



# DO NOT WAKE UP A SLEEPING LION

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**MAPPING THE LEGAL ENVIRONMENT  
OF LGBTQ PERSONS  
IN FRANCOPHONE WEST AFRICA**

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Countries: Benin, Burkina Faso, Côte d'Ivoire, Mali and Togo



First Published  
July 2015

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*Do not wake up a sleeping lion* - is an expression, or veiled threat used to deter LGBT and MSM leaders of Togo who want to advance the issue of human rights of LGBTQ people through their advocacy. The sleeping lion made reference to Article 88 of the country's Penal Code, which criminalizes homosexuality but is rarely implemented.

This publication is available in French.

Publication by :



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## ACKNOWLEDGEMENTS

The Queer African Youth Network (QAYN) expresses its deep gratitude to Credo Ahodi (Benin), Christelle K. (Burkina Faso), Franck Arnaud Amani Kouadio (Côte d'Ivoire), Yanne Coulibaly (Mali) and Sheba Akpokli (Togo), the researchers who led the research in their respective countries. Would it have been your sense of professionalism and knowledge of your different context, the data for this mapping would have been very limited.

Thank you also to all organizations and individuals for responding to the questionnaire and provided access to the research to their contacts.

A hearty thank you to Professor Peter Meyer, QAYN's Legal Advisor for your conception of the research project, your keen sense of analysis and for writing this rich report.

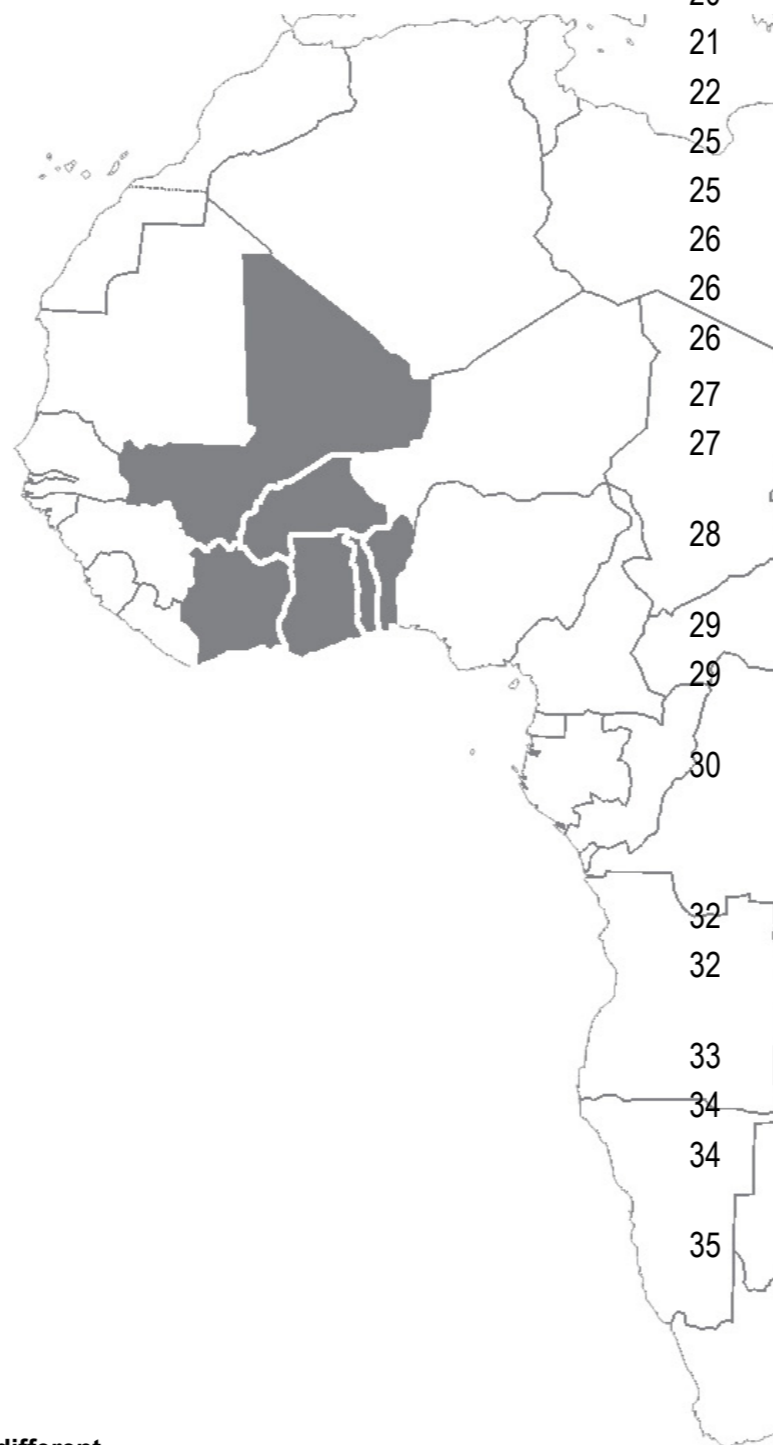
Thank you Moussa Toé, for your meticulous French to English translation of the report full of legal jargons.

We want to say a sincere thank you to American Jewish World Service, Foundation for a Just Society and Astraea Lesbian Foundation for Justice, our long time donors who continue to believe in our work.



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## LIST OF ACRONYMS AND ABBREVIATIONS

<b>AOF:</b>	French West Africa
<b>Art.:</b>	Article
<b>ACHPR:</b>	African Commission on Human and Peoples' Rights
<b>CAS:</b>	Coalition Anti-Sida (AIDS Coalition)
<b>CCM:</b>	Country Coordination Mechanism
<b>ECOWAS:</b>	Economic Community of West African States
<b>UPR:</b>	Universal Periodic Review
<b>MSM:</b>	Men who have Sex with Men
<b>Ibid.:</b>	Ibidem
<b>J.O.:</b>	Official journal
<b>J.O. AOF:</b>	Official journal of French West Africa
<b>LGBTI:</b>	Lesbians, Gay, Bisexuals, Transgender, and Intersex
<b>LGBTQ:</b>	Lesbians, Gay, Bisexuals, Transgender, and Queer
<b>LLACI:</b>	Lesbian Life Association Côte d'Ivoire
<b>MSM:</b>	Men who have sex with men
<b>N°:</b>	Number
<b>ILO:</b>	International Labor Organization
<b>UNO:</b>	United Nations Organization
<b>SOGI:</b>	Sexual orientation and Gender identity
<b>p.:</b>	Page(s)
<b>i.e.:</b>	For instance
<b>ICCPR:</b>	International Covenant on Civil and Political Rights
<b>ICESCR:</b>	International Covenant on Economic, Social and Cultural Rights
<b>PNLS:</b>	Programme National de Lutte contre le SIDA (National programme for AIDS control)
<b>QAYN:</b>	Queer African Youth Network
<b>See. :</b>	See
<b>AIDS:</b>	Acquired Immune Deficiency Syndrome
<b>TGI:</b>	Tribunal de Grande Instance (High court)
<b>HIV:</b>	Human Immunodeficiency Virus

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# 1. BACKGROUND AND RATIONALE



## 1.1. Background

An overview of the legal situation of lesbian, gay, bisexual, transgender and queer persons (LGBTQ) in West Africa is a paradox between the assertion of the universal character of human rights for all individuals on the one hand, and the violence, discrimination and outright denial of LGBTQ persons' rights in several African countries on the other hand.

The universal nature of human rights is asserted in international human rights instruments. Most African countries acceded to the two key international covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of December 16th, 1966.

Articles 2 and 26 of the ICCPR and Article 2 of the ICESCR established a principle of non-discrimination in the enjoyment of the basic rights stated in the said covenants. Thus, article 2 of the ICCPR provides:

*“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

The use of the expression “*especially*” and the specific mention of “*other status*” clearly show the non-specificity of the prohibited grounds for discrimination.

Article 26 of the ICCPR provides that:

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any*

*discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

It emerges from the interpretation of the prohibited discrimination criteria in the enjoyment of the rights provided for by the general and specific organs established by the United Nations as regards the protection of human rights, that the non-discrimination principle should also apply to sexual orientation and gender identity so as to guarantee rights to all individuals regardless of their sexual orientation and gender identity<sup>1</sup>.

At the regional level, all African States are parties to the African Charter on Human and Peoples' Rights (ACHPR) entered into force in 1986. This Charter enshrines, inter alia, the right to non-discrimination on whatsoever grounds (art. 2), equality before the law and equal protection of the law (art.3), the right to the respect of the dignity inherent in a human being (art.5), the right to work (art.15), the right to health (art.16), the right to education (art.17). Thus, Article 2 provides that:

*“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language,*

1. See. For instance for the United Nations High Commissioner for Human Rights, the report entitled “Discriminatory Laws and Practices and Acts of Violence » against individuals based on their sexual orientation and gender identity”, doc A/HRC/19/41 of November 2011. For the Committee on Economic, Social and Cultural Rights, voy. Observation n°20 on non-discrimination in the enjoyment of economic, social and cultural rights, doc. E/C.12/GC/20 of 10 June 2009.

*religion, political or any other opinion, national and social origin, fortune, birth or other status.”*

Article 3 provides that:

1. *“Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.”*

Similar to the international level, the African regional human rights treaty bodies prohibit the criterion of sexual orientation as a ground for discrimination in the enjoyment of human rights. Moreover, the African regional law prescribes specific measures to ensure the enjoyment of the rights of vulnerable groups, which are groups facing major obstacles in the enjoyment of their rights. Among these vulnerable groups, LGBTQ persons are explicitly mentioned. This emerges from the interpretation of the provisions of the Charter set forth in the principles and guidelines on the implementation of the economic, social and cultural rights developed by the ACHPR. In these principles and guidelines, the Commission specifies that:

*“Prohibited grounds of discrimination include but are not limited to race, ethnic group, color, sex, gender, **sexual orientation**<sup>2</sup>, language, religion, political or any other opinion, national and social origin, economic status, birth, disability, age or other status.”<sup>3</sup>*

The Commission specifies that vulnerable and disadvantaged groups include:

*“People who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights. Vulnerable and disadvantaged groups include, but are not limited to... **Lesbian, homosexual, transgender and intersex persons**<sup>4</sup> ...”<sup>5</sup>.*

In the statement of States' key obligations towards taking measures to ensure the enjoyment of the rights provided for in the Charter, the Commission cites the principle of equality among the key obligations of States and specifies that:

*“Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection*

*of economic, social and cultural right ”<sup>6</sup>.*

The commission states that:

*“The right to equality includes the adoption of special measures for the purpose of securing the adequate advancement of members of vulnerable and disadvantaged groups to enable their equal enjoyment of economic, social and cultural rights. This means that in some cases States will have to take temporary special measures in favor of these groups in order to reduce or suppress conditions that perpetuate discrimination and to realize substantive equality”.<sup>7</sup>*

However, the Commission mentioned LGBTQ among vulnerable groups. As regards the right to work provided for in Article 15 of the Charter, sexual orientation as ground for discrimination is expressly prohibited<sup>8</sup> Concerning the right to health, the principles state that States must “*Ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups*”<sup>9</sup>. Moreover, the Preamble to the said Charter reaffirms the commitment of the African union's member States:

*“of the liberties and human rights contained in the declarations, conventions and other instruments adopted within the framework of the Organization of African Unity, the Non Aligned Movement and the United Nations Organization.”*

The reference to the universal conventions adopted within the framework of the United Nations clearly indicates that regional protection cannot be contradictory or incompatible with universal protection as it results from the two 1966 covenants.

2. Highlighted by us

3. African Commission on Human and Peoples' Rights, Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights, 24 /10/2011, p. 8, n° 1. <http://www.achpr.org/fr/instruments/economic-social-cultural>  
The document can be downloaded from: achpr. instr. guide ex rights fra pdf

4. Highlighted by us

5. Ibid., p. 9, art. 1e

6. Ibid., p. 16, art. 31

7. Ibid., p. 16, art. 34

8. Ibid., p. 22, art.59 k

9. Ibid., p. 26, art 67 y

This assertion of the universal character of human right is, in practice, contradicted by numerous media reports revealing the worrying situation of LGBTQ individuals in several African states. This situation is reflected in the criminalization of – or attempt to criminalize – homosexuality in some countries, which, so far, did not criminalize it. For example, this is the case in Burundi and Chad whose recent legislations criminalize same-sex relations, which were not criminalized so far. Burkina Faso and the Democratic Republic of Congo made two attempts – so far aborted – to criminalize homosexuality while the current texts in force do not criminalize it.

Some countries strengthened the criminalization of homosexuality or incriminated same-sex relations. This is the case in The Gambia and Nigeria. Uganda made an aborted attempt to reinforce sanctions against homosexuality and to criminalize certain behaviors – such the non-reporting of homosexual individuals – in relation to homosexuality. The Ethiopian government has planned, through a draft bill presented in March 2014, to reinforce the criminalization of homosexuality before abandoning this project. Finally, a country – Liberia – has constitutionally prohibited same-sex marriage.

**Table 1. Legislative Amendments, proposed legislative amendments or attempts to amend laws criminalizing or strengthening the criminalization of homosexuality or incriminating same-sex sexuality and relations**

	Burkina	Burundi	Congo (RDC)	Ethiopie	Gambie	Libéria	Nigéria	Ouganda
Criminalization of homosexual relations		X <sup>(1)</sup>						
Proposed laws criminalizing same-sex sexuality and relations								
Attempt to criminalize homosexuality	X <sup>(3)</sup>		X <sup>(4)</sup>					
Reinforcement of sentences for same-sex sexuality and relations and (or) extension of incriminated same-sex sexuality					X <sup>(5)</sup>		X <sup>(6)</sup>	
Attempt to reinforce sentences for same-sex sexuality and relations and (or) to extend the incriminated same-sex sexuality and relations				X <sup>(7)</sup>				X <sup>(8)</sup>
Constitutional prohibition of same-sex marriage						X <sup>(9)</sup>		

Notes for Table 1:

1. In Burundi, a law of 22 April 2009 punishes homosexuality with two year-imprisonment while this was not initially punished in the Burundian legislation.
2. In Chad, Article 361 (a) of the new draft criminal code now criminalizes homosexuality with up to 20-year imprisonment whereas homosexuality was not punished in the Chadian legislation. The draft code was adopted by the Council of ministers in 2004 but is yet to be voted by Parliament.
3. In Burkina Faso, a bill was tabled before the transitional parliament on 13 February 2015 by a political party for the “prohibition and repression of animality, pedophilia, homosexuality and same-sex marriage”.
4. In the Democratic Republic of Congo, a bill was submitted in December 2013 by MP Steve Mbikayé, criminalizing homosexuality and certain same-sex relations (including adoption by a homosexual individual both for the adopter and for those who have given their consent for the adoptee).
5. In The Gambia, in 2014, a law significantly enhanced the sentences for the so-called aggravated homosexuality (homosexual relation of a person already sentenced for homosexuality, homosexual relation with an individual who is HIV+, or with a minor) with life imprisonment.
6. In Nigeria, a law of 14 January 2013 prohibits homosexual unions and punishes, in addition to homosexuality already punished by the previous legislation, any person who participates in gay societies or organizations.
7. In Ethiopia, the government planned in March 2014 to describe same-sex sexuality and relations – punished with 15 year-imprisonment – as “unforgivable crimes” for which there is no amnesty, before abandoning this plan.
8. By an Act of 20 December 2013 declared unconstitutional in 2014.
9. In Liberia, a constitutional amendment adopted in 2012 constitutionally prohibits same-sex marriage as it exclusively defines marriage in relation to the difference between the spouses’ gender.

This unpredictable legal situation is also reflected in the numerous cases of violation (unsolved murders of LGBTQ activists, lynching that could lead to death or attempts to lynch of perceived or actual LGBTQ individuals, corrective rape of perceived or actual lesbians, attacks against the offices of LGBTQ organizations, etc.) and in the restriction on the freedom of association of LGBTQ organizations. In most countries, these groups can only registered as “vulnerable groups” working in the field of HIV/AIDS. In other words, any organization those work go beyond public health issues, to include a broader thematic issue of protecting the rights of LGBTQ individuals, is denied recognition by administrative authorities<sup>10</sup>. Such restriction on freedom of association is a major hindrance to numerous LGBTQ organizations.

This situation of contradictions led two institutions responsible for monitoring the protection of human rights, either at the universal level or at the African regional level, to react in 2011 and in 2014.

On the universal level, the United Nations Human Rights Council adopted, during its 17th meeting of 21 June 2011, a resolution 17/19<sup>11</sup> – the first ever United Nations’ resolution on sexual orientation and gender identity – which expressed its “serious concern’ about the acts of violence and discrimination against individuals on account of their sexual orientation and gender identity”. Following the resolution, an official report of the United Nations (A/HRC/19/41) was released, which identified numerous discriminations, violations of the rights of individuals based on their sexual orientation and gender identity, and made the connection between these violations and acts of violence and the repressive legislations. In September 2014, the Human Rights Council adopted a new resolution 27/32<sup>12</sup> expressing, once again, its serious concern about these violations of human rights and urged the High Commissioner to update the report A/HRC/19/41 in order to disseminate good practices and the ways and means to overcome violence and discrimination, pursuant to the international human rights law, and to submit it to the Human Rights Council at its 29th session.

At the African regional level, the ACHPR adopted, on 12 May 2014, Resolution 275 on protection from violence and other human rights violations against

certain individuals based on their sexual orientation or their perceived or actual gender identity<sup>13</sup>. The ACHPR, in accordance with the interpretative principles of economic, social and cultural rights contained in the Charter, clearly states therein that articles 2 (prohibition of discrimination), 3 (equality before the law), 4 and 5 (respect for life, physical and moral integrity and protection against torture, cruel, inhumane and degrading treatments), of the African Charter on human and peoples’ rights apply to all individuals regardless of their sexual orientation and their gender identity. The Commission also expressed “concerns about acts of violence and other violations of human rights that continue to be perpetrated against people in several parts of Africa on account of their imputed or real sexual identity or orientation”. Therefore, the Commission:

*“Condemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their perceived or real sexual orientation or gender identity;*

*Specifically condemns the situation of systematic attacks by State and non-state actors against persons on the basis of their perceived or real sexual orientation or gender identity;*

<sup>10</sup>. However, it is worth mentioning a decision by the High Court of Botswana (14 November 2014) to grant official legal recognition to the organization “Lesbians, Gays and Bisexuals of Botswana” (LEGABIBO) <http://www.hrw.org/news/2014/11/14/botswana-high-court-upholds-basic-freedoms>. The Court stated that « it is not a crime to be attracted to people of the same sex » and that « pleading for legislative reforms aimed at decriminalizing homosexuality is legal ». In the same way, it is worth mentioning a decision by the High Court of Kenya (24 April 2015) <http://kenyalaw.org/caselaw/cases/view/108412/> which determined that, by refusing to register an LGBT organization – in this case the National commission on the rights of gays and lesbians – the government has violated Article 36 of the Constitution of Kenya, which guarantees freedom of association. The decision stated that social moral and religion cannot be invoked to limit rights.

<sup>11</sup>. Resolution 17/19 of 17 June 2011 on human rights, sexual orientation and gender identity, <http://ap.ohchr.org/documents/dpage/A/HRC/17/L.9/Rev.1>

<sup>12</sup>. Resolution 27/32 of 26 September 2014 on human rights, sexual orientation and gender identity, <http://ap.ohchr.org/documents/dpage/A/HRC/27/L.27/Rev.1>

<sup>13</sup>. Resolution 275 on the protection against violence and other violations of human rights of individuals based on their imputed or real sexual identity or orientation. <http://www.achpr.org/fr/sessions/55th/resolutions/275>

*Calls on State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities; and*

*Strongly urges States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their perceived or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims”.*

The context within which this research was undertaken reveals a problem that justifies the study.

## Justification

The problem surfaced by the context is the widespread violation of the basic human rights of LGBTQ citizens in a number of African countries in spite of the assertion of the universal character of human rights by the international treaty law.

Therefore, attention should be paid to the legal framework applicable to LGBTQ persons in Africa in order to try and understand this ineffectiveness. The fact that the international human rights law is not extended to LGBTQ individuals, suggests indeed deliberate intentions by States or shortcomings in the legislation of States that do not respect the said international law. A precise analysis of the legal status of LGBTQ persons is then essential in order to identify the weaknesses in legislation.

A mapping of a legal environment should not only cover law as enshrined in legislative or regulatory texts; it should also focus on the implementation of this law by the key institutions responsible for applying it (judicial system, police, administration). The application of law by tribunals, the police or the administration is, as a matter of fact, an essential component of the law experienced.

Analyzing the application of law also allows documenting the main types of right violations, discriminations in the recognition of rights and other abuses against LGBTQ individuals.

The justification of this mapping can also be measured against the spatial framework of the research. As a matter of fact, while the media's attention as regards the situation of LGBTQ persons is, by and large, focused on a few African countries (Cameroon, Nigeria, Uganda, The Gambia, Senegal), the mapping will focus on five countries in francophone Africa for which information regarding the situation of LGBTQ persons are poorly collected and not well known. These include Benin, Burkina Faso, Côte d'Ivoire, Mali and Togo.

## 2. OBJECTIVES



### 2.1. Overall objective

The objective of the mapping of the legal environment is to take stock of the legal status of LGBTQ individuals in five West African countries: Benin, Burkina Faso, Côte d'Ivoire, Mali and Togo. Legal status means, first and foremost, the status of the legislation as regards the rights and freedoms of LGBTQ persons, but also the implementation of this legislation by tribunals, the police and the administration.

### 2.2. Specific objectives

The specific objectives include:

- Identify and analyze the legal standards likely to protect or, conversely, to discriminate LGBTQ persons;
- Identify right violations, discriminations in the enjoyment and the exercise of the rights and freedoms of LGBTQ persons and organizations;
- Make the connection between the status of the legislation and abuses and discriminations against LGBTQ individuals and organizations in order to identify the inadequacies of the legislations or in the implementation of these legislations;
- Propose recommendations to improve on the legislations as regards their content and(or) their implementation.

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## 3. METHODOLOGY



The methodology of the mapping rested on a field work carried out based on a questionnaire the results of which were qualitatively analyzed.

### 3.1. Questionnaire

The questionnaire used for the research was made up of semi open questions calling for documented responses. The type of documentation for justifying responses was identified in each section of the questionnaire: legal provisions, reports of human rights organizations, country reports for the African Commission on Human and People's Rights, press reports, personal stories collected through interviews, etc.

The questions focused on criminal legislation, police practices, legislations pertaining to civil liberties (expression, association, meeting), legislations relating to economic and social rights (work, health, education) as well as the legislation regarding access to housing.

The questions focused on the above-mentioned legislations as regards their content and their application, in particular by state actors (justice, police, administration) in relation to the rights and freedoms of LGBTQ persons.

### 3.2. The Research

The research was conducted by focal points identified by QAYN in the five countries.

It had two elements: a first consisted of a desk research and a second element consisted in the administration of a questionnaire to a specific target.

The first component consisted of a literature review

through desk research and focused mainly on legislations, judgments, reports from human rights organizations, country reports for the African Commission on Human and People's rights and print and on-line media articles.

The second component consisted in administrating a standardized questionnaire to specific target in order to get answers to all or part of the questions. The respondents included **151 people** for all the countries involved.

The respondents, based on the questionnaire, were, in all the countries involved, mainly made up of:

- LGBTQ individuals, members or non members of identity-based association or working in the area of HIV amongst MSM communities,
- Heads or members of human rights organizations,
- Jurists (lawyers, magistrates, law lecturers).

In two countries, (Benin et Togo), the panel of respondents included police officers and, in one country (Togo), it included journalists.

### 3.3. Analysis

The wholly or partly completed questionnaires were submitted for analysis. The analysis was a qualitative one, which allows for: collecting data, making a comparative analysis of data in each country in order to verify the reliability of the data and, making a country-per-country comparison.

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## 4. PRESENTATION OF FINDINGS



The present report is organized as follows:

- Analysis of criminal legislations, legislations on civil liberties and rights, and legislations on economic and social rights;
- Implementation of these legislations by public and private actors;
- Linking of these legislations with their implementation by public and private actors in order to assess their effectiveness and ineffectiveness; and,
- Recommendations on the improvement of existing legislations and the means to be used to ensure greater effectiveness of the existing and (or) future legislations.

### 4.1. Analysis of legislations

L'analyse de la législation débutera par les dispositions légales pénales et se poursuivra par les législations portant sur les libertés et droits civils et enfin par celles portant sur les droits économiques et sociaux.

#### 4.1.1. Criminal legislations

Criminal legislation includes all legal provisions that incriminate certain behaviors. Incriminating a behavior means that the said behavior has become an offence resulting from a violation, a tort or a crime. The difference between these three types of offences – contravention, tort, crime – is based on the severity of the sentences attached to each of the infractions.

Two major principles dominate penal law. The first principle provides that there cannot be an offence – and thus a sentence – without a law incriminating a behavior.

If there is to be an offence and a repression, there must be a law incriminating the behavior, i.e. a law making it an offence and attaching a sentence thereto. The second principle is a principle for interpreting criminal laws, which instructs the state organs to restrictively interpret the legal provisions. This principle prohibits from extensively interpreting the legal provisions, and by means of interpretation, from punishing behaviors that are not expressly and specifically incriminated.

The analysis of the criminal legislations focuses on three points: the criminalization or non-criminalization of same-sex sexuality and relations, the age of sexual consent and the criminalization of "homophobic" behaviors.

#### 4.1.1.1. Homosexuality and explicit or implicit criminalization

Among the five countries surveyed through this research, only Togo expressly criminalizes same-sex sexuality. Article of the 1980 criminal code of Togo states that "*anyone who commits an indecent or unnatural act with a person of the same sex will be punished with a prison sentence of one to three years and a fine of 100,000 to 500,000 francs*".

This article criminalizes not homosexuality – defined as emotional, affective, sexual attraction to an individual of the same sex – but same-sex sexual practices, which, to be punished, must therefore, be evidenced by the state organs for prosecution. By using the pronoun "*anyone*", the text includes any person, including adults. Moreover, by mentioning no restriction to the incriminated relation, the text includes consensual relations, thus free of coercion and violence.



The criminal legislations of the other four countries do not contain any legal provisions that call for punishing same-sex sexuality between consenting adults.

**Table 2. Explicit criminalization of same-sex sexuality between consenting adults**

	Bénin	Burkina	Côte d'Ivoire	Mali	Togo
Criminalization of homosexual relations	No <sup>(14)</sup>	No	No	No	Yes

The absence of reference to homosexuality or same-sex sexuality and/or relations in the criminal laws of these four countries does not mean, whatsoever, that there is a legal vacuum.

**Based on the principle that there is no infraction without a law incriminating a behavior, this results in homosexuality or same-sex sexuality and/or relations not being criminalized in these countries and homosexuality therefore, cannot be seen as illegal in a legal sense. While it can be subject to social or moral reprobation, it is not illegal. This clarification is important as certain people confuse illegality with social or moral reprobation.**

The above-mentioned principle of strict interpretation of criminal law (4.1.1. Criminal legislation) normally prohibits implicit criminalization of homosexuality.

However, all survey results indicate the possible use of criminal laws, which do not expressly criminalize same-sex sexuality and/correlations, to punish them. These include, in the four countries, legal provisions that punish indecent exposure.

Indecent exposure is defined in a similar manner in the criminal laws of Benin, Burkina Faso and Mali. These legislations, unlike the Ivorian criminal law, contain no discriminatory provisions as regards the nature of the

indecent exposure, whether it is homo or hetero-sexual. In any case, the act must be committed publicly or in a private place accessible to public view and likely to violate decency and the moral sentiment of people who involuntarily witness the act. This text originates from the French Criminal Code and was enacted to punish indecent - exhibitionist - behaviors in public places. Such provision does not allow, in any case, for criminalizing private intimate relations between consenting adults of the same sex. Neither should it permit to punish public behaviors that do not involve any form of exhibitionism. Only a very extensive interpretation of the notion of decency and moral sentiment - and thus contrary to the principle of strict interpretation of criminal law - could allow for punishing public behaviors between homosexual - or even heterosexual - individuals, which do not involve any form of exhibitionism. However, such provisions allow punishing public exhibitionist behaviors, regardless of their hetero or homosexual nature.

While not mentioning this possible implicit criminalization of homosexuality through the public indecency law, the research did not find the use of this provision in various countries' court judgments or decisions.

The Ivorian criminal code establishes discrimination of public indecency depending on whether the indecency involves hetero or homosexual behaviors. Indeed,

<sup>14</sup>. It should be noted that in Benin, a draft criminal code dating from 1996 planned to criminalize same sex sexuality in the same terms and thus with the same punishment as provided for in Article 88 of the Togolese Criminal code. Another project dating from 2008 cancelled the criminalization of same sex relations between consenting adults but maintained the difference of the age of sexual consent, set at 15 years within a heterosexual framework, and to the age of civil majority set at 18 years by Article 549 of the Code of persons and the family of 24 August 2004 (art. 543 of the 2008 project). To date, none of these projects has been adopted.

Article 360 of the Ivorian Criminal Code punishes public indecency with an imprisonment of three months to two-year term of imprisonment. The sentence is aggravated with six months to two-year term of imprisonment should the public indecency consist of "an indecent or unnatural act with an individual of the same sex".

#### 4.1.1.2. Homosexuality and Age of Consent

The age of consent refers to the age at which sexual activity is consented to. It is set in the legislations of the five countries surveyed by the same provisions related to the offence of indecent exposure.

The criminal legislations of the five countries punish indecent exposure. Indecent exposure involves any sexual act performed on an individual in public. Indecent exposure is punished regardless of age of the victim should it be attempted or committed with use of violence, coercion or surprise. If it is committed or attempted, even without violence, coercion or surprise on minors, the penalties are increased. If it is committed or attempted with use of violence, coercion or surprise on minors, the penalties are further increased compared to the penalties for indecent exposure committed without violence on minors.

**Table 3. Age of sexual consent**

	Bénin	Burkina	Côte d'Ivoire	Mali
Age of consent: Heterosexual relation	15 years	20 years	15 years	15 years
Age of consent: Homosexual relation	21 years	20 years	18 years	15 years

#### 4.1.1.3. Criminalization of Homophobic Acts

Here, the issue is whether criminal legislations of the countries surveyed criminalize incitement to intolerance, discrimination, hatred or violence and (or) behaviors expressing intolerance, discrimination, hate crime towards an individual or a group of individuals based on their sexual orientation or gender identity.

None of the criminal legislations of the countries concerned contains provisions punishing incitements to or behaviors expressing intolerance, discrimination, hate crime towards an individual or a group of individuals based on their sexual orientation or gender identity.

<sup>15</sup>. Togo is not concerned as there is no age of consent for homosexual relations being criminalized between consenting adults.

In two of the four countries concerned<sup>15</sup> Benin and Côte d'Ivoire – the age of consent varies according to whether the sexual act is of heterosexual or homosexual in nature. In Benin, while the age of consent for heterosexual relations is 15 years, it is set at 21 years for homosexual relations. This results from the Beninese Criminal Code, which states that "any person that commits an indecent or unnatural act with a person of the same sex aged 21 and below, will be punished with a prison sentence of six months to three years and a fine of 20,000 to 50,000 francs". In Côte d'Ivoire, the age of consent is, in principle, set at 15 years, and 18 years for homosexual relations. This results from the Ivorian Criminal Code, which states that "anyone who commits an indecent or unnatural act with a person of the same sex aged over 15 years and less than 18 years, will be punished with a prison sentence of six months to two years and a fine of 100,00 to 100,000 francs".

In Burkina Faso and in Mali, the age of consent - respectively 20 years (art. 414 and 415 of the Criminal Code) and 15 years in Mali (art. 225 of the Criminal Code) – make no difference between the heterosexual or homosexual nature of the relation.

It is also worth mentioning that the victim's sexual orientation or gender identity does not constitute in none of the criminal legislations of the countries surveyed, an aggravating circumstance that may be invoked against the person committing offences such as manslaughter, rape or assault and battery.

**Table 4. Criminalization of homophobic behaviors**

	Bénin	Burkina	Côte d'Ivoire	Mali	Togo
Criminalization of incitements to intolerance, discrimination, hatred or violence based on sexual orientation and gender identity (SOGI)	No	No	No	No	No
Criminalization of behaviors expressing intolerance, discrimination, hatred or violence based on SOGI	No	No	No	No	No
SOGI of the victim: aggravating circumstance for offences	No	No	No	No	No

## 4.1.2. Legislation on civil liberties and rights

The legislations on civil liberties and rights cover, first and foremost: the constitutional texts establishing fundamental rights and freedoms; then the laws and regulations regulating civil freedoms of expression, association and assembly; and, finally the laws that regulate the exercise of civil liberties and rights, i.e. personal and family life and, non professional contractual relations.

The analysis of these legislations will focus on possible explicit or implicit discriminations or restricting put upon LGBTQ individuals.

### 4.1.2.1. Constitutional Rights and Civil Liberties

The constitutions of all the countries surveyed by the mapping contain provisions dealing with freedoms and civil rights. Under various formulations but more or less similar in their scope, they enshrine equal rights among the citizens, the rights to life, physical integrity, equal protection before the law, inviolability of private and family life, as well as freedom of belief, expression and assembly without discrimination as pertinent to citizens or all individuals living in the country. None of the constitutions makes a distinction among people whom the civil rights and freedoms are accorded to.

For instance, the Burkinabe Constitution of 1991

specifically refers to the prohibition of discriminations in the enjoyment of rights and freedoms guaranteed by the Constitution. Prohibited discriminations include “*notably those based on race, ethnic group, region, color, gender, language, religion, caste, political opinion, wealth and birth*” (art.1). The adverb “*notably*” allows including other discrimination criteria. However, it should be noted that the criterion related to sexual orientation and gender identity is not expressly mentioned therein.

It emerges from the analysis of these texts that the constitutions, by referring to all citizens or all persons, do not formulate any discrimination in the enjoyment and the exercise of civil rights and freedom recognized in the constitutions. When they prohibit discriminations, they do not expressly, however, mention the prohibition of discriminations based on sexual orientation and gender identity.

### 4.1.2.2. Freedom of Expression, Association and Assembly

The legislative and regulatory texts applied to freedoms of expression, association or assembly do not mention any restriction towards LGBTQ persons or groups of persons. The sole restrictions covered by these texts are related to respect of law and order and preservation of good morals - or similar closely related notions such as public sensitivity and mores - in the enjoyment of these freedoms.

These provisions that aim to safeguard public order and preservation of ‘good morals’, particularly in the area of freedom of expression, are often reinforced by criminal provisions that punish the posting, distribution, exhibition of reading materials, writings, drawings, posters, photographs, films, shots, pictures contrary to ‘good morals’. Certain provisions limit freedom of expression by resorting also to the notion of public sensitivity. The same applies in Beninese and Burkinabe Criminal Codes (*art. 2 and 3 of decree 2379 of 3 August on the repression ...of certain acts contrary to good morals, JO. AOF, 3 October 1942, p.839*).

### 4.1.2.3. Civil Rights

Civil liberties refer to the rights of an individual in his/her family relations and in his/her non- professional, private relations.

The civil legislations on family relations - conjugality, parenting - of the five countries do not expressly deal with LGBTQ persons. However, the unique form of conjugality legally established is marriage, which is still defined based on the spouses’ gender difference. This implies that marriage between people of the same-sex

is still civilly prohibited and that no other legal regime is organized - for instance that of registered partnerships or civil unions - for LGBTQ persons.

From the perspective of parental rights, the civil legislations deal only with biological and adoptive parents. Legislations on biological parents consider, neither birth by medically assisted reproduction, nor gestational or reproductive surrogacy.

In countries where adoptive parenting by a single person is authorized (for example, Benin, Burkina, Mali) no reference is made to the adopter’s sexual orientation. However, it emerges from surveys that adoption by a homosexual single person would be impossible if the sexual orientation of the adopter is known. When a couple makes the adoption, it is always defined based on gender difference such that the adoption by a homosexual couple is civilly prohibited.

The civil legislations on family relations is characterized by the invisibility of LGBTQ persons, which, unlike the legislations on constitutional rights and freedoms, results in a discriminatory treatment against them as they have no possibility to establish a legal regime of their conjugality and be able to adopt.

**Table 5. Conjugality and Parental Rights for LGBTQ Individuals**

	Bénin	Burkina	Côte d'Ivoire	Mali
Same-sex marriage	No	No	No	No
Civil union between same-sex persons	No	No	No	No
Adoptive parentage in regard to an homosexual persons or couple of persons	No	No	No	No

Civil rights also include the rights enjoyed by an individual in his/her private non-professional relations. These include notably the right to enter into a marriage and the right to property. This part of the civil legislation attaches no specific condition to the enjoyment of these rights; it makes no discrimination in the enjoyment or in the exercise of these rights for LGBTQ persons. The effect of the “invisibility” here is to grant LGBTQ individuals the same rights as other people.

Civil rights specified in the research included the right to housing. The question was to know whether the legislation on the right to housing includes restrictions likely to impede on the exercise of this right for LGBTQ people, either for personal use, or to be used as the offices of an organization. No legislation in the countries surveyed includes restrictions aimed at limiting this right for LGBTQ people.

### 4.1.3. Legislation on Economic and Social Rights

The revised Constitutions in some of the countries incorporate economic and social rights their provisions. The most complete enumerations integrate the right to work, social security, education, training, instruction, housing, sport, leisure, health, assistance to old or people living with a handicap.

The economic and social rights covered by the research, include the rights under the labor legislation (access to employment, advancement, salary, paid leave, etc.), the right to health and the right to education.

#### 4.1.3.1. Right to Employment

The labor codes of all the countries surveyed prohibit discrimination, exclusion or preference for employment and occupation.

Certain codes specify the prohibition of certain discrimination. By and large, they correspond to those contained in the ILO Convention n°111 of 25 June 1958 regarding discrimination in respect of employment and occupation. These include race, color, gender, religion, political opinion, nationality or social origin. One can notice that sexual orientation and gender identity are not mentioned therein.

However, revised codes have, in general, added a general provision forbidding *“any other distinction, exclusion or preference with the effect of destroying or altering equal opportunities or treatment in employment and occupation”* (see for instance, art. 3 of the Burkinabè Labor code of September 2004).

The situation of LGBTQ persons is, therefore, unclear from the perspective of labor law. The most protective legislations are those prohibiting discriminations by expressly targeting sexual orientation and gender identity. No legislation in the 5 countries ensures this protection. A general provision prohibiting, in principle, discriminations is protective should it be correctly applied. The least protective situation relates to legislations that expressly cite exhaustive discrimination criteria - without adding the adverb *“particularly”* to the

list - without including sexual orientation and gender identity.

#### 4.1.3.2. Right to Health

All institutions of the countries concerned recognize, in similar terms, the right to health without any restriction. It is typically stated that the State works to promote it. The beneficiaries are, either the citizen (for example art.34 of the Togolese Constitution) or the text does not specify the beneficiaries so that any person without distinction can benefit from it (art. 26 of the Constitution of Burkina Faso).

No legislation related to public health excludes people from healthcare for reasons of sexual orientation or gender identity.

The risk management of HIV/AIDS pandemic led to the recognition of the right of vulnerable groups to treatment, including expressly men who have sex with men (MSM). In particular, the UNAIDS International guidelines on HIV/AIDS and human rights of 2006, clearly state that the right to treatment must be guaranteed for vulnerable groups, including MSM.

#### 4.1.3.3. Right to Education

Neither the Constitutions that recognize the right to education, nor the specific legislations that organize the different types of education, do not contain the least restriction that enables to discriminate pupils, students, learners based on their sexual orientation.

#### 4.1.4. Provisional Conclusion on the Analysis of the different Legislations

Two observations can be made from the analysis of the legislations: except Togo, the legislations are relatively less discriminatory against LGBTQ but they do not grant them any special protection.

**The legislations in the countries surveyed are discriminatory when they penalize same-sex sexuality and/or relations (Togo), when**

**they significantly penalize indecent exposure when it consists in an intimate relation with an individual of the same-sex (Côte d’Ivoire), when they establish different age of consent for heterosexual and homosexual sexual practices (Benin, Côte d’Ivoire), and finally, when they are characterized by total lack of recognition of the rights to family life: conjugality, adoptive parents(all countries concerned).**

**Apart from the discriminations mentioned above, the legislations of the five countries are not discriminatory. There is no exclusion, neither explicit, nor implicit based on sexual orientation or gender identity. This absence of discrimination results from the fact that sexual orientation and gender identity are ignored by these legislations unless exceptionally to incriminate (Togo) or introduce the various discriminations mentioned above.**

**None of the legislations accord specific protection to LGBTQ persons. The absence of specific protection results from lack of penalization of “homophobic” behaviors and the non-mentioning of sexual orientation and gender identity in the enumeration of discrimination criteria when legislations make such enumeration. Therefore, no protection is given to LGBTQ persons when they fall victim to homophobic acts (see table 3), or when they are the victims of discriminations from the perspective of their human rights (for instance access to housing), or in terms of economic and social rights (work, health, education).**

This type of legislations could be considered adequate if there was no violence or discriminatory treatment based on sexual orientation or gender identity in social life. The analysis of the practice of law is therefore essential to measure the adequacy or inadequacy of the different legislations.

**Table 6. Discriminations législatives pénales et civiles**

	Bénin	Burkina	Côte d’Ivoire	Mali	Togo
Penalization of same-sex sexuality and/or relations					X
Indecent exposure			X		
Difference of age of consent for sexual relations	X		X		Not concerned
Conjugalité (marriage or civil union)	X	X	X	X	X
Adoption	X	X	X	X	X

## 4.2. Implementation of Legislations

Before examining the actual implementation of the different legislations, a number of preliminary observations should be made, mainly to specify the scope of this part of the rapport.

First of all, it is worth mentioning the near total absence of the lived realities of LGBTQ citizens in official human rights related reports (Country reports as part of the universal periodic review by UN’s Human rights Committee, Country reports presented to the African Commission on Human and People’s rights). The same near total absence is observed in the reports of human right organizations. Only the situation in Côte d’Ivoire was subject to an alternative report presented in October 2012 to the 52nd Ordinary session of the African Commission on Human and People’s Rights<sup>16</sup>. So, little is known about LGBTQ individuals’ legal and social experience in the countries surveyed.

<sup>16</sup>. Alternative côte d’Ivoire, Arc en ciel Plus, Les violations des droits de l’Homme sur la base de l’orientation sexuelle et de l’identité de genre en République de Côte d’Ivoire, Octobre 2012 (Human right violations based on sexual identity and gender identity in Côte D’Ivoire, October 2012)

This section of the report does not purport to be a presentation of statistical data on violence, abuses and discriminations, which LGBTQ people may or have experienced. The exact number of violence, abuses or discriminations does not matter. The most important thing is to know whether they exist and if so, if this is exceptional or regular. The statistical presentation of these acts of violence, abuses and discriminations will be insignificant if it is not measured over time. However, there is no previous statistics that would help identify positive or negative trends of the number of these acts of violence, abuses or discriminations.

The approach is not to make a country-by-country comparison and try to measure and compare the acts of violence, abuses and discriminations in the different countries concerned. Such comparison would be uncertain and even likely to be misleading. As a matter of fact, the largest number of acts of violence, abuses or discriminations identified in a country does not necessarily mean the largest number of acts of violence, abuses or discriminations is the highest. This may result from the fact that, in such country, the monitoring and documentation of these acts is more systematic and the LGBTQ communities are more active in collecting information. This seems to be the case in Côte d'Ivoire where there is a community watchdog committee on violence against LGBTQ individuals, chaired by Alternative Côte d'Ivoire.

This part of the report purports to accurately reflect the answers provided to the survey questions on the legal and social experience of LGBTQ persons, so on the implementation of the legislation by actors concerned. This should help measure the most important thing, viz. the possible existence of acts of violence, abuses and discriminations and their exceptional or regular character.

The practical implementation of legislations is ensured by public actors as well as by private actors if it concerns relations among private individuals.

#### 4.2.1. Implementation of Legislations by Public Actors

State actors concerned include: courts, the police

or gendarmerie and the executive and social administrations.

##### 4.2.1.1. Jurisdictions

The actual application of legislations will be considered from the perspective of the explicit penalization of same-sex sexuality and/or relations, the implicit penalization of homosexuality, as well as in terms of possible discrimination against LGBTQ individuals in punishing the existing offences but not related to sexual orientation and gender identity.

##### Explicit Penalization of Same-Sex Sexuality and/or Relations

The analysis of the different legislations shows that only the Togolese legislation was explicitly criminalizing same-sex sexuality and/or relations under Article 88 of the Criminal code (see table 2 above). However, the Togolese courts have never applied this provision. So, no judgment has ever applied Article 88 of the Togolese Criminal Code. The absence of such ruling is reflected in the reports of Togo submitted to the African Commission on Human and People's rights (mainly the reports on the period from 2003 to 2010) as well as from review of reports or press reports relating to the application of this provision<sup>17</sup>. However, it was reported that in 2012, a Ghanaian was arrested under this provision. Yet, the tribunal did not sentence him based on article 88, which penalizes homosexual, but for "*disturbing public order*"<sup>18</sup>.

##### Implicit Penalization of Homosexuality

Though in the analysis of the criminal legislations, reference was made to the possibility of implicit penalization of homosexuality through extensive qualification of the offence related to indecent exposure, no conclusion could be made in the countries surveyed - except in Togo in the above mentioned matter - to support this possibility.

<sup>17</sup>. Thus, an article of the Newspaper "Africa RDV" note on its issue of 11 December 2014 that in living memory, no person has been sentenced in Togo on grounds of his/her homosexuality". [www.africardv.com](http://www.africardv.com)

<sup>18</sup>. US State Department - Bureau of Democracy and Human rights, 2012 Rapport on countries' practices as regards human rights, Section 6 : Discrimination, social abuses and human trafficking, p.18

##### Discrimination in Applying Criminal Legislations

Offences are further punished when LGBTQ individuals perpetrate them. Two judgments given by tribunals in Burkina Faso demonstrate this practice, without, however, being able to determine whether this practice is exceptional or common. Thus,

**in a judgment by the High Court of Bobo-Dioulasso on 7 January 2013<sup>19</sup>, a young transvestite gay was sentenced for street solicitation whereas this offence is almost never referred to tribunals for other cases of street solicitation. Likewise, an offence of corruption of a minor was used to sentence a young lesbian, whereas this offence is not used to protect heterosexual minors.**<sup>20</sup>

##### 4.2.1.2. Police and Gendarmerie Forces

We will examine the practice of legislations as regards the possible existence of arbitrary arrests, acts of violence perpetrated by the police forces, as well as the protection accorded by the said forces to LGBTQ individuals who fall victims of violence.

##### Arbitrary Arrests

An arrest is arbitrary when it occurs without any recorded infringement or without any attempt to perpetrate an offence or when it occurs outside the investigations of the criminal police. Logically, such arrests are neither referred to the public prosecutor's office, nor subject to criminal prosecution.

The data from all five countries indicate the existence of arbitrary arrests. However, the number of people surveyed alleging such arrests, whether they were affected or they had a direct knowledge of such arrests, is on the whole, rather limited or imprecise. Only the

report on Mali makes a statistical measurement of this type of arrest by specifying that they are acknowledged by 16% of 74 people interviewed. The report on Benin indicates that a police officer, during an interview, recognizes that "*homosexual individuals... are taken into custody for warning but they are released afterwards*" because the police have no evidence, "*i.e. no homosexual person is caught red-handed in this act, apart from the feminine appearance of some of them*". For Burkina Faso, people surveyed testify to the exceptional character of such arrests. Only one person mentions an arbitrary arrest. Concerning Côte d'Ivoire, without giving accurate figures, the investigation report states that "*LGBT individuals are often subject to arbitrary arrests*" by specifying that "*this is more frequent among transvestites and transgender people*". The report on Togo also identifies cases of arbitrary arrest most often based on appearance - feminine (for men), masculine (for women) - of people arrested. Thus, 2 young transvestite gays were arrested and held in custody at a police station in Lomé for 5 days before they were released<sup>21</sup>. All the reports mention that this type of arrest concerns a larger proportion of transgender and transvestite individuals and that such arrests are often conducted for the offence of passive soliciting. In such circumstances, the arrest does not have any arbitrary character.

##### Violence committed by the Police and the Gendarmerie during arrests

All persons arbitrarily arrested or being aware of arbitrary arrests mention acts of violence suffered by people arrested. This violence is mainly verbal, in the form of insults, and psychological in the form of humiliations. However, the report on Côte d'Ivoire mentions physical violence in the form of beating. The alternative report presented by Arc en Ciel Plus, a MSM organization, on human rights violations in Côte d'Ivoire based on sexual orientation and gender identity, identified several cases of violence committed by the police against arrested LGBTQ individuals. For instance, a young gay arrested in October 2012 in Dabou was stripped naked and

<sup>19</sup>. Ref. On the Websites of Faso net and Burkina 24

<sup>20</sup>. Ref. On the Webmaster Sidwaya, 25 June 2013 : "Prison for a 18 year-old lesbian"

received beatings with baton on his sex. Moreover, while he was HIV positive, he was denied access to the medication he needed<sup>22</sup>. The report on Mali also mentions cases of violence, mainly verbal violence from the part of other prisoners without the police reacting. The report on Togo mentions that two young transvestite gays, arbitrarily held in custody for 5 days at a police station, had to march before the police officers with the women's clothes they were wearing when arrested; a police officer filmed them with his Smartphone and shared the video on WhatsApp. One can conclude that the acts of violence specified are systematic in the case of arbitrary arrests against LGBTQ persons.

#### Protection of LGBTQ Victims of Violence

Data from Burkina Faso, Côte d'Ivoire and Mali indicate situations where the police intervened to protect LGBTQ persons, sometimes in the form of exfiltration, as well as situations where the police did not intervene. Concrete examples of intervention cases were provided in the reports on Burkina Faso, Côte d'Ivoire and Mali. However, no element in the reports on Benin and Togo mentions situations where the police ensure the security

of LGBTQ persons or group of persons under attack.

In any case, even if it exists,

**the protection provided to the victims of violence is uncertain. So, it seems not to be based on awareness of a legal duty to protect all persons, but on an individual willingness to ensure - or not to ensure - the protection of persons.**

Such uncertainty in protecting people is likely to cause insecurity for individual persons, social and cultural activities jointly carried out, as well as for offices of LGBTQ organizations. This is the reason why all the reports indicate that when social or cultural activities are organized, LGBTQ individuals prefer to ensure their own security, either by themselves or by resorting to hiring private security guards, or seek informal protection from "friendly" members of the police or gendarmerie.

**Table 7. Actual Implementation of Legislation by the Police or Gendarmerie**

	Bénin	Burkina	Côte d'Ivoire	Mali	Togo
Arbitrary arrests	No precise data	Exceptional	Not exceptional	Not exceptional	No precise data
Violence during arrests	Systematic	Systematic	Systematic	Systematic	Systematic
Protection provided by security forces	No case mentioned	Not systematic	Not systematic	Not systematic	Not systematic

#### 4.2.1.3. Executive and Public Administrations

The public administrations concerned include administrations responsible for the recognition of organizations and public health centers.

#### Public Administrations responsible for the Recognition of Organizations

With the exception of Côte d'Ivoire, the public administrations responsible for granting legal recognition to organizations

in all countries surveyed refuse to recognize organizations aiming at expressly protecting the rights of LGBTQ persons. Only organizations whose missions include the prevention and treatment of HIV/AIDS for "vulnerable groups" (MSM), are recognized. In some cases, no explicit ground for refusal of recognition is specified, but in most cases, the notion of "respect for moral standards" is used to justify this refusal. Respect for "moral standard" is correlated to the fact that such associations would seek "to promote homosexuality", which is considered by these administrations as "contrary to moral standards". So, there is a widespread discrimination in the application of freedom of association against LGBTQ organizations.

#### Benin

The report identifies 15 organizations and groups : Association des femmes pour une relève orientée (AFRO-Benin), Amis des Sans voix (ASV), Association pour le soutien et l'aide à la jeunesse (ASAJ), Adorable club des jeunes solidaires (ACJS), Bénin Synergie Plus (BESYP), Espoir Vie Arc-en-ciel Bénin (EVAB), Fly together, Madnice Production, Union pour la solidarité, l'entraide et le développement, Mouvement pour la solidarité des minorités-Love Story, Alternative porto Novo, Initiative Educateur contre le Sida (EDUSIDA), Tous Nés Libres et Egaux (TNLE), Les Palmiers, Hirondelle Club Bénin. Eight of these organizations and groups are members of Réseau Bénin Synergie Plus (BESYP) and six are members of Réseau Coalition Anti Sida Bénin (CSB). None of these networks is recognized as such by authorities because, to be recognized as a network, each organization/group affiliated to the network should be recognized itself. Only one association –Benin Synergie Plus (BESYP) – has been recognized after it has changed its mission and placed it within the framework HIV/AIDS prevention. Indeed, its first request for recognition, while its social purpose was largely consistent with the rights of LGBTQ persons, was rejected. Two organizations/groups are in their recognition procedure: Association des femmes pour une relève orientée (AFRO-Benin) and Initiative Educateur contre le Sida (EDUSIDA). AFRO-Benin's mission is the promotion of women's rights and the prevention of STIs/HIV. EDUSIDA aims at promoting education, STIs/HIV prevention and human rights. All

these organizations/groups work under the cover of STI and HIV/AIDS prevention.

#### Burkina Faso

The report identifies two organizations/groups: Alternative Burkina et Queer African Youth Network (QAYN). QAYN, which applied for registration as a LGBTQ organization, was denied recognition by the administration without any explanation. To be recognized, Alternative Burkina had to place its social purpose under HIV/AIDS control, specifically targeting "vulnerable groups" (MSM).

#### Côte d'Ivoire

Four organizations/groups were identified: Alternative Côte d'Ivoire, Arc en Ciel Plus, Secours social and, Lesbian Life Association Côte d'Ivoire (LLACI). Two of these organizations (Alternative CI and Secours social) received in 2010 an acknowledgement of receipt of their application. The bylaws of Alternative CI mentions "Health and human right education" and the specific action of the association for "sexual minorities". The bylaws of Secours social aimed at promoting "mutual assistance and solidarity among its members and all persons having sexual intercourse with other people of the same sex". However, these two organizations have yet to receive their full, legal recognition though their acknowledgement of receipt for their application dates back from 2010. The acknowledgement of receipt of application enables them to work in a legal manner before they receive a full recognition as a legal entity.

#### Mali

The association Coalition anti-sida (CAS) works on HIV/AIDS prevention, especially amongst MSM communities, and the promotion of human rights. The director of CAS specified that his association "should, in no case, carry out actions contrary to moral standards".

#### Togo

Four organizations/groups were identified through the research: Men's, Club des 7 jours, Afrique Arc en Ciel and Ladies' Voice.

21. Documentation form n° 0007 of 2/01/2015 developed by "Afrique Arc en Ciel"

22. Alternative Côte d'Ivoire, Arc en Ciel Plus, Les violations des droits de l'Homme sur la base de l'orientation sexuelle et de l'identité de genre en République de Côte d'Ivoire, Octobre 2012, p. 11 (Human right violation based on sexual orientation and gender identity in Côte D'Ivoire, October 2012, p. 11)

Three of these organizations – Men's, Club des 7 jours and Afrique Arc en Ciel – are registered organizations. The application of Ladies'Voice is pending. The three organizations did not mention that they were identity-based association; they defined their social purpose within the framework of HIV/AIDS control. Two of them (Club des 7 jours and Afrique Arc en ciel) were, at first, denied registration because they mentioned LGBTQ individuals as target beneficiaries. They were pushed to revise their profile using “vulnerable groups” in lieu of LGBTQ.

**Table 8. Practice of the legislation on associations**

	Bénin	Burkina	Côte d'Ivoire	Mali	Togo
Legislation on organizations /groups	Discriminatory application against LGBTQ organizations /groups	Discriminatory application against LGBTQ organizations /groups	Uncertainty. Possible change of the practice towards a non-discriminatory practice	Discriminatory application against LGBTQ organizations /groups	Discriminatory application against LGBTQ organizations /groups

## Public Health

In the area of health, the research surfaced a paradox: on the one hand, NGOs and groups working in the HIV/AIDS field (inclusive of MSM beneficiaries), by and large, work with state actors on the risk management of HIV/AIDS; on the other hand, there is blatant discrimination against LGBTQ individuals in the healthcare system.

Yet, in all the countries surveyed, MSM and gay-led organizations/groups whose work is within the field of HIV prevention and control among “vulnerable groups” are associated with state mandated actors:

- Benin: The entire LGBT groups have designated a MSM to represent them at the Country Coordination Mechanism (CCM).
- Burkina: On-going process for the integration of a representative of “vulnerable groups” (this includes MSM) in the Country Coordination Mechanism (CCM).
- Côte d'Ivoire: Representation of LGBTQ persons –or specifically MSM and gay men in the Board of directors of the Ivorian Network of organizations of people living with HIV and in the national coordination body for the Global fund to fight AIDS, Tuberculosis and Malaria.

- Mali: A representative of “vulnerable groups” in the person of an MSM working at ARCAD-SIDA within the Country Coordination Mechanism (CCM)-Mali.

- Togo: Integration of LGBTQ representatives - or specifically MSM and gay men - first in the STIs/HIV thematic group of the National Program for AIDS control and, under a decree adopted on 30 December 2014, in the Country Coordination Mechanism (CCM).

In all the countries, LGBTQ persons are clearly discriminated, in particular during their attempts to access treatments for certain infections. This discrimination is expressed most often, either in the form of denial of care, or less frequently, in the form of blatant hostility to patients. It is worth mentioning that the health care staff in these centers are rarely trained to treat LGBTQ patients. A Burkinabè association noted that during a training on this topic with public health workers, the latter expressed their disapproval, considering that such training “was promoting” homosexual practices. This widespread discrimination in access to public health services result in LGBTQ persons resorting to private sector or self-medication.

**Table 9. Representation of LGBTQ persons in country responses to HIV/AIDS prevention and access of LGBTQ individuals to care in public health centers**

	Bénin	Burkina	Côte d'Ivoire	Mali	Togo
Representation of vulnerable persons (including MSM) in administrative bodies for HIV control	Yes	Yes	Yes	Yes	Yes
Access of LGBTQ individuals to care in public health centers	Discrimination (including in the form of denial of treatment)	Discrimination (including in the form of denial of treatment)	Discrimination (including in the form of denial of treatment)	Discrimination (including in the form of denial of treatment)	Discrimination (including in the form of denial of treatment)

## 4.2.2. Practice of Legislations by Private Actors

We will examine in turn: the cases of violence or threat against LGBTQ persons when perpetrated by private individuals, lived realities at work and in school and access to housing.

### 4.2.2.1. Violence or Threats of Violence against LGBTQ persons

The data from all of countries surveyed indicate cases of violence or threat perpetrated against LGBTQ persons or group of persons by private individuals. This can concern individual private person or group of persons. In certain cases, the violence is perpetrated against individuals in isolation. For example, the data on Burkina outline the attempts of violence against a couple of gay including one Chadian by the Chadian community members in Ouagadougou. The report “Off the Map” states that in Abidjan, in 2006, two gay men were beaten to death by young men<sup>23</sup>. The report prepared by Arc-en-Ciel Plus on the situation in Côte d'Ivoire, identifies the case of a young gay assaulted and lynched by a group of young men at a bus station in a village, while he was waiting for a vehicle to go to a neighboring village. The lynching resulted in injuries and trauma<sup>24</sup>. There are also cases of blackmailing against LGBTQ individuals who, more often than not, refuse to file a complaint - or do not act on a complaint already filed - for fear of having their sexual orientation and/or gender identity publicly revealed. Regarding violence

against groups of people, the data on Côte d'Ivoire mentions a case related to the abduction of the Director of Alternative CI and two of his staff by the residents of the area in 2014, as well as cases of violence during private parties. The data on Mali mentions violence committed by private individuals against LGBTQ groups of persons in the cities of Mopti and Niono in 2013. The two situations are similar: these were real attacks on LGBTQ individuals who were organizing a private party. Religious preaching in Mopti encouraged this type of violence. Moreover, in the same city, following the violence, search operations were carried out in private homes in order to identify homosexual individuals. Many gays in this region have sought refuge in Bamako. The report of Burkina Faso mentions that in March 2012, LGBTQ persons were threatened and summoned to leave their neighborhood, Wemtenga, by a group of young people in the neighborhood; the report also mentions violence committed by residents against LGBTQ individuals. The same applies to the report on Togo, which indicates violence and aggressions perpetrated by private individuals during private parties organized by LGBTQ persons in 2012 and 2013 in two areas of Lomé. Similar violence occurred in 2014 during a private party organized at the community center run by MSM and gay-led organizations/groups in Lomé and the party had to be interrupted.

<sup>23</sup>. Report “Off The Map How HIV Aids Programming is failing Same sex practicing people in Africa, p. 27

<sup>24</sup>. Alternative côte d'Ivoire, Arc en ciel Plus, Les violations des droits de l'Homme sur la base de l'orientation sexuelle et de l'identité de genre en République de Côte d'Ivoire, Octobre 2012, p. 11 et 12 (11 (Human right violation based on sexual orientation and gender identity in Côte D'Ivoire, October 2012, p. 11 and 12) and appendix A showing pictures of the young man after the assault.

The various cases recorded show that private individuals using violence or threat of violence often include the police and security forces. For example, Arc en Ciel Plus report documented threats of violence by members of the guard forces of the Republic of Côte d'Ivoire against the manager and clients of a bar frequented by the gay community in Abidjan. The threats aimed at obtaining money and drinks<sup>25</sup>.

It should be noted that these various acts of violence - even in the case of Côte d'Ivoire in 2006 which claimed the life of two people - while they are, in some cases, contained by the police, they never resulted in prosecution and therefore, in criminal sentences.

#### 4.2.2.2. The Right to Employment

All the data on the countries mention that LGBTQ persons are very tight-lipped as regards their sexual orientation and/or gender identity, either during job interviews, or in the performance of their job.

**However, despite this discretion, many respondents claim to have experienced discriminatory treatment - denial of employment, denial of promotion, lay-off - on grounds of their sexual orientation when discovered. The realization of an employee's sexual orientation constitutes a ground for discrimination in access to employment; however, it is difficult to make a precise statistical assessment of the situation due to lack of data.**

Given the major difficulty in revealing one's sexual orientation, transgender individuals are the most affected by this type of discrimination.

It should be noted that no claim was filed with the labor courts against this type of discrimination.

#### 4.2.2.3. Rights to Education

In the education system, the data in all five countries do not mention any discrimination that would be expressed by the exclusion of an LGBTQ person from the educational system. However, verbal violence is frequently reported - insults, mockeries, and more rarely physical violence, by other pupils or students. Verbal violence is, very seldom, perpetrated by teachers. However, it is noted that authorities in charge of education institutions do not intervene to address this violence when it is verbal, in particular to promote an education environment free of discrimination. In practice, these situations come to an end between the parties concerned. Certain respondents stated such incidents forced them into abandoning their education.

#### 4.2.2.4. Rights to or Access to Housing

As regards the rental of offices building for LGBTQ organization/groups, it should be noted that most are able to rent such space. However, none of LGBTQ organization/groups surveyed mentioned their real purpose when signing the lease contract. Only HIV/AIDS prevention or human right protection and promotion in broad sense, were mentioned. The report on Togo states that the rental applications of certain organizations/groups were denied when they specified their purpose, such as the protection of vulnerable groups (MSM) in the prevention and treatment of HIV/AIDS. Likewise, in Burkina Faso, a group rented a building by stating that its social purpose was related to the field of human rights.

LGBTQ persons who sign a lease contract for residential purpose, have no problem when their sexual orientation and/or gender identity are unknown to the landlord at the time of rental. However, the situation may change when this information is made known to the landlord, usually by the tenant's neighbors even if the contract is still in effect. The research documented several cases where the landlord terminates the contract, even evicted the tenant out the house when he knew that the tenant is a gay or a lesbian. This is evidenced in Côte d'Ivoire,

<sup>25</sup>. Ibid., p. 12 et 13

Burkina, Mali and Togo. For example, in Burkina Faso, in addition to the situation mentioned above where LGBTQ tenants were summoned to leave their house by a group of young people in Wemtenga (see 4.2.2.1. above), a lesbian couple was evicted by neighbors out of their rented house in Wayalghin in November 2013<sup>26</sup>. Similar situations are recorded in Togo where 9 out of 20 LGBTQ persons surveyed reported having a landlord who, either refused to rent his building, or terminated the lease contract once he got to know the tenant's sexual orientation and/or gender identity.

The presentation of the implementation of the legislations should be against the analysis of these legislations in order to surface the adequacy or inadequacy of these legislations.

### 4.3. Analysis of the Legislations and their Implementation

The actual implementation of the various legislations clearly shows a climate of social stigmatization against LGBTQ persons, which translates into violence, abuses and discriminations. While this report does not aim to make a statistical assessment of these acts of violence, abuses and discriminations, one can conclude that, in view of the elements provided in the analysis of the actual implementation of these legislations, that they are exceptional or marginal. The most important element is not their number so much as the fact that they are not followed by sanctions, neither against perpetrators of violence, nor against perpetrators of abuses or discriminations. Yet, it was noted that the universal international law on human rights established a principle of non-discrimination based on sexual orientation and gender identity and that the national legislation could be considered as sufficient should there be no violence or discriminatory treatment based on sexual orientation or gender identity. The relation to be established between the actual implementation of the legislations and the status of the legislations - international and national - help state that the legislations - international and national - are inadequate.

#### 4.3.1. Inadequacy of the International and Regional Human Rights Protection Law: Institutional Inadequacies

The norms for protection against discrimination in the enjoyment of civil, economic and social rights, based on sexual orientation and gender identity, exist in both universal international and the African regional laws. The African regional laws are quite explicit as we have seen that the principles and the guidelines for the implementation of the economic, social and cultural rights stated by the ACHPR mention "*sexual orientation*" and that gay, lesbian, transgender and intersex individuals are included in the category of "*vulnerable and disadvantaged groups*", i.e. those where people "*were and/or are facing major obstacles in the enjoyment of their rights...*" These groups can benefit from "special measures meant to ensure adequate advancement...to enable them to enjoy equal rights". So, the inadequacies of the international and regional human rights laws do not result from the content of the norms for protection but from the lack or the inadequacy of institutional mechanisms responsible for their implementation.

A legal system is characterized by the fact that it combines two types of norms: legal behavioral norms and institutional norms responsible for ensuring efficient standards of legal behaviors. Legal behavioral norms impose a way of acting. In the case at hand, international and regional norms require States to ensure equal enjoyment of human, civil, economic and social rights for all persons, without discrimination. Institutional norms create institutions, mainly judicial institutions responsible for ensuring efficient legal behavioral norms, particularly by punishing their violation by States.

The universal human rights laws totally lack such institutions; there is no international jurisdiction that would impose on States when they violate the norms, which they have adhered to in the area of human rights protection. While there are bodies - The UN Human Right Council - responsible for examining the compliance of States with universal norms, they have

<sup>26</sup>. Le Reporter, n°130, from 15 to 30 November 2013 : "Wayalghin : Lesbian hunt"

no judicial power, let alone a power with binding effect on States.

Until recently, the African regional human rights laws were characterized by their lack of a jurisdiction imposing on States parties by the ACHPR. A body -the ACHPR - with no judicial power, assured the effectiveness of the norms. The establishment of the African court of justice and human rights at the continental level and the ECOWAS Court of Justice for the West African region - announces the start of a process for the “judicialization” of the human litigation, which, if used by the consumers of justice, especially LGBTQ people will ensure more effective behavioral norms.

“Judicialization” is a necessary stage to ensure real effective international or regional human rights norms. These norms are, most often, akin to principles that the courts before which the litigation as regards their application is brought, express in specific circumstances. As long as such jurisdictions do not exist, the norms remain “grand principles”, which the States violate without any consequence whatsoever.

**For the “judicialization” to contribute to the effectiveness of the regional protection of human rights in West Africa, it is necessary that competent law courts in the area of human rights protection as recognized by the ACHPR, exist and that their legal status provide for the possibility for private individuals to refer directly to them.**

This is the case for the ECOWAS Court of justice. Unfortunately, such is not the case for the African Court of justice and human rights as private individuals (individuals or organizations) cannot directly refer matters to it, unless the State concerned made a statement authorizing individuals or organizations<sup>27</sup> to refer to the Court. However, authorizing private individuals to refer to the court is not sufficient. Citizens must also refer to them in order to claim their rights when they consider that these are violated. This involves a “legal

culture” and even a “judiciary culture”, which, for the time being, is seriously lacking in the countries surveyed by this research. The acquisition of this “legal culture”, in particular by LGBTQ persons and organizations, constitutes a stage that is essential to ensure greater efficiency of regional human rights protection norms for LGBTQ persons.

### 4.3.2. Inadequacy of National Legislations in Protecting LGBTQ Persons’ Rights: Normative Inadequacies & Lack of Political Will

The analysis of the practice of legislations revealed cases of violence, abuses, discriminations of all kind experienced by LGBTQ persons without any sanction for the perpetrators and without any possibility to prevent discriminations by explicitly prohibiting them. Therefore, it could be concluded that the legislations are inadequate.

**The States in the countries surveyed refuse systematically to acknowledge this reality and argue, either for the non-discriminatory nature of their legislations towards LGBTQ persons, or that the general population is not ready to accept legislative amendments to protect the basic right of LGBTQ persons.**

In 2011, during the universal periodic review at the UN Human Right Council concerning Togo, when asked to abrogate Article 88 of the Criminal code, which criminalizes same-sex sexual practices between consenting adults, and to take measures to put an end to social stigmatization of homosexuality, Togo stated:

*“It [Togo] is not prepared to legislate on the issue of homosexuality, given that homosexual individuals are not subject to any form of discrimination. Furthermore,*

27. Art. 34.6. of the Protocole on the statut of the African court of justice and human rights adopted in July 2008 at the African Union’d Assembly in Sharm El Sheikh

*such legislations might be counterproductive, given the attitude of the population “.*<sup>28</sup>

Such denial by States results in not taking an action to amend existing legislations, nor undertake public education so as to minimize the climate of social stigmatization against LGBTQ persons. By refusing to review their legislations, the States fail their duty to protect human rights, i.e. to prevent third parties from interfering with the enjoyment of a person’ rights. By not implementing actions for education, training and awareness raising, the States fail to fulfill their obligation to promote human rights, i.e. their obligation to create the conditions for ensuring equal enjoyment of rights, if necessary, through information, education and sensitization activities.

#### 4.3.2.1. Criminal Legislations

Criminal legislations are inadequate since they do not allow for effective punishment of acts of violence and discriminations and threats against people based on their sexual orientation and gender identity. In a society where persons or group of persons are subject to stigmatization likely to result in violence, abuses and discriminations, a usual non-discriminatory legislation is not sufficient to ensure that these persons or groups of persons effectively enjoy their rights. This is what is provided for in Article 34 of the Principles and Guidelines on the implementation of certain rights in the African Charter, since the ACHPR states therein that:

*“The right to equality includes the adoption of special measures for the purpose of securing the adequate advancement of members of vulnerable and disadvantaged groups to enable their equal enjoyment the rights...”.*

These “special measures” may take the form of protective legislations.

On the criminal front, a protective legislation should incriminate two categories of behaviors and specify aggravating circumstances for certain categories of offences.

First, the criminal legislation should incriminate and thus, sanction hate speech, intolerance, violence and

discriminations against a person, persons or a group of persons based on their sexual orientation or gender identity. Finally, it should consider sexual orientation and gender identity, as aggravating circumstances for certain offences, particularly offences of manslaughter, rape and intentional assault and battery.

On the legislative front, i.e. in terms of wording in the drafting of such legislations, it would be advisable that incriminating legislations specifically state criteria for sexual orientation and gender identity. The wording would then sanction “*incitements to violence, hatred, intolerance, discriminations against a person, persons or groups of persons based on their sexual orientation and gender identity*”. If from a political perspective, such wording is impossible or hard to sell, a broader and more comprehensive wording could be used. This wording would sanction “*incitements to violence, hatred, intolerance, discriminations as well as acts of violence, hatred, intolerance and discriminations against a person, persons or groups of persons for any reason whatsoever*”.

#### 4.3.2.2. Legislations on the Enjoyment of Constitutional Rights and Freedoms, Civil, Economic and Social Rights

Legislations on the enjoyment of constitutional rights and freedoms, civil, economic and social rights, are also inadequate since they do not allow, on the civil or administrative side, sanctioning effectively abuses and discriminations against individuals based on their sexual orientation and gender identity.

With regards to legislations pertaining to the enjoyment of constitutional rights and freedoms, civil rights, economic and social rights, specific provisions should expressly prohibit discriminations based on sexual orientation and gender identity.

With such legislations, States will effectively fulfill their role as guarantors of rights, i.e. assuming their responsibilities to ensure the effective enjoyment of

28. UN Human Right Council, Universal periodic review, Togo Report, AHCR 19/10, item 64



rights for all, if need be, via criminal sanctions for certain acts or behaviors, and through sanctions by civil, social and administrative courts against discriminatory attitudes in civil relations, labor relations or in public administrations. By not implementing such legislations, States are not fulfilling their obligations to protect the rights of all individuals, including LGBTQ persons, in order to prevent and/or punish third-party actions undermining the enjoyment of their rights.

### 4.3.2.3. Measures to Educate, Train and Raise Awareness in Promoting the rights of LGBTQ Individuals

It was mentioned that States often invoke the assumed attitude of the general population to refuse to implement appropriate legislations to protect LGBTQ individuals' rights (see Togo's statement at the UPR of 2011). During the UPR at the UN Human Right Council in 2014, Côte d'Ivoire adopted a similar attitude. In its general report presented in accordance with Resolution 16/21 of the Council, Côte d'Ivoire declared that it is yet to undertake any action to address discrimination based on sexual orientation and gender identity, stating that:

*« No legal provision prohibits relations between consenting adults. However, the levels of mentality are such that they cannot accept formalizing same sex relations ».*<sup>29</sup>

Benin adopted the same attitude during the UPR by stating that Benin did not buy into recommendation n° 6 on human rights, sexual orientation and gender identity, requesting Benin to take measures to reduce social stigmatization based on sexual orientation<sup>30</sup>. One could not be more explicitly about a total lack of political will to change the perception of homosexuality by the society. However, by refusing to implement an action to change the general public perception of homosexuality, States prove to be seriously failing in their role as guarantors of the rights of all citizens, including LGBTQ individuals. Indeed, the function, which States must assume in the field of human rights are many. They do not comprise only obligations to respect or to protect; they also encompass obligations to promote, which require States to create the conditions, notably social conditions, for

equal enjoyment and exercise of rights.

Firstly, States do not undertake any action to inform, educate and raise awareness in order to achieve equal enjoyment of rights for all. They do not take any appropriate measure in education and information programs towards eliminating prejudices based on the idea of superiority of a dominant sexuality over another. They do not either take measures to train the judiciary staff, the police and prison security personnel on protecting and promoting equal enjoyment of human rights, without discrimination, for all.

Not only do the States not assume this duty, the education and awareness-raising function, but they prevent organizations and groups that are willing to accomplish this mission for being legally recognized. Indeed, we have seen that the legislation on freedom of association were, unanimously - perhaps with an improvement for Côte d'Ivoire - applied in a discriminatory manner against LGBTQ organizations and groups (see Table 8 above). Against this backdrop, the State goes further than the simple abstention since they prevent or impede on the information, education and awareness-raising activities that may be carried out by these organizations and groups.

This failure of States and the impediments they upon the actions of LGBTQ organizations and groups mean that only the discourse, based on ignorance, preconceived ideas, stigmatization, and often calling for violence, stoked by the media, is likely to shape the opinion of the public. All the data of the countries surveyed unanimously underscore the extremely negative role of the media as regards the rights of LGBTQ persons. By and large, homosexuality is presented therein in a manner to generate the reader's moral condemnation. It is a common tactic to tight pedophilia and homosexuality together. Some newspapers use evidence of relatively high HIV prevalence rate in the MSM communities to call on the authorities to crack down on homosexuality. This is, for instance, the case of the Togolese newspaper

"Indépendant express", which stated in its issue of 13 July 2012 that the prevalence rate in the gay community "should prompt Togolese authorities to be tough and take the most radical measures in order to stem such behaviors in the country"<sup>31</sup>. Certain newspapers go even further as they would reproduce remarks incriminating homosexuality as the most serious crime in the qualifications of the international criminal law - crime against humanity. Thus, a newspaper reproduces the remarks by a Burkinabe politician who states that homosexuality is a "crime against humanity" without any comment from the reporter<sup>32</sup>. These inflammatory news reporting have never prompted a reaction from the part of State actors which should feel compel to react.

One can conclude that the States do not take any measure to change the mindset of their public opinion, that they impede on the endeavors of LGBTQ organizations and groups which could carried out actions in this area, and that they tolerate the development, without any legal or ethical restriction, of media discourse likely to stoke, and even to reinforce social stigmatization against LGBTQ persons.

**The refusal to develop and to implement protective legislations in order to ensure effective enjoyment of the rights of LGBTQ individuals; the total lack of information; education and awareness-raising activities to reduce social stigmatization of homosexuality in particular among the general public, the impediments to the recognition of LGBTQ organizations and groups; the total lack of condemnation of inflammatory news reporting by different types of media outlets; clearly show that there is no political will from the States to change the current situation with regards to the rights of LGBTQ individuals. Recalling the provisions of Article 34 of the principles and guidelines developed by the ACHPR, which prescribes "special measures for the purpose of securing the adequate advancement of members of vulnerable and disadvantaged groups to enable their equal enjoyment the right", the research found no such "special measures" been taken in the countries surveyed.**

<sup>29</sup>. Human right Council, Universal periodic review, National report presented by Côte d'Ivoire in accordance with 5 of the Appendix to Resolution 16/21 of the Council, A/HRC/WG.6/19/CIV/1, p. 17

<sup>30</sup>. Human right Council, Universal periodic review, National report presented by Benin d'Ivoire in accordance with 5 of the Appendix to Resolution 16/21 of the Council, A/HCR/WG.6/14/BEN/1, p.16

<sup>31</sup>. <http://www.Indépendantexpress.com/homosexualité-sujet-tabou-au-togo>

<sup>32</sup>. <http://www.wikiburkina-net/2014/04/02/revendication-du-droit-a-lhomosexualité>

## 5. RECOMMENDATIONS



The recommendations aimed at ensuring a better protection for LGBTQ persons for them to be able, like others citizens, to fully exercise their civil, economic and social rights.

### A. Legislative Amendments: Adoption of Legislations Protecting LGBTQ Individuals against Violence in the pursuit of their Civil, Economic and Social Rights

The analysis of the different legislations against their actual implementation showed that they are inadequate since they do not protect the rights of LGBTQ individuals when they are subject to violence, abuses or discriminations.

The comparative history of legislations on homosexuality tends to evolve through the following phases:

- **1° Penalization phase.** Penalization of same-sex sexuality and relations, meaning the condemnation of homosexuality based, mainly on religious factors (prejudice to the order of divine creation, crime against the community entailing the destruction of the community (destruction of Sodom), crime against the survival of humanity).
- **2° Phase of creating reactive rights (corresponding to a social attitude of tolerance).** This phase results in the development of legislations preventing the public from violating private life (hence the decriminalization of homosexual practices considered as part of the private sphere) and the prohibition of legal discriminations a behavior (homosexual) regarded as part of the private sphere.
- **3° Phase of creating prospective rights.** While legislations decriminalizing and prohibiting discriminations correspond to a social attitude of tolerance, legislations creating prospective rights correspond to an attitude of recognition. Same-sex sexuality and relations are recognized by the society and laws, and a legal framework as part of civil law, is gradually developed. This is the scope of legislations on registered partnerships or civil unions developed from 1989 in certain countries (the Danish law of 1989 on registered partnership).
- **4° Phase of unification of norms regardless of sexual orientation and/or gender identity.** This 4th phase corresponds to legislations where same-sex sexuality and relations are trivialized and subject to the same legal protection as heterosexual relations. The law becomes unconcerned with sexual orientation and/or gender identity. Such is the

aim of legislations opening marriage up to same-sex couples and/or on homo parenting.

It clearly appears through the analysis of the legal environment of the five countries, that legislation for creating reactive rights is an essential step to ensure that LGBTQ individuals enjoy equal rights like other citizens.

- **For Togo, the abrogation of Section 88 of the Criminal code, which penalizes same-sex sexuality and relations between consenting adults.**
- **In all countries surveyed, criminal legislations should incriminate “incitements to violence, hatred, intolerance, discriminations against a person, individuals or groups of persons based on their perceived or sexual orientation and/or gender identity.**
- **These criminal legislations should also make violation based on perceived or reel sexual orientation and/or gender identity, aggravating factors for certain offences, in particular homicide, rape, and assault and battery.**
- **In terms of constitutional rights and freedoms, the legislations of the States should expressly prohibit discriminations based on sexual identity and/or gender identity.**

The implementation of these recommendations is not the exclusive responsibility of LGBTQ persons and/or organizations. It calls for a synergy of actions between LGBTQ organizations and groups, and other civil society organizations, particularly those working in the field of human rights. Awareness-raising among social justice actors should be combined with a dialogue with decision-makers, especially at the political level. A priority should be giving towards advocacy and lobbying among government agencies responsible for protecting and promoting human rights.

### B. Training for LGBTQ Community Members and Activists

It emerged from the research that the vast majority of LGBTQ respondents are in total ignorance of the legislations that impact their lives. LGBTQ organizations and groups, until recently, did not have a right-based approach to their work. In addition, there is a lack of complaints before the court to seek redress in the event right violation. This is evident at both individual and organizations levels; for instance in case of the denial of registration, no organization - unlike in some Anglophone countries - appealed before the administrative tribunals.

**Knowledge of legislations is a one of the prerequisites for its effectiveness. Therefore, minimum legal training of LGBTQ organizations and groups is essential. Such training should focus on certain basic legal concepts, legislations that may directly relate to the rights or the protection of LGBTQ individuals and the institutional mechanisms (judicial in particular) that can be used to condemn violence, abuses and discriminations against LGBTQ persons.**

## C. Creation of Community-led Watchdog to Document Rights Violation

With the exception of Côte d'Ivoire where a community-led watchdog monitors violence against LGBTQ individuals and organizations, there is no such system in place for the other four countries. A systematic recording of human rights violation is indispensable when it comes to justifying the inadequacy of the current legislations and the need to revise them.

- **It is necessary for LGBTQ organizations and groups to establish a community-led watchdog responsible for recording violence, abuses and discriminations against LGBTQ persons. The establishment of such observatory calls for inter-organizational collaboration because the aim should be to collect data for the whole country and ensure that there is no duplication of records.**

- **From the perspective of efficiency and credibility, it is essential that the volunteers leading the watchdog receive appropriate legal training, as well as training on the methodology for identifying, collecting and treating data, particularly statistics.**

## D. Creation of Networks of Lawyers to Support LGBTQ individuals and/or organizations

Training of members of the LGBTQ communities in legal matter cannot be sufficient in all cases to effectively ensure the prosecution of violence, abuses and discriminations against LGBTQ individuals. In particular, when the situation needs to be taken to the judicial level, it is indispensable that a lawyer represents the plaintiff. Because of his/her training and the practice of his/her profession, a lawyer better understands the technical aspects and is therefore able to advise, recommend, and develop effective arguments.

- **It is necessary to find within the Bar Association of each of the countries surveyed, one or more lawyers who may use their knowledge and competences to effectively represent LGBTQ individuals or organizations before the law.**

- **A referral system should be established and shared across organizations and among lawyers open to take the cases of LGBTQ individuals and/or organizations.**

- **LGBTQ organizations and groups should create a network of like-minded lawyers across the country to represent LGBTQ individuals in case of needs.**

## E. Training of State Actors in Law, in Particular in International and Regional Human Rights Laws

The international and regional human rights laws include, as part of their provisions, without any ambiguity, the rights of LGBTQ individuals. This dimension of international and regional laws is not widely known, in particular by key public servants (tribunals and police) responsible for implementing these laws.

**LGBTQ organizations and groups should engage in a dialogue with national public institutions (government agencies) and foreign partners (many training sessions are organized as part of projects or programs funded by development partners, in particular the European Union, within the framework of projects and programs to support the justice sector (including the judicial police) so that they incorporate this dimension in training curricula, especially for magistrates and judicial police officers.**



[www.qayn.org](http://www.qayn.org)