the child.¹³¹

Additionally, states that recognise same-sex marriages or registered partnerships are called upon to provide equal entitlements, privileges, obligations, and benefits to same-sex married or registered partners as those available to different-sex married or registered partners. Similar equality should be ensured for same-sex unmarried partners.¹³²

In light of the case law presented above, Principle 24 arguably offers vital lessons for Kenya. It challenges heteronormative and heterosexist assumptions¹³³ and provides important guidelines for Kenya to ensure equal treatment and protection for all families. It is a significant step

128 As above principle 24.

129 As above.

130 As above.

131 As above.

132 As above.

133 Vollmer (n 1) 218.

towards advancing the rights of lesbian couples' family rights. I propose that states, including Kenya, adopt a resolution to reflect guidelines in the Yogyakarta Principles by virtue of article 2(5) and (6) of the Constitution, especially because Kenya is a signatory to the Principles.¹³⁴

6.2 African Commission Resolution 275

Resolution 275 of the African Commission addresses the protection against violence and human rights violations based on sexual orientation or gender identity.¹³⁵ While the resolution does not explicitly focus on family rights for lesbian couples, it provides important context for understanding the challenges faced by LGBTQIA+ individuals and their families in Africa.

The resolution reaffirms the principles of non-discrimination and equality enshrined in the African Charter.¹³⁶ It acknowledges the alarming acts of violence, discrimination, and other human rights violations committed against individuals due to their actual or perceived SOGI. This includes acts such as 'corrective' rape, physical assaults, torture, murder, arbitrary arrests, and detentions.¹³⁷

Moreover, the resolution expresses concern about the violence and human rights abuses faced by human rights defenders and civil society organisations working on issues of SOGI in Africa. It highlights the failure of law enforcement agencies to diligently investigate and prosecute perpetrators of violence targeting individuals based on their sexual orientation or gender identity.¹³⁸

Furthermore, it is argued that the resolution indirectly supports the need to recognise and protect lesbian family rights by states such as Kenya. It implicitly acknowledges that lesbian couples and their families may face discrimination and harm. It calls on all states to ensure an enabling environment for human rights defenders, including those advocating for the rights of sexual minorities.¹³⁹

134 Yogyakarta Principles (n 125) annex.

135 ACHPR/Res.275(LV)2014.

136 African Charter, arts 2 and 3; however, it is uncertain whether these principles are explicitly extended to SOGI see Rudman (n 73) 24.

137 ACHPR/Res.275(LV)2014.

138 As above.

139 As above.

The resolution's primary goal is to terminate violence and abuse, guarantee equal legal protection, and implement responsive judicial processes, all of which enhance the recognition and protection of non-heteronormative families. It encourages states to enact and enforce laws that prohibit violence based on SOGI, helping establish an inclusive legal framework that protects the rights of lesbian couples and their families. It provides a broader context for Kenya to understand the challenges faced by LGBTQIA+ communities. In Kenya, the Ministry of Defence implemented a Gender Policy in 2017 incorporating gender considerations and Resolution 275 into military operations.¹⁴⁰ This resolution is the closest African states have come to adopting a framework that protects LGBTQIA+ rights. It is hoped that other resolutions will follow suit to cover other areas, such as family rights protection, but this is good progress, though slow.

6.3 SDG 10

SDG 10, specifically Target 10.3, focuses on reducing inequalities in outcomes and ensuring equal opportunities.¹⁴¹ This target is highly relevant to the family rights of lesbian couples as it addresses the need to eliminate discriminatory laws, policies, and practices that hinder equal access to family rights.¹⁴²

Many African countries have laws and policies that discriminate against non-heteronormative families.¹⁴³ As discussed earlier, these often deny legal recognition and protection to non-heteronormative families, limiting their ability to form families and enjoy family-related rights and benefits.

140 Republic of Kenya combined 12th and 13th Periodic Reports 2015-2020 on the African Charter on Human and Peoples' Rights and Initial Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, April 2020 para 291.

141 Sustainable Development Goals 'Goal 10' <https://sdgs.un.org/goals/goal10> (accessed 9 July 2024).

142 As above.

143 ILGA World: Lucas Ramon Mendos, and others 'State-sponsored homophobia 2020: Global legislation overview update', December 2020, https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf (accessed 11 April 2024).

Target 10.3 aims to foster an environment in Kenya where lesbian couples can freely form families and have their relationships officially recognised and protected. It advocates for giving lesbians the same opportunities as heterosexual couples, including equal access to adoption, assisted reproduction technologies, and other family formation methods. This target underscores the importance for Kenya to confront and dismantle discriminatory laws, practices, and barriers that hinder the family rights of lesbian couples. It encourages Kenya to rectify systemic inequalities and biases in its legal and social frameworks, moving toward a more inclusive and equitable society, as highlighted in queer theory.

7 Conclusion and recommendations

This chapter delved into the progress, challenges, and barriers surrounding family rights for lesbian couples under the Maputo Protocol. It has highlighted the potential of various provisions within the Protocol to advance these rights. However, there are limitations as the Maputo Protocol, as was presented under section 4, is queer blind. This gap, coupled with Kenya's non-compliance with regional and international law, hinders legal recognition and access to family-related rights for lesbian couples. To address these issues, the final section proposes several recommendations, including advocacy, legal reforms, support systems, and monitoring. Legal reforms such as the adoption of a queer-sensitive resolution by African states implementing the Protocol will be key to protecting family rights for lesbian couples. The journey towards equal family rights for lesbian couples in Kenya requires concerted efforts from stakeholders to challenge discriminatory laws, raise awareness, and foster inclusive support systems. Consequently, Kenya can overcome barriers and create a more just and inclusive society that respects the rights of all individuals, regardless of sexual orientation or gender identity. This would go a long way in interpreting and implementing the Maputo Protocol in an inclusive manner to protect family rights for lesbian couples in Kenya.

In light of the above, this chapter provides the following recommendations: First, comprehensive advocacy campaigns in Kenya and Africa as a whole should be conducted to raise awareness about LGBTQIA+ rights and challenges faced by lesbian couples in accessing family rights under the Protocol. This can entail engaging with civil society organisations, human rights activists, and LGBTQIA+ rights

advocates to create a united front in advocating for the recognition and protection of family rights for lesbian couples. This can involve utilising various communication channels, including social media, public events, and media outreach, to educate the public about the importance of inclusivity and challenge heteronormative assumptions. Once people understand the discrimination faced by lesbians in accessing family rights (as discussed in the gay and lesbian rights theory), they become empathetic and more tolerant of diverse views.

Second, African countries, including Kenya, should advocate for legal reforms to eliminate discriminatory laws and policies that impede the recognition and protection of family rights for lesbian couples. African states should push for the recognition of same-sex relationships, including marriage or civil partnership, through legislative measures that ensure equal rights and responsibilities for lesbian couples. For instance, Kenya should formulate laws to reflect guidelines in the Yogyakarta Principles by virtue of article 2(5) and (6) of the Constitution, especially because Kenya is a signatory to the Principles.¹⁴⁴ States should adopt a queer-sensitive resolution that implements the Protocol and reflects protections against discrimination based on SOGI and equality of family rights in accordance with queer theory.

Third, states, including Kenya, should advocate for the establishment of support systems and services tailored to the unique needs of lesbian families, including counselling, healthcare, and social welfare services. This necessitates adequate funding and collaboration with healthcare providers, mental health professionals, and social workers to ensure culturally sensitive and LGBTQ+ inclusive care and support. The government should allow LGBTQIA communities to establish networks and support groups that provide a safe and empowering environment for lesbian families to share experiences, seek guidance, and build social connections.

Finally, states, including Kenya, should monitor and document human rights violations and discriminatory practices against lesbian families and report such incidents to relevant human rights bodies and mechanisms. To address human rights violations against lesbian families, it is essential to utilise established mechanisms like the Universal Periodic

¹⁴⁴ Yogyakarta Principles (n 125) annex.

Review (UPR). This mechanism monitors and assesses member states' compliance with human rights obligations, including those related to sexual orientation and gender-based violence. Vollmer and Vollmer¹⁴⁵ show how the UPR not only reviews countries' human rights records but also promotes enhancements through targeted recommendations. This structured approach aids Kenya in advancing protections for lesbian family rights under the Maputo Protocol.

145 DT Vollmer & SC Vollmer 'Global perspectives of Africa: Harnessing the universal periodic review to process sexual and gender-based violence in SADC member states' (2022) 33 *Stellenbosch Law Review* 8-41.

Table of abbreviations

AU	African Union
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
IACHR	Inter-American Court of Human Rights
IPV	Intimate partner violence
LGBTQIA+	Lesbian, gay, bisexual, transgender, queer or questioning, intersex, asexual, and more
SOGI	Sexual orientation and gender identity
UN	United Nations
UPR	Universal Periodic Review

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