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We cannot pray it away: The African Charter on Human and Peoples' Rights requires state parties to ban 'conversion therapy'

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Summary: *'Conversion therapy' is a practice that seeks to change an individual's sexual orientation or gender identity. The practice is not currently banned in any African jurisdiction. This is an alarming state of affairs, as 'conversion therapy' leads to severely negative mental and physical health outcomes; and there is no evidence that 'conversion therapy' attains its desired objectives of making individuals cisgender or heterosexual. This article contends that state parties to the African Charter on Human and Peoples' Rights are required to ban 'conversion therapy' as it violates the right to dignity of LGBTQIA+ individuals under article 5. In addition, all forms of 'conversion therapy' constitute 'torture, cruel, inhuman or degrading punishment' and, therefore, should be prohibited as a violation of article 5 of the African Charter. 'Conversion therapy' is in relevant respects akin to abuse that are recognised as more typical forms of degrading treatment. While the intentions of the agent and the perception of the survivor are not necessary preconditions for degrading treatment, the consequences of ill-treatment for individual interests do play an important role. Applying this account of degrading treatment, the article concludes that 'physical' and forcible forms, as well as 'non-physical' and non-forcible forms of*

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'conversion therapy', all amount at a minimum to degrading treatment under human rights law, and give rise to positive obligations on the part of state parties to the African Charter.

Key words: *LGBTQIA+ rights; 'conversion therapy'; Africa; dignity; torture; punishment*

1 Introduction

'Conversion therapy' is a widely discredited practice that, according to the United Nations (UN), seeks to 'cure' lesbian, gay, bisexual, transgender, queer, intersex and asexual (LGBTQIA+) persons by altering or suppressing non-heteronormative sexual orientations and non-cisgender gender identities.¹ These practices take various forms including 'talk therapy, exorcism, drinking herbs, prayer, laying of hands for healing, beatings, and rape or another form of sexual assault'.² As of 20 September 2024, approximately 16 countries, including Germany, Ecuador and Brazil, have introduced a full or partial ban on 'conversion therapy'.³ In the United States of America, 20 states have introduced bans on the practice,⁴ although many exempt religious counsellors and organisations from the scope of the prohibition. A similar exemption is part of the ban on 'conversion therapy' in Queensland, one of the three Australian jurisdictions that currently ban the practice.⁵

In addition to the surprising fact that only a handful of states have banned the practice, it is further surprising that there is a dearth of legal scholarship on the matter.⁶ For example, very few scholars have

1 United Nations Human Rights Council 'Practices of so-called "conversion therapy" report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity' 1 May 2020, A/HRC/44/53 para 2. See also Independent Forensic Expert Group 'Statement on conversion therapy' (2020) 72 *Journal of Forensic and Legal Medicine* 1.

2 Y Wamari & K Farisè *Converting mindsets, not our identities* (2022) 8.

3 'What is conversion therapy and when will it be banned?' *BBC News* 20 September 2024, www.bbc.com/news/explainers-56496423 (accessed 2 December 2024).

4 At the time of writing, these countries are New Jersey, California, Oregon, Illinois, Vermont, New Mexico, Connecticut, Rhode Island, Nevada, Washington, Hawaii, Delaware, Maryland, New Hampshire, New York, Massachusetts, Colorado, Maine, Utah and Virginia.

5 The others are Victoria and the Australian Capital Territory.

6 IY Nugraha 'The compatibility of sexual orientation change efforts with international human rights law' (2017) 35 *Netherlands Quarterly of Human Rights* 176. 'Conversion therapy' involving children is mentioned in the United Nations Committee on the Rights of the Child General Comment 20 on the implementation of the rights of the child during adolescence CRC/C/GC/20, 6 December 2016 34; I Trispiotis & C Purshouse "'Conversion therapy" as degrading treatment' (2021) 42 *Oxford Journal of Legal Studies* 105.

examined the compatibility of 'conversion therapy' with particular human rights such as the right to dignity and the prohibition on torture and other cruel, inhuman or degrading treatment.⁷ This is a peculiar omission, given the strong body of evidence indicating that 'conversion therapy' causes serious harm,⁸ not only to those who undergo the 'treatment' but also to the LGBTQIA+ community more generally. Moreover, according to the Independent Forensic Group, an organisation of 42 distinguished experts from 42 countries specialised in the evaluation of torture and ill-treatment cases, there is no evidence that 'conversion therapy' achieves its purported objectives.⁹

Accordingly, it is not surprising that the UN and the European Parliament¹⁰ have called on states to take action against 'conversion therapy'.¹¹ However, this article is not concerned with politically useful declarations; rather, its focus is on whether the African Charter on Human and Peoples' Rights (African Charter) requires state parties to ban 'conversion therapy' and, if so, why. In doing so, two theoretical arguments will be advanced.

First, it is argued that 'conversion therapy' violates article 5 of the African Charter as it violates the dignity of LGBTQIA+ individuals. Article 5 of the African Charter provides:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

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- 7 Exceptions to this include Trispiotis & Purshouse (n 6); Engage with Outright reports and CHR reports on conversion therapy; O Atilola, Y Wamari & K Farisé *Health ethics and the eradication of conversion practices in Africa* (2024); T Naidoo & A Sogunro 'Conversion therapy: Current practices, emerging technology, and the protection of LGBTQ+ rights in Africa' (2021) *African Human Rights Policy Paper* 3.
- 8 United Nations Human Rights Council (n 1) para 2; A Bartlett and others 'The response of mental health professionals to clients seeking help to change or redirect same-sex sexual orientation' (2009) 9 *BioMed Central Psychiatry* 7.
- 9 Independent Forensic Expert Group 'Statement on conversion therapy' (2020) 72 *Journal of Forensic and Legal Medicine* 1.
- 10 European Parliament Committee on Civil Liberties, Justice and Home Affairs, 'Amendment 8 to the Report on the Situation of Fundamental Rights in the EU in 2016' A8-0025/8 21 February 2018.
- 11 United Nations 'United Nations entities call on states to act urgently to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex adults, adolescents and children' (2015); Annual Report of United Nations High Commissioner for Human Rights 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (2011) para 56; United Nations 'Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2001) para 24.

This article argues that ‘conversion therapy’ disrespects LGBTQIA+ persons and, therefore, violates their dignity, not only because it places them at real risk of grave physical and psychological harm, or only because it denies them specific freedoms related to sexuality and gender identity, or only because it depends on, and reflects, their social subordination. ‘Conversion therapy’ disrespects LGBTQIA+ persons for all those reasons, at the same time.

Second, it is argued that this distinct coalescence of wrongs entails that all forms of ‘conversion therapy’ violate article 5 of the African Charter’s prohibition on ‘torture, cruel, inhuman or degrading punishment’. It will be demonstrated that ‘conversion therapy’ is relevantly akin to examples of abuse that are recognised as more typical forms of degrading treatment. For that reason, this article analyses the meaning of ‘degrading’ treatment under article 5 of the African Charter and argues that the term is conditioned by the ideas of human dignity and power. Through an analysis of case law, the article concludes that an act is degrading and, therefore, constitutes a violation of article 5, if it expresses the unequal moral worth of the other and if the acting person or entity has sufficient power or status over the survivor such that their actions can undermine their dignity.

The article also argues that the intentions of the agent and the perception of the survivor are not necessary preconditions for degrading treatment, whereas the consequences of ill-treatment for individual interests do play an important role.¹² The article then applies degrading treatment to ‘physical’ forms, forcible forms and, finally, ‘non-physical’ and non-forcible forms of ‘conversion therapy’. It is concluded that all forms of ‘conversion therapy’ amount, at a minimum, to degrading treatment in human rights law as all forms of ‘conversion therapy’ fall within the scope of the prohibition on degrading treatment. As the focus of the article is determining whether ‘conversion therapy’ violates article 5 of the African Charter, the article ends with a brief examination of the positive state obligations in this area. It is acknowledged that this subject warrants its own lengthy discussion.

2 Definition of ‘conversion therapy’

‘Conversion therapy’ is an umbrella term that describes ‘a multitude of practices and methods’ to change or suppress an individual’s sexuality or gender identity to better align them with

¹² Trispiotis & Purshouse (n 6) 107.

heteronormative standards.¹³ Each practice or method 'attempts to pathologise and erase the identity of individuals'.¹⁴ The scope of methods of 'conversion therapy' is limitless. However, the most common methods of a physical nature are 'corrective' rape and sexual assault,¹⁵ physical abuse,¹⁶ electroconvulsive shock treatments,¹⁷ hormone treatments¹⁸ and 'aversion therapy'.¹⁹ Conversion practices that do not involve overt physical violence, often referred to as 'talking therapies', include psychotherapy, pastoral counselling or peer support.²⁰ These 'therapies', whether physical or non-physical, have been found to frequently lead to life-long effects, such as loss of self-esteem, anxiety, depression, social isolation, intimacy difficulty, self-hatred, shame, sexual dysfunction, suicidal ideation and post-traumatic stress disorder.²¹ It has been asserted that it is difficult to classify certain forms of 'conversion therapy' due to the range of physical and psychological elements.²²

3 Emergence of 'conversion therapy' in Africa

Globally, 'conversion therapy' practices emerged in the mid-nineteenth century due to the medicalisation of minority gender and sexual identities.²³ These practices sought to find medical interventions to 'correct' such identities.²⁴ Religious groups soon became providers of these practices through the provision of 'spiritual cleansing' based on their own conception of gender non-conformity and homosexuality as immoral, prohibited and or evil possession.²⁵

In contemporary times, 'conversion therapy' is a global phenomenon that LGBTQIA+ individuals across the globe

13 United Nations Human Rights Council (n 1) 17. See also Independent Forensic Expert Group 'Statement on conversion therapy' (2020) 72 *Journal of Forensic and Legal Medicine* 1.

14 United Nations Human Rights Council (n 1) 17.

15 United Nations Human Rights Council (n 1) 18 & 39.

16 United Nations Human Rights Council (n 1) 39, 50 & 52.

17 Special Rapporteur of the Commission on Human Rights 'Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2001) 24.

18 United Nations Human Rights Council (n 1) 46.

19 United Nations Human Rights Council (n 1) para 43.

20 KA Hicks "'Reparative' therapy: Whether parental attempts to change a child's sexual orientation can constitute child abuse' (1999) 49 *American University Law Review* 506.

21 United Nations Human Rights Council (n 1) 56. See also J Fjelstrom 'Sexual orientation change efforts and the search for authenticity' (2013) 60 *Journal of Homosexuality* 801.

22 Trispiotis & Purshouse (n 6) 109.

23 Atilola and others (n 7) 10.

24 As above.

25 As above.

experience.²⁶ However, there is a lack of data on the prevalence of these practices worldwide. Health and human rights researchers have only recently focused on collecting data relating to conversion practices. Their efforts have been further complicated by the fact that LGBTQIA+ individuals often conceal their experiences and identity and, therefore, are difficult to access during research.²⁷

One of the most recent surveys, which included over 8 000 respondents in more than 100 countries, on the prevalence of conversion practices indicated that 20 per cent of participants had personally been subjected to 'conversion therapy' or knew someone who had endured the treatment.²⁸ In Africa, research conducted by Outright International in South Africa, Kenya and Nigeria found that approximately half of the 2 891 LGBTQIA+ participants indicated that they had been subjected to 'conversion therapy' (58, 44 and 49 per cent of the surveyed participants surveyed in these countries, respectively).²⁹

On the African continent, 'conversion therapy' takes many forms and the practice is primarily driven by members of religious communities.³⁰ Non-heteronormative and non-cisgender expressions of sexual orientation and gender identity are often perceived to be spiritual problems rather than mental illnesses.³¹ Churches and other religious institutions may organise exorcisms and prayers to drive out the 'demon of homosexuality'.³² Indeed, a South African LGBTQIA+ individual who was subjected to 'conversion therapy' reported that the practice left him feeling 'dirty and cursed'.³³

Other common practices on the continent include torture, wrongful imprisonment in camps or religious centres, and sexual violence, including forced or coerced marriage.³⁴ Other providers of 'conversion therapy', according to Out Right International's research, include traditional healers and healthcare workers.³⁵

26 See, generally, A Bishop *Harmful treatments: The global reach of so-called conversion therapy* (2023).

27 This is true even in non-criminalising countries such as the United Kingdom. Eg, see A Jowett and others *Conversion therapy: An evidence assessment and qualitative study* (2020) 1.

28 Atilola and others (n 7) 10.

29 Wamari & Farisè (n 2) 8.

30 As above.

31 Atilola and others (n 7) 10.

32 Wamari & Farisè (n 2) 8.

33 Wamari & Farisè (n 2) 23.

34 Wamari & Farisè (n 2) 9.

35 Wamari & Farisè (n 2) 25.

In 2019 the international organisation Out Right International conducted a study on 'conversion therapy' in Africa, which found that 75 per cent of 'conversion therapy' practices are carried out for religious and cultural reasons.³⁶ Many African countries continue to tolerate these kinds of religious interventions despite the harmful experiences of LGBTQIA+ persons.³⁷

4 African LGBTQIA+ individuals as rights holders

There is no mention of the terms associated with 'LGBTQIA+' identity, such as 'sexual orientation' and 'gender identity', in the African Charter. Therefore, it is necessary to establish that LGBTQIA+ individuals indeed are rights holders in terms of the African Charter and, consequently may rely on the rights contained therein. The African Commission on Human and Peoples' Rights (African Commission) has interpreted the African Charter in an increasingly progressive manner.³⁸ However, 'gender identity' and 'sexual orientation' have remained largely unexplored by the African Commission. This is despite ongoing and sustained violations against LGBTQIA+ individuals in numerous African countries.³⁹

Non-discrimination is addressed by article 2 of the African Charter, which provides that individuals enjoy the rights contained within the African Charter 'without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status'. Viljoen and Murray persuasively argue that the inclusion of phrases 'or other status' and 'such as' indicates that the list of grounds is 'open' as the phrasing suggests that the drafters of the African Charter envisioned that the list of grounds could be expanded.⁴⁰ Indeed, the rationale of the African Charter requires that 'other status' should be an 'expansive and open-ended' concept due to the grave consequences, in relation to the reliance on other African Charter rights, which follow from the exclusion of the ambit of article 2.⁴¹

36 Bishop (n 26) 38.

37 Naidoo & Sogunro (n 7) 9.

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

39 Amnesty International 'Africa: Barrage of discriminatory laws stoking hate against LGBTI persons' 9 January 2024, <https://www.amnesty.ie/africa-discrimination-lgbti/> (accessed 1 May 2025).

40 Murray & Viljoen (n 38) 91.

41 As above.

The fact that LGBTQIA+ status falls within the ambit of article 2 finds further support in the African Commission's adoption of the 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 (Resolution 275). Resolution 275 was adopted in line with the African Commission's mandate⁴² to interpret the rights in the African Charter.

Despite constituting 'soft law', Resolution 275 is significant for the purposes of this article in three ways. First, the Preamble to the Resolution indicates that LGBTQIA+ status falls within the ambit of article 2 of the African Charter and, therefore, LGBTQIA+ individuals are entitled to the rights contained therein. Second, the African Commission urged states to end all acts of violence and abuse, committed by state and non-state actors, which target persons 'on the basis of their imputed or real sexual orientation or gender identities'. Part 2 of this article makes it clear that 'conversion therapy' practices constitute 'abuse' and 'violence'. Third, and perhaps most importantly, the Preamble to Resolution 275 suggests that LGBTQIA+ individuals specifically enjoy the protection of article 5 of the African Charter, a provision which is central to this article.

5 Degradation and dignity in the African Charter on Human and Peoples' Rights

Article 5 of the African Charter is dedicated to the right to dignity and combating several manifestations of its violations. The article provides:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited.

This provision recognises an enforceable right to dignity. Accordingly, the provision differs from the reference to dignity in the Preamble which refers to a value that informs all the rights incorporated under the African Charter.⁴³ Further, this provision unequivocally perceives dignity as something that is embedded within every human person. This formulation of human dignity aligns with the provisions of several human rights instruments such as the Universal Declaration

⁴² Under art 45 of the African Charter.

⁴³ TA Gelaye 'The role of human dignity in the "human rights" jurisprudence of the African Commission on Human and Peoples' Rights' (2021) 5 *African Human Rights Yearbook* 127.

of Human Rights (Universal Declaration).⁴⁴ Notably, the African Court on Human and Peoples' Rights (African Court) and the African Commission have interpreted the right to life broadly to include both the 'inviolable nature and integrity of the human being'⁴⁵ as well as the right to a dignified life.⁴⁶

The African Commission has interpreted 'inhuman or degrading treatment or punishment' quite broadly to include the 'widest possible protection against abuse, whether physical or mental'.⁴⁷ For example, the African Commission found that addressing individuals in degrading language constitutes an infringement of article 5.⁴⁸ In the context of the right to dignity, the African Court and African Commission have also found infringements relating to living conditions of detained persons,⁴⁹ mandatory death penalties⁵⁰ and unlawful detention.⁵¹

In relation to the dignity of members of the LGBTQIA+ community on the African continent, the African Commission, through Resolution 275, expressed concern about violence and other human rights violations committed against persons based on their real or imputed non-heteronormative sexual orientation or gender identity. Considering the right to human dignity, in conjunction with other human rights enumerated in the African Charter, the African Commission, through Resolution 275, implored state parties to arrest perpetrators of all forms of violence against sexual minorities and to adopt legislation to protect them. Furthermore, the African Commission acknowledged that violence and discrimination based

44 African Commission on Human and Peoples' Rights 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).

45 *African Commission on Human and Peoples' Rights v Kenya* Application 6/2012, African Court on Human and Peoples' Rights (2017) 152.

46 African Commission on Human and Peoples' Rights General Comment 3 on the African Charter on Human and Peoples' Rights: The right to life (art 4) (2015) 3.

47 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 58. See also *Armand Guehi v United Republic of Tanzania* Application 1/2015, African Court on Human and Peoples' Rights (2018). See also *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000) para 71; *Doebbler v Sudan* (2009) AHRLR 208 (ACHPR 2009) para 37.

48 *Purohit* (n 47) paras 58-59.

49 *Purohit* (n 47) para 55; *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) para 53; *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) para 41.

50 *Ally Rajabu & Others v United Republic of Tanzania* Application 7/2015 African Court on Human and Peoples' Rights (2019) 119.

51 *African Commission on Human and Peoples' Rights v Libya* Application 2/2013 African Court on Human and Peoples' Rights (2016) 78-85. See also *Institute for Human Rights and Development in Africa* (n 49) para 50; *Huri-Laws* (n 49) para 40.

on sexual orientation and gender identity violate the right to human dignity.⁵²

A key trend that has emerged in the jurisprudence of the African Commission is the importance of 'equal moral personhood' in assessing infringements of human dignity. For example, in *Purohit* the African Commission found that an individual cannot lose their dignity or respect due to a disability. Rather, their value as any other member of the human family always persists.⁵³

In *Open Society v Côte d'Ivoire* the African Commission issued perhaps its strongest statement on human dignity, by stating the following:⁵⁴

Dignity is ... the soul of the African human rights system and which it shares consubstantial with both the other systems and all civilised human societies. Dignity is intrinsic and inherent to the human person. In other words, when the individual loses his dignity, it is his human nature itself which is called into question, to the extent that it is likely to interrogate the validity of continuing to belong to human society ... When dignity is lost, everything is lost. In short, when dignity is violated, it is not worth the while to guarantee most of the other rights.

This passage underscores the intrinsic nature of human dignity and its indelible relationship to human nature. Accordingly, when one's dignity is jeopardised, their very human nature is also threatened.

6 Dignity and 'conversion therapy'

In addition to constituting moral wrongs because of the harmful psychological and physical effects of 'conversion therapy',⁵⁵ all forms of 'conversion therapy' inherently undermine the equal moral worth of LGBTQIA+ persons. Regardless of the grave harms that 'conversion therapy' inflicts on LGBTQIA+ individuals, and social and cultural understandings of what constitutes disrespectful behaviour, all forms of the practice fail to recognise that all individuals possess equal moral worth despite their gender identity and sexuality. In the remainder of this part, two ways in which 'conversion therapy' fails to treat LGBTQIA+ individuals with equal moral personhood will be outlined.

52 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.

53 Gelaye (n 43) 129.

54 *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06 African Commission on Human and Peoples' Rights (2015) para 139.

55 Identified earlier in the article.

6.1 Attacks on autonomy

First, 'conversion therapy' practices disrespect the equal moral personhood of LGBTQIA+ individuals as they discount the group's important autonomy concerns without any justifiable rationale for such disregard.⁵⁶ In essence, 'conversion therapy' singles out LGBTQIA+ identities as being inferior to heterosexual and cisgender identities and, consequently, furnishes less regard to the interests of individuals with these identities.⁵⁷ Accordingly, despite a person's gender identity or sexuality constituting the justification of this lower regard, the 'responses constitutive of less consideration are focused on the person and their interests'.⁵⁸ This communication of inferiority, which is inherent to 'conversion therapy', emerges in testimony of a South African transmasculine survivor of 'conversion therapy' who states that 'I have always felt like a guy and still feel like a guy. Conversion hasn't changed anything. I just felt impure.'⁵⁹

As such, it has been argued that all forms of 'conversion therapy' possess a common goal of undermining autonomy, that is, to restrain a set of deep-seated paramount interests concerning gender identity and sexuality,⁶⁰ of which perhaps the most patent is the interest to develop one's sexual attraction into sexual activity.⁶¹ This is the case as many forms of 'conversion therapy' seek to either inhibit same-sex attraction or inhibit the possibility of the development of same-sex attraction into consensual same-sex sexual activity.⁶² Both objectives seek to inhibit choices that are fundamental to the model of an autonomous life formed by an individual's continuous external and internal identity affirmation regarding gender identity and sexuality, of which transgender, cisgender, non-binary, heterosexual, bisexual, asexual and homosexuality identities are seen as having equal moral personhood.⁶³

56 H Frankfurt *Necessity, volition, and love* (1999) 146-155.

57 N Kolodny 'Rule over none II: Social equality and the justification of democracy' (2014) 42 *Philosophy and Public Affairs* 287.

58 Trispiotis & Purshouse (n 6) 110.

59 Atilola and others (n 7) 12.

60 Since 'conversion therapy' breaches autonomy-based duties, state intervention is legitimate. See J Raz *The morality of freedom* (1986) 416-417.

61 Trispiotis & Purshouse (n 6) 110.

62 The definitions of 'conversion therapy' in some of the existing laws against it cover practices that aim to convert, cancel or suppress sexual orientation or gender identity. See, eg, the legislation adopted in Queensland (Public Health Act 2005, sec 213F as amended by Health Legislation Amendment Act 2020, sec 28) and Victoria (Change or Suppression (Conversion) Practices Prohibition Act 2021, sec 5).

63 J Gardner 'On the ground of her sexuality (1998) 18 *Oxford Journal of Legal Studies* 172-173. The question of whether sexuality constitutes an immutable characteristic or a fundamental choice cannot determine whether people are entitled to protection from 'conversion therapy'. In either case, sexuality and

6.2 Unfair subordination of LGBTQIA+ individuals

The second way in which all forms of ‘conversion therapy’ fail to treat LGBTQIA+ persons as human beings with equal moral personhood is by inhibiting LGBTQIA+ individuals from possessing pride in their gender identity and sexuality and asserting these elements as aspects of their public personality. The suppression of pride in one’s LGBTQIA+ identity that associated with ‘conversion therapy’ is humanised through the testimony of a South African survivor of ‘conversion therapy’, who states: ‘I believed I needed to change. I attempted suicide several times.’⁶⁴

This decision to possess pride in your identity, and to express this pride in your public personality, is a profound decision that is also fundamental to personal autonomy, as the self-suppression of one’s identity impedes full engagement in worthy aspects of public culture – such as politics, art and music – which are shaped and imbued by a myriad of gender identities and sexual orientations.⁶⁵ By denouncing these critical choices, ‘conversion therapy’ undermines self-worth as individuals determine their own sense of worth in relation to their capacity to realise their potential, objectives and aspirations.⁶⁶ Therefore, ‘conversion therapy’ diminishes the equal moral personhood of LGBTQIA+ individuals without justifiable rationale, by disregarding fundamentally significant interests that are core to their personal autonomy.

Importantly, the harm of ‘conversion therapy’ to the dignity of LGBTQIA+ individuals extends beyond harming the dignity of those specific individuals who are subjected to the practice. ‘Conversion therapy’ is sustained by and manifests a social order in which LGBTQIA+ persons are disempowered and are treated with less respect than heterosexual and cisgender individuals.⁶⁷ The existence of ‘conversion therapy’ implies the disdain or contempt for LGBTQIA+ identities, which can and should be eradicated. This implication is humiliating for all LGBTQIA+ persons, including those who have never themselves been subjected to ‘conversion therapy’,⁶⁸

gender identity are so central to self-definition that the harms of ‘conversion therapy’ amount to an attack on the autonomy of LGBTQIA+ persons.

64 Atilola and others (n 7) 12.

65 Gardner (n 63) 176-8.

66 DG Réaume ‘Discrimination and dignity’ (2003) 63 *Louisiana Law Review* 673; T Khaitan ‘Dignity as an expressive norm: Neither vacuous nor a panacea’ (2012) 32 *Oxford Journal of Legal Studies* 1; J Wolff ‘Fairness, respect, and the egalitarian ethos’ (1998) 27 *Philosophy and Public Affairs* 107.

67 Trispiotis & Purshouse (n 6) 111.

68 On the demeaning message of discrimination, see D Nejaime and RB Siegel ‘Conscience wars: Complicity-based conscience claims in religion and politics’ (2015) 124 *Yale Law Journal* 2574-2578.

as it advances the message that LGBTQIA+ individuals are social deviants – a message that underlies their pre-existing stigma in many societies.⁶⁹ Accordingly, the negative effects of 'conversion therapy' are not limited to those who experience the practice but also to the LGBTQIA+ population more generally as the practice influences the perceptions of the population towards the LGBTQIA+ community. Indeed, evidence indicates that there is a link between the absence of a legal ban on 'conversion therapy' in most European countries, on the one hand, and a social context of historical stigmatisation of homosexuality, on the other.⁷⁰

Let us consider real-life examples with the opposite aim in terms of which courts have found that coercive forms of interference with core aspects of an individual's identity, such as religion, are unlawful. Here, due to the fact that there is no jurisprudence from African Court or the African Commission on the issue, case law from the European Court of Human Rights (European Court) will be considered. Notably, the African Commission has drawn upon European Court case law in interpreting the right to dignity in numerous cases.⁷¹ The European Court has consistently ruled that exploiting a power imbalance within certain settings, for example, in a military environment,⁷² in order to change an individual's religious beliefs is unlawful in terms of the European Convention on Human Rights (European Convention).⁷³

6.3 The issue of consent

'Conversion therapy', sustained by and manifesting the systemic disempowerment of LGBTQIA+ individuals, occurs in many societies in Africa.⁷⁴ These broader, subjugating effects of 'conversion therapy'

69 M Nussbaum *From disgust to humanity: Sexual orientation and constitutional law* (2010) 2-26.

70 The force of this objection depends on an analysis of the socio-historical particularities that determine the meaning of an act.

71 Eg, *Ireland v UK* (1978) ECtHR 1, cited in *Egyptian Initiative for Personal Rights and Interights v Egypt* (2011) AHRLR 90 (ACHPR 2011) para 194 and *Huri-Laws v Nigeria* (n 49) para 41. See also R Murray 'Article 5: Respect of dignity; prohibition of slavery and torture and other forms of ill-treatment' in R Murray (ed) *The African Charter on Human and Peoples' Rights: A commentary* (2019) 139.

72 *Larissis v Greece* (1998) ECtHR 51.

73 This argument does not suggest that there is a positive state obligation to ban all forms of proselytism. It only aims to show that the legitimacy of proselytism, to a significant extent, depends on an evaluation of the background conditions in which it takes place. See *Nasirov & Others v Azerbaijan* (2020) ECtHR 65; *Jehovah's Witnesses of Moscow & Others v Russia* (2010) ECtHR 122. More broadly, egalitarian considerations can justify restrictions on freedom of religion or belief; see I Trispiotis 'Religious freedom and religious antidiscrimination' (2019) 82 *Modern Law Review* 864.

74 AA Onyisi and others 'Constitutional protection of the LGBT rights and access to justice: A case analysis of select East African Community (EAC) states' (2023) 4

provide a further important need to counter the practice. However, one might assert that the argument only applies to instances of forced 'conversion therapy' as opposed to instances when individuals choose to subject themselves to the practice. The objection may proceed to assert that if a practitioner of 'conversion therapy' details the risks associated with 'conversion therapy, then an individual who chooses to undergo the 'practice' is responsible for the concomitant harm. It may be argued that allowing an individual to make this choice is in itself a form of respect for their autonomy.

Indeed, consent is not irrelevant in the determination of whether particular conduct constitutes prohibited treatment in human rights law. For example, the African Court has found a violation of article 5 of the African Charter in an instance where an individual was forced to act against 'his will or conscience'.⁷⁵ Nevertheless, the objection is based on an untenably restrictive interpretation of the moral significance of choice, and disregards the underlying circumstances in which the decision is taken. Crucially, this conception of consent is incongruous with regard to the existing jurisprudence on article 5, which was detailed in part 5 of this article, in terms of which the existence of systemic prejudice against a group or the vulnerability of the survivor is the principal consideration and not whether the survivor had a choice to avoid the relevant conduct. The jurisprudence on article 5 reflects a more extensive understanding of the moral significance of choice in terms of which certain conditions must be satisfied prior to determining whether an individual's choice is sufficient.

6.4 The issue of intention

The last issue to address in this part is the relationship between the intention of the provider of the 'therapy' and the repudiation of the equal moral personhood of LGBTQIA+ individuals. Although the belief that LGBTQIA+ persons lack equal moral personhood is central to most instances of 'conversion therapy', it does not follow that the practice should be banned only in instances where the provider holds such a belief. To underscore this point, let us consider a religious leader who provides 'conversion therapy' to save a lesbian woman from eternal damnation. It is possible for the religious leader to assert that she believes that LGBTQIA+ individuals possess equal moral value and, therefore, efforts must be taken to save their souls

75 *Journal of International Social Science and Humanities* 172.
International Pen & Others (on behalf of Saro-Wiwa) v Nigeria (2000) AHRLR 212 (ACHPR 1998) para 79.

through 'treatment' in the form of 'therapy'. A religious leader with such beliefs would not be providing the 'therapy' due to their belief that LGBTQIA+ individuals are inherently less valuable than others.

However, even if, in these instances of the provision of 'conversion therapy', it is due to benevolent motives, the right to dignity of LGBTQIA+ individuals is nevertheless infringed as their interests – personal autonomy, development of personality, and physical and mental well-being – are, without good cause, considered less valuable than the corresponding interests of their cisgender heterosexual counterparts. Accordingly, the violation of the right to dignity through 'conversion therapy' is independent of a therapist's beliefs. Rather, the violation stems from a belief that sexual orientations and gender identities that differ from an ordained norm dictate that certain interests of LGBTQIA+ persons should be disregarded to achieve a certain objective.

7 'Conversion therapy' and the scope of the prohibition on torture or degrading treatment

The preceding part demonstrated why 'conversion therapy' constitutes a grave violation of human dignity. In this part of the article it will be assessed whether all forms of 'conversion therapy' constitute 'degrading treatment' and/or 'torture'. The importance of this determination cannot be overstated due to the existence of an absolute ban on degrading treatment in the African regional human rights system.

7.1 Article 5's absolute ban

The African Commission has affirmed that the article 5 ban against, cruel, inhuman and degrading treatment is absolute.⁷⁶ Even in instances of combating alleged terrorist activities, it is 'not justified to subject' individuals to such treatment.⁷⁷ This absolute ban is underpinned by the absence of a derogation clause in the African Charter.⁷⁸ Notably, this provision refers to both 'punishment' and 'treatment', but typically these terms are not distinguished one from one the other.⁷⁹ It is further regrettable that the African Commission's

⁷⁶ *Huri-Laws* (n 49) 41.

⁷⁷ *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) paras 113-114.

⁷⁸ *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 165.

⁷⁹ Association for the Prevention of Torture (APT) and the Centre for Justice and International Law (CEJIL) *Torture in International Law* (2008) 127.

and Court's efforts to distinguish between 'punishment' or 'treatment' that is 'cruel', 'degrading', 'inhuman' and 'torture' are *ad hoc* and do not demonstrate an intention for the terms to be treated separately.⁸⁰

In line with the European Court, the African Commission refers to 'the minimum level of severity' in order to determine whether treatment constitutes a violation of article 5. These factors include the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the survivor, and so forth.⁸¹

7.2 The nature of the 'punishment' and 'treatment' that violates article 5

The determination that 'treatment' or 'punishment' is 'inhuman or degrading' is case-specific.⁸² In making this determination, it is clear that the dignity of the affected person or persons is an important consideration.⁸³ For example, the African Court has endorsed the European Court's findings that in order for treatment to be 'degrading', the relevant individual must have undergone humiliation or debasement attaining a minimum level of severity in their own eyes or the eyes of others.⁸⁴ In this respect, violations of article 5 have been found in the context of situations that are 'analogous to slavery',⁸⁵ the denial of identity documents to an ethnic group⁸⁶ and the issuance of death threats in incommunicado detention.⁸⁷ A common thread in these series of findings is the practice demonstrating the unequal moral worth of certain individuals or groups.

In addition to violations of article 5 being found in the context of 'punishment' or 'treatment' that signals the unequal moral worth of the other, a further trend that emerges in the case law is the existence of a person or persons that occupy a position of power over the survivor that allows them to humiliate or degrade the other. For example, in *Doebbler* the complainant alleged that the punishment

80 See also F Viljoen & C Odinkalu *The prohibition of torture and ill-treatment in the African human rights system: A handbook for victims and their advocates* (2014) 48-51.

81 *Huri-Laws* (n 49) 41.

82 *Egyptian Initiative for Personal Rights* (n 71) para 187.

83 *Egyptian Initiative for Personal Rights* (n 71) paras 189-190.

84 *Campbell and Cosans v UK* (1982) ECtHR 1, as cited in *Egyptian Initiative for Personal Rights* (n 71) para 200.

85 *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 135.

86 *Open Society Justice Initiative* (n 54) para 69.

87 *Abdel Hadi, Ali Radi & Others v Republic of Sudan* Communication 368/09 African Commission on Human and Peoples' Rights (2013) para 74.

by security agents and police officials of individuals by lashings was disproportionate and humiliating.⁸⁸ An aggravating factor here, according to the African Commission, was the public nature of the lashing which 'is contrary to the high degree of respect accorded to females in Sudanese society'.⁸⁹ A further example of the existence of a power imbalance in the context of an article 5 'punishment' and 'treatment' violation involved Egyptian state security intelligence officers being complicit in sexual assault and physical beatings.⁹⁰

In these contexts, the societal message that is communicated is that victims are powerless under the control of a person in a position of power, usually a law enforcement official, and that the individual is morally inferior to them.⁹¹

7.3 Degrading and inhuman treatment and 'conversion therapy'

The foregoing parts have demonstrated that under the African human rights law system, degrading 'punishment' and 'treatment' (article 5) violations exist when (i) an act displays the unequal moral worth of an individual or group of individuals; and (ii) the person who commits the act occupies a position of power over the survivor that allows them to humiliate and degrade others. It has been argued that the formulation of these two conditions reflects the close relationship between dignity and degrading treatment that exists in our moral vocabulary.⁹²

It will now be considered whether two of the most common forms of 'conversion therapy' (namely, extreme and violent forms of 'conversion therapy', on the one hand, and milder, non-forcible forms of 'conversion therapy', on the other) satisfy the conditions outlined above. The former types of 'conversion therapy', such as those involving, among others, the injection of drugs, rape, forced genital examinations and electroshocks, cause severe mental and physical pain⁹³ and, therefore, constitute a 'punishment' and 'treatment' violation according to article 5. Depending on the severity of this treatment, they may constitute 'torture' as opposed to 'degrading and inhuman punishment or treatment'.⁹⁴

88 *Doebbler v Sudan* (n 47).

89 *Doebbler v Sudan* (n 47) para 32.

90 *Egyptian Initiative for Personal Rights* (n 71) 186.

91 Trispiotis & Purshouse (n 6) 117.

92 Trispiotis & Purshouse (n 6) 118.

93 Special Rapporteur of the Commission on Human Rights (n 17) 24.

94 Trispiotis & Purshouse (n 6) 124.

The second class of ‘conversion therapies’ to consider are the milder forms, which typically include non-physical ‘talking’ sessions that pathologise certain gender identities and/or sexualities and seek to repress or eliminate their expression.⁹⁵ If it is shown that these non-physical forms of ‘conversion therapy’ violate the ‘treatment’ and ‘punishment’ article 5 provision, then all types of ‘conversion therapy’ – from its most violent and forcible forms to its milder and non-forcible forms – would face absolute prohibition by article 5 of the African Charter. It will be demonstrated that all forms of ‘conversion therapy’ satisfy the two preconditions for ‘treatment’ and ‘punishment’ article 5 violations outlined above.

7.3.1 *The first condition*

An inherent feature of all forms of ‘conversion therapy’ is the treatment of LGBTQIA+ individuals as if they are of less value than their non-LGBTQIA+ counterparts as every iteration of the ‘practice’ exhibits disdain for LGBTQIA+ identities.⁹⁶ This disdain is discharged through the purposeful refusal to acknowledge the equal value of the well-being of LGBTQIA+ persons.⁹⁷ This is a violation of dignity that necessarily manifests irrespective of whether the survivors of ‘conversion therapy’ suffer mental or physical harms. It is important to note that the implication is not that the damaging effects of ‘conversion therapy’ on the survivors are irrelevant. Rather, the easily foreseeable deleterious mental and physical consequences that ‘conversion therapy’ has on its survivors are relevant in determining the degrading nature of the practice.⁹⁸

As outlined, the practice results in a significant risk of severe, life-long physical and psychological suffering of its survivors detailed in the second part of this article. Separate from these mental and physical harms, however, the existence of the practice also constitutes a message of contemptuous disdain for the well-being and interests

95 This does not include counselling that seeks to provide acceptance, support, facilitation and understanding of a person’s sexual and gender identity. That is why some bans expressly exempt such practices from the scope of ‘conversion therapy’. See, eg, the legislation adopted in Queensland (Public Health Act 2005, sec 213F as amended by Health Legislation Amendment Act 2020, sec 28) and Victoria (Change or Suppression (Conversion) Practices Prohibition Act 2021, sec 5).

96 Trispiotis & Purshouse (n 6) 126.

97 As above.

98 Thus, legal intervention against ‘conversion therapy’ is justified, at least in part, by appeal to the states of affairs it promotes. This (broadly) consequentialist view is different to rule of utilitarianism because it is unconcerned with benefit maximisation. See TM Scanlon ‘Rights, goals and fairness’ in TM Scanlon (ed) *The difficulty of tolerance* (2003) 33-39.

of LGBTQIA+ individuals,⁹⁹ including instances where the message is not blatantly communicated, but the degrading essence of the practice is unambiguous to its recipients as it indicates and sustains a widely intelligible message regarding sexuality and gender identity norms and expectations related to normality and desirability.¹⁰⁰ This message is easily understood by its recipients as they are members of the 'same community of shared meanings as those who try to "convert" them'.¹⁰¹ For this reason, 'conversion therapy' degrades its recipients even if individual survivors do not feel degraded and also in circumstances where it is not the intention of the 'provider' of the 'therapy' to degrade.¹⁰² Therefore, the practice is inherently irreconcilable with the understanding of self-worth that is central to human dignity, a concept that entails that an individual feels assured in their individual identity, 'including as a member of those communities with which they identify'.¹⁰³

This understanding of 'self-worth' is extinguished by 'conversion therapy' as the 'practice's' intrinsic objective is to suppress the freedom of LGBTQIA+ individuals to pursue options with respect to some of the most intimate and important domains of life. These possibilities that 'conversion therapy' obstructs would not be denied to a non-LGBTQIA+ individual.¹⁰⁴ Therefore, all forms of 'conversion therapy' satisfy the first condition of not treating individuals with equal moral worth.

7.3.2 *The second condition*

The second condition, that is, the person who commits the act occupies a position of power over the survivor that allows them to humiliate and degrade others, will now be considered. All forms

99 The prohibition on discrimination is partly a response to the subordinating meaning of 'institutionalised humiliation' conveyed by certain forms of disadvantageous treatment. See JM Balkin & RB Siegel 'The American civil rights tradition: Anti-classification or anti-subordination?' (2004) 58 *University of Miami Law Review* 9. Expressive harms can directly injure, and function differently from ideological or purely subjective injuries. Student note 'Expressive harms and standing' (1999) 112 *Harvard Law Review* 1313; RH Pildes & RG Niemi 'Expressive harms, "bizarre districts", and voting rights: Evaluating election-district appearances after *Shaw v Reno*' (1993) 92 *Michigan Law Review* 483.

100 Trispiotis & Purshouse (n 6) 126.

101 As above.

102 Subordinated groups do not choose the social meanings imposed on them by society's institutions, such as religious groups or medical experts. L Melling 'Religious refusals to public accommodations laws: Four reasons to say no' (2015) 38 *Harvard Journal of Law and Gender* 177; M Lim & L Melling 'Inconvenience or indignity? Religious exemptions to public accommodations laws' (2014) 22 *Journal of Law and Policy* 705.

103 Trispiotis & Purshouse (n 6) 126.

104 Trispiotis & Purshouse (n 6) 127.

of 'conversion therapy' also satisfy this criterion as an appreciable power imbalance is intrinsic to the practice.

'Conversion therapy' is customarily provided by individuals belonging to prominent social institutions, such as healthcare practitioners and religious leaders, who occupy a higher social status and appreciable power disparity in relation to survivors. As a result of this significant power imbalance between therapists, doctors, pastors, imams, and so forth, and individual survivors, the disrespect conveyed by 'conversion therapy' degrades survivors in addition to insulting them.¹⁰⁵

Accordingly, all manifestations of the practice of 'conversion therapy' constitute a 'treatment' and 'punishment' article 5 violation because they all involve disrespect of the equal moral worth of LGBTQIA+ individuals coupled with an appreciable status or power differential between the relevant parties.

8 Positive obligations

So far, it has been demonstrated that all forms of 'conversion therapy' violate the human dignity of all LGBTQIA+ individuals in a society and amount to degrading treatment. Therefore, while article 5 of the African Charter neither expressly prohibits 'conversion therapy', nor does it mention the terms 'sexual orientation' or 'gender identity', the elements that are inherent to all forms of 'conversion therapy' place the practice within the ambit of article 5. Therefore, state parties are obligated to prohibit all forms of 'conversion therapy'.

It has been widely acknowledged that the civil and political rights detailed in several human rights instruments do not exclusively create negative obligations on states, in the sense that they impose duties on states to refrain infringing the enumerated rights, but they also impose positive obligations on states to take active measures to allow the enjoyment of rights.¹⁰⁶

Article 1 of the African Charter contains the source of positive obligations under the instrument. This provision states that '[m]ember states of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms

¹⁰⁵ As above.

¹⁰⁶ JV Wibye 'Reviving the distinction between positive and negative human rights' (2022) 35 *Ratio Juris* 375.

enshrined in this Chapter and *shall undertake to adopt legislative or other measures to give effect to them*'.¹⁰⁷

Also, in *Legal Resources Foundation v Zambia*, the African Commission held:¹⁰⁸

The Commission is mindful of the positive obligations incumbent on States Parties to the Charter in terms of article 1 not only to 'recognise' the rights under the Charter but to go on to 'undertake to adopt legislative or other measures to give effect to them'. The obligation is peremptory, States 'shall undertake' Indeed, it is only if the States take their obligations seriously that the rights of citizens can be protected.

Indeed, the African Commission has found that even in instances of civil war, a state cannot escape a finding of its violation of article 1 on the basis that the violations were committed neither by the state nor its agents. In *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, the African Commission held as follows:¹⁰⁹

The Charter specifies in article 1 that the States Parties shall not only recognise the rights duties and freedoms adopted by the Charter, but they should also 'undertake ... measures to give effect to them'. In other words, if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation.

While focus of this article has been on the African Charter, the UN Committee Against Torture's (CAT Committee)'s work on 'conversion therapy' demonstrates that this article's main arguments are applicable more generally under international law. While a more comprehensive analysis is beyond the scope of this article, the relevance of the broader international human rights law framework serves to be emphasised.

The Yogyakarta Principles, which codify international human rights standards and how they apply to LGBTQIA+ persons, are also increasingly respected as a source of international law, albeit as a soft law source,¹¹⁰ oblige states to prohibit all forms of 'conversion therapy'.¹¹¹ The source of this obligation is the absolute prohibition on 'cruel, inhuman and degrading treatment' in terms of article 2(2)

¹⁰⁷ My emphasis.

¹⁰⁸ (2001) AHRLR 84 (ACHPR 2001) para 62.

¹⁰⁹ (2000) AHRLR 66 (ACHPR 1995) para 20.

¹¹⁰ A Jjuuko *Strategic litigation and the struggle for lesbian, gay and bisexual equality in Africa* (2020) 149.

¹¹¹ The Yogyakarta Principles Plus 10, Principle 10 E. See M O'Flaherty & J Fisher 'Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 237-247.

of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as confirmed by two state periodic reports of the CAT Committee. The first report called on the Republic of Ecuador to close all private centres where 'conversion therapy' is administered and to hold all involved individuals accountable.¹¹² Likewise, the body has called on the People's Republic of China to ban 'conversion therapies', as well as all other 'forced, involuntary or otherwise coercive or abusive treatments' against LGBTIQIA+ persons.¹¹³ The reference to 'abusive treatments' is crucial as it indicates the little importance that the CAT Committee attaches to consent to such 'therapies'. States are obliged to ban all 'abusive treatments' targeting LGBTIQIA+ individuals as opposed to exclusively 'forcible' forms of 'conversion therapy'.¹¹⁴ The African Charter implicitly bars public authorities from engaging in the provision of 'conversion therapy' as doing so would violate article 5.

9 Compliance with positive obligations

The preceding part nevertheless raises the question as to whether articles 1 and 5 of the African Charter, read together, place a positive obligation on states to criminalise all forms of 'conversion therapy' or whether civil measures will suffice. Parts 4 and 5 of the article demonstrated that all forms of 'conversion therapy', at a minimum, amount to a violation of article 5 of the African Charter as they all constitute a severe violation of human dignity. The provision of civil remedies to individuals who have experienced 'conversion therapy' should not be overlooked. Indeed, such an approach may be a more appropriate response to address the human rights infringements present in cases of non-intentional forms of 'conversion therapy'.¹¹⁵ Nevertheless, this part demonstrates that applying the African Commission's jurisprudence on article 5 and corresponding jurisprudence from the European Court, criminalising all forms of 'conversion therapy', can be justified under the African Charter. One must keep in mind, however, that while criminal sanctions are generally assumed to provide an effective means of retribution and

112 United Nations Committee Against Torture 'Concluding Observations on the seventh periodic report of Ecuador' (2017) 49.

113 United Nations Committee Against Torture 'Concluding Observations on the fifth periodic report of China' (2016) 55.

114 United Nations Committee Against Torture (n 112) 56.

115 *Mitkus v Latvia* (2010) ECtHR 76. That might not be the case, however, for grossly negligent violations of art 3. See K Kamber *Prosecuting human rights offences: Rethinking the sword function of human rights law* (2017) ch 1.

deterrence,¹¹⁶ broadening the scope of criminal conduct in order to protect human rights entails appreciable risks.¹¹⁷

9.1 The issue of criminalisation

The African Commission has found that the duty under article 5 can translate to a state duty to mobilise the criminal law against proscribed forms of ill-treatment. For example, in a previous instance of a violation of article 5, the African Commission ordered the relevant state to 'immediately amend' its criminal statute 'in conformity with its obligations under the African Charter and other relevant international human rights instruments'.¹¹⁸

In considering how this duty under article 1 applies to 'conversion therapy', the remainder of this part of the article will rely heavily upon the precedents of the European Court, as the African Commission has largely followed the latter's jurisprudence to develop positive obligations under the African Charter.¹¹⁹ In doing so, it is useful to consider the text of article 3 of the European Convention, which largely mirrors article 5 of the African Charter, stating that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

The European Court has found that violations of article 3 of the European Convention places a positive duty on states to make amendments to criminal laws in the following contexts: sexual abuse of minors;¹²⁰ ill-treatment in custody;¹²¹ rape;¹²² disproportionate police violence;¹²³ and domestic violence.¹²⁴ However, the rationale

116 For a critical appraisal of this presumption, see L Lazarus 'Positive obligations and criminal justice: Duties to protect or coerce' in L Zadner & J Roberts (eds) *Principles and values in criminal law and criminal justice* (2012) 135-157; F Tulken 'The paradoxical relationship between criminal law and human rights' (2011) 9 *Journal of International Criminal Justice* 577.

117 Trispiotis & Purshouse (n 6) 130.

118 *Doebbler v Sudan* (n 47) 44.

119 This approach is consistent with the mandate of the African Commission to 'draw inspiration from international law on human and peoples' rights' (art 60 of the African Charter) and to 'take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions laying down rules expressly recognised by member states of the Organisation of African Unity ... as well as legal precedents and doctrine' (art 61 of the African Charter). See also O Mba 'Positive obligations under the African Charter on Human and Peoples' Rights: The duty of the Nigerian government to enact a Freedom of Information Act' (2009) 35 *Commonwealth Law Bulletin* 16.

120 *M and C v Romania* (2011) ECtHR para 4.

121 *Myumyun v Bulgaria* (2015) ECtHR para 77.

122 *MC v Bulgaria* (2003) ECtHR para 166; *X and Y v The Netherlands* (1985) ECtHR para 80.

123 *Cestaro v Italy* (2015) ECtHR para 225.

124 *Volodina v Russia* (2019) ECtHR para 81.

underlying the instances in which the state has a duty to criminalise certain forms of 'ill-treatment' is not entirely apparent. For example, although the aforementioned examples all involve physical abuse, the European Court has upheld the need for criminalisation on the grounds that the degrading treatment in question gravely affects psychological well-being and human dignity,¹²⁵ irrespective of whether physical harm of a certain level of seriousness has been suffered.¹²⁶

9.2 The adoption of specific provisions

Nevertheless, the exact combination of criminal and civil law protections that would adequately protect LGBTQIA+ individuals from 'conversion therapy' warrants further analysis within a further thorough contextual evaluation, which is beyond the scope of this article. However, it is plain to assert that it is unlikely that state parties to the African Charter can comply with the positive duty imposed on them by articles 1 and 5 without adopting specific provisions against 'conversion therapy', which define the scope of the practice and detail the duty and power that public authorities have in acting against providers of the 'therapy'. Moreover, these provisions must identify remedies available to survivors and include a support and reporting framework for survivors. At the bare minimum, the African Charter requires a basic legal framework of this nature to be adopted. The remainder of this part is dedicated to detailing three factors for consideration in the adoption of such a ban.

First, 'conversion therapy' in Africa often occurs outside public spaces, such as in locations provided by religious bodies.¹²⁷ Thus, the obligation imposed on state parties by the African Charter cannot be fully complied with if a legislated ban on the 'practice' only imposes sanctions on the conduct of healthcare professionals to the exclusion of other actors.¹²⁸ As state parties' positive obligation to ban the 'practice' is the result of the absolute prohibition on torture or cruel, inhumane and degrading treatment under the African Charter, the ban must apply to all potential providers, including non-state actors such as religious actors.

Second, as both consensual and non-consensual types of 'conversion therapy' constitute, at a minimum, degrading treatment, states must ban both forms. However, therapeutic interventions that

¹²⁵ *Myumyun* (n 121) para 74.

¹²⁶ *Volodina* (n 124) para 81.

¹²⁷ *Bishop* (n 26) 38.

¹²⁸ As is the case, eg, in Albania.

seek to affirm LGBTQIA+ identities, as opposed to pathologising them, must be exempted from the ban as they do not amount to 'conversion therapy'. This is the case as they are not grounded in the supposition of a hierarchy of gender identities or sexualities and, therefore, do not seek to suppress aspects of or alter an individual's identity.

Third, this article does not postulate that the imposition of a legal ban on 'conversion therapy' on its own will eliminate the practice or offer adequate protection to the LGBTQIA+ community. Other steps exist that must be taken in tandem with a legal ban to fully eradicate this deeply inegalitarian practice. These steps include supporting survivors of 'conversion therapy', public awareness initiatives that involve engagement with religious and traditional leaders and community groups, including provisions addressing the role of parents and legal guardians. While these accompanying measures are necessary to protect the LGBTQIA+ community, this article has demonstrated why the African Charter requires a ban on all forms of 'conversion therapy' to begin with. This ban is a vital first step towards addressing the impunity that providers of the damaging 'practice' currently enjoy.

10 Conclusion

The rights of LGBTQIA+ individuals in Africa continue to be violated on a daily basis. This article has argued that LGBTQIA+ status falls within the ambit of article 2 of the African Charter and, therefore, enjoys the rights and freedoms contained in the instrument. Therefore, LGBTQIA+ individuals enjoy the protection of article 5 of the African Charter which protects their human dignity and protects them from being subjected to 'torture or cruel, inhumane and degrading treatment'.

Arguably, being subjected to 'conversion therapy' ranks among the worst of the violations that African LGBTQIA+ individuals experience as all forms of the practice disrespect the equal moral personhood of LGBTQIA+ persons. Accordingly, all forms of 'conversion therapy' amount to a violation of human dignity, which is prohibited by article 5 of the African Charter. Furthermore, depending on the nature or scope of the particular 'conversion therapy' intervention, the act could amount to an act of 'torture or cruel, inhumane and degrading treatment'. This article concludes by arguing that all state parties to the African Charter are obliged to take effective measures to protect LGBTQIA+ individuals from harms associated with 'conversion therapy'. A vital step that states must take to comply with their

positive obligation is to ban all forms of 'conversion therapy'. While the exact additional measures, whether they be criminal or civil, that state parties must adopt to comply with their obligations to protect LGBTQIA+ individuals from 'conversion therapy' warrants a lengthy and context-dependent analysis, the penultimate part of this article provided policy and law makers with key factors to consider.