This book focuses on the strategies that activists for LGBTIQ+ equality in Africa deploy to challenge deep seated homophobia and transphobia, as well as the politicisation of LGBTIQ+ issues. It is a peer-reviewed, edited volume with scholarly contributions from lawyers, anthropologists, and LGBTIQ+ activists. It covers different country situations – those where equality is taking root, as the case is in South Africa, Botswana and Mozambique; those where homophobia reigns and LGBTIQ+ rights are politicised such as, Ghana, Kenya, Malawi, Nigeria, Senegal, Uganda, and Zambia; and those where traditional LGBTIQ+ activism is almost a nonstarter, such as in Ethiopia, Sudan and The Gambia.

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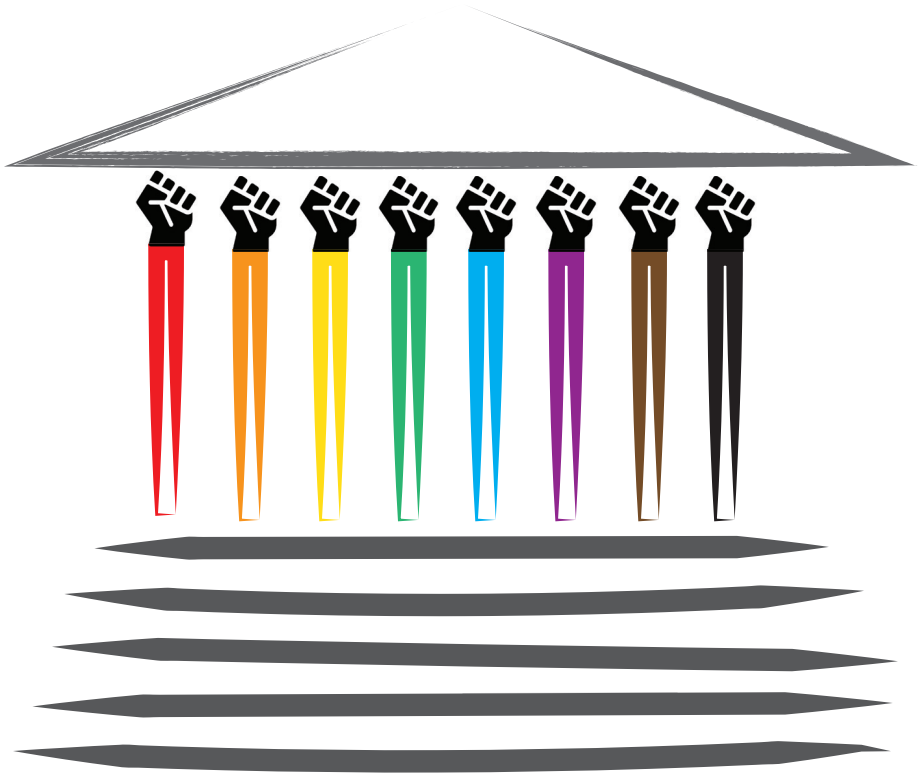

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Acronymns and abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ACN	Action Congress of Nigeria
AHA	Anti-Homosexuality Act (Uganda)
AHB	Anti-Homosexuality Bill (Uganda)
ANC	African National Congress (South Africa)
APRC	Alliance for Patriotic Reorientation and Construction (The Gambia)
ART	antiretroviral therapy
ASDSSA	Alteration of Sex Description and Sex Status Act (South Africa)
AU	African Union
CAC	Corporate Affairs Commission (Nigeria)
CEDAW	Committee on the Elimination of Discrimination Against Women
CHRAJ	Commission on Human Rights and Administrative Justice (Ghana)
CFRN	Constitution of the Federal Republic of Nigeria
CNLS	*Conseil National De Lutte Contre le Sida* (Senegal)
COSF	Children of the Sun Foundation (Uganda)
COVID-19	Corona Virus Disease 2019
CRC	Constitutional Review Commission (Botswana)
CREAW	Centre for Rights Education and Awareness for Women (Kenya)
CSCHRCL	Civil Society Coalition on Human Rights and Constitutional Law (Uganda)
DRZ	Dette Resources Zambia
EACJ	East African Court of Justice
EFCZ	Evangelical Churches Fellowship of Zambia

EOC	Equal Opportunities Commission (Uganda)
FARUG	Freedom and Roam Uganda
FSW	female sex workers
GALAG	Gay and Lesbian Association of Ghana
GALCK	Gay and Lesbian Coalition of Kenya
GASA	Gay Association of South Africa
GLOW	Gay and Lesbian Organisation of the Witwatersrand (South Africa)
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
HRAPF	Human Rights Awareness and Promotion Forum (Uganda)
HRC	UN Human Rights Committee
ICASA	International Conference on AIDS and STIs in Africa
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILGA	International Lesbian and Gay Association
IRCC	Inter-Religious Council of Uganda
KNEC	Kenya National Examination Council
LAMBDA	Mozambican Association for the Defense of Sexual Minorities
LC	Local Council
LDH	Human Rights League (Mozambique)
LEGABIBO	Lesbians, Gays, and Bisexuals of Botswana
LEGATRA	Lesbian, Gay, Bisexual and Transgender Association (Zambia)
LGB	lesbian, gay and bisexual
LGBT	lesbian, gay, bisexual and trans
LGBT+	lesbian, gay, bisexual and trans +
LGBTI	lesbian, gay, bisexual, trans and intersex

LGBTIQA	lesbian, gay, bisexual, trans, intersex, queer and asexual
LGBTIQ+	lesbian, gay, bisexual, transgender, intersex, queer+
LIZ	Lotus Identity Zambia
MARPI	Most At Risk Populations Initiative (Uganda)
MSM	men who have sex with men
NAC	National HIV/AIDS Council (Zambia)
NCAHSAU	National Coalition Against Homosexuality & Sexual Abuses Uganda
NCGLE	National Coalition for Gay and Lesbian Equality (South Afrtica)
NGLHRC	National Gay and Lesbian Human Rights Commission (Kenya)
NGOs	non-governmental organisations
NHRC	National Human Rights Commission (The Gambia)
NHRI	national human rights institution
OAU	Organisation of African Unity
PULP	Pretoria University Law Press
RCN	Research Council of Norway
SAHRC	South African Human Rights Commission
SOGI	sexual orientation and gender identity
SSMPA	Same Sex Marriage (Prohibition) Act (Nigeria)
SALC	Southern Africa Litigation Centre
SMUG	Sexual Minorities Uganda
STIs	sexually transmitted infections
TBZ	Transbantu Association of Zambia
TEA	Transgender Education and Advocacy (Kenya)
TRRC	Truth, Reconciliation and Reparations Commission (The Gambia)
UCLT	Uganda Centre for Law and Social Transformation
UGANET	Uganda Network on Ethics, Law and HIV/AIDS
UHRC	Uganda Human Rights Commission
UNAIDS	Joint United Nations Programme on HIV/AIDS

UNIP	United National Independence Party (Zambia)
UNSG	United Nations Secretary General
UPR	Universal Periodic Review
URSB	Uganda Registration Services Bureau
USA	United States of America
WHER	Women's Health and Equal Rights Initiative
WFD	Westminster Foundation for Democracy
WMA	Minority Women in Action (Kenya)
ZMIT	Zambia Independent Monitoring Team
ZHRC	Zambia Human Rights Commission

INTRODUCTION

QUEER LAWFARE IN AFRICA: INTRODUCTION AND THEORETICAL FRAMEWORK[†]

Siri Gloppen, Adrian Jjuuko,** Frans Viljoen,*** Alan Msosa*****

1 Introduction

Since the mid-1990s, many African countries have seen a rise in legalised contestations (lawfare) over the rights of lesbian, gay, bisexual, trans, intersex, and queer (LGBTIQ+) persons. In this volume we term this *queer lawfare.*[1] Through court cases, constitutional amendments, proposed and adopted legislation, and 'rights talk', pro-and anti-queer activists and governments have weaponised the law and used it as a central tool in struggles to advance their goals. During this period, African countries have moved in very different directions with regard to queer rights. At the time when South Africa's 1994 and 1996 post-apartheid constitutions outlawed discrimination on grounds of sexual orientation (the first in the world),[2] Zimbabwe's then President Robert Mugabe, in his infamous speech at the 1995 Harare Book Fair described gay people as worse than pigs and dogs, sparking off the first major campaign of state-led anti-queer mobilisation (sometimes referred to as state-led homophobia).[3] Since then, both trends (progress and retrogression) have continued and have been amplified. In 2005, Uganda's Parliament amended the country's Constitution to prohibit same-sex marriages, while a year later in 2006,

† This research project and book is part of the RCN funded project 'Sexual and reproductive right lawfare – Global battles #230839'.

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1 We use queer as an overarching term, mindful of the fact that the term has a more specific meaning as an ideological position criticising and transgressing established gender categories, and that it is a term that is not very widely used on the continent. See discussion below.

2 See Chapter 1 on South Africa in this volume.

3 L Duke 'Mugabe makes homosexuals public enemies' *Washington Post* 9 September 1995 https://www.washingtonpost.com/archive/politics/1995/09/09/mugabe-makes-homosexuals-public-enemies/94008c9a-c402-48ad-b99d-7a4176217e43/?fbclid=IwAR3YWHRmHu3DfsxCMMaUFzyXaOKLPMkS4N2XySRYTwphK-bS3lyqNqeVXgs (accessed 2 August 2022).

South Africa legalised same-sex marriage. Three years later, Uganda's infamous Anti-Homosexuality Bill proposed the death penalty for same sex intimacy.[4]

This volume examines queer lawfare processes as they have played out over the past decades in 13 African countries: Botswana, Ethiopia, Ghana, Kenya, Malawi, Mozambique, Nigeria, Senegal, South Africa, Sudan, The Gambia, Uganda, and Zambia. In doing so, we asked five interlinked questions: How does queer lawfare differ across the African continent? What drives and shapes this phenomenon in its diversity? What is the relationship between pro-queer lawfare and the anti-gay politicisation prevailing on the continent? What are the consequences of lawfare for LGBTIQ+ groups – legally, politically, socially, and regarding health and wellbeing? And under which conditions are lawfare strategies most likely to produce beneficial outcomes for queer communities?

The chapters that follow this introduction describe queer lawfare dynamics as they play out in the different countries – in courts, mainly, but also in legislatures and constitutional bodies, in administrative agencies and other arenas where law and rights are engaged, and in public rights-based discourse. The chapters also shed light on the driving forces – the strategies of domestic actors – as well as regional and international dynamics. The various chapters include discussions on what motivates and shapes the legal actions taken by queer activists and their opponents and explore the contexts in which judges and other salient actors operate and how these shape their decisions. In doing so the book probes the proposition often made that what we see in Africa is an export of the American culture war, which has played out for decades in US courts and law-making bodies, or more generally, is driven by transnational actors and reflects global trends. The book also, in more limited ways, analyses the effects of queer lawfare that has played out across the continent. The effects explored to various extents in the different chapters include *legal effects* on the nature of the law; *material effects* for queer people on the ground, including on their physical and mental health; *attitudinal effects* on beliefs and ideas, including the self-perceptions of queer people; and *political effects* on the power-relations between different groups, and broader political dynamics. Special attention is given to whether the use of courts and law by queer activists has sparked a *political backlash*, and if so, under which circumstances and to what effects.[5]

4 See Chapter 5 on Uganda in this volume.

5 This engages the *backlash* literature, which sees the anti-queer mobilisation as a response to a more assertive queer lawfare. See for example: GN Rosenberg *The hollow hope: Courts and social reform* (1985); TM Keck 'Beyond backlash: Assessing the impact

2 Queer lawfare

The concept of *lawfare*, as used in this book, describes long-term battles over heated social and political issues, where actors on different sides employ strategies using rights, law and courts as tools and arenas. While sometimes associated with the *misuse* of law for political ends, 'lawfare' is here used as a descriptive, analytical term, de-linked from (the perceived) worthy-ness of the goal. The association with warfare is intentional and important: these are ongoing 'wars', with hard ideological cleavages and iterative battles.[6] They are typically fought on several fronts and the contestants on each side have long term goals that they seek to advance by way of incremental tactics, often responding to, or anticipating their opponents' moves, as well as other aspects of their (always potentially shifting) *opportunity structure*. We discuss the concept of actors' opportunity structure and its analytical use in more depth towards the end this chapter. For now, it suffices to say that actors' opportunity structure is about the possibilities for reaching their goals through different courses of action, including through some form of lawfare.

Lawfare strategies may include litigation to change the law through judicial review or force compliance or implementation of existing legal norms; advocacy and lobbying to make political bodies change the law through constitutional reform or new legislation; sensitivity training to change ways in which administrative bodies and other social actors understand and enforce relevant laws; as well as other forms of 'rights talk' aiming at attitudes and mindsets – including within their own pro- or anti-queer movements. Which of the strategies are open – or are perceived to be open – to particular actors will depend on the costs and barriers involved in the different strategies, and the resources the actors have or can access through their allies.

In the broad sense, lawfare can be used to describe any strategy centrally using rights or law in efforts to advance a contested political goal. Governments and state actors frequently use lawfare as the form of targeted legislation and selective law enforcement aimed at groups

of judicial decisions on LGBT rights' (2009) 43 *Law & Society Review* 151; and A Jjuuko *Strategic litigation and the struggle for lesbian, gay and bisexual equality in Africa* (2020).

6 For a more comprehensive discussion see S Gloppen 'Conceptualising lawfare: A typology and theoretical framework' (2018) https://www.academia.edu/35608212/Conceptualizing_Lawfare_A_Typology_and_Theoretical_Framwork (accessed 12 July 2022); and S Gloppen 'Conceptualizing abortion lawfare' *Revista Direito GV* 17 (2021) https://www.scielo.br/j/rdgv/a/7CV9SGHgDphL6L9TFTN6S8q/ (accessed 12 July 2022).

deemed troublesome or socially undesirable – such as sexual and gender minorities. Other political actors, such as opposition party politicians, often make claims of unconstitutionality or illegality against policies and actions undertaken by the executive, and even engage in court action to advance their aims. We also commonly see civil society actors – from social movements and non-governmental organisations (NGOs) to churches and labour unions – using legal arenas and strategies such as litigation, rights-based lobbying, and demonstrations, in their struggle for political change, ideological hegemony and social transformation.

As illustrated in Table 1 below, the broad lawfare concept encompasses not only diverse actors, but also a range of strategies and venues. These strategies include: attempts to push social change through law and constitution-making and regulative measures (*legislative strategies*); endeavours to change the law from within, by changing how courts and administrative bodies interpret, apply and enforce laws, constitutional provisions, international treaties and regulations (*court-centred and bureaucratic strategies*); and attempts to change mindsets, legal consciousness, social discourses, norms and behaviours in less institutionalised ways, through rights advocacy, art, demonstrations, sensitisation trainings and other 'rights-talk' and awareness-raising strategies (*societal strategies*). The lawfare-typology, laid out in Table 1, brings out the various facets of the law, the many sites where legal norms are made and changed – often simultaneously in mutually supportive or countervailing ways – and the different legal strategies and tactics that may serve as alternate and complementary avenues for social actors seeking to transform society in different directions. It provides a map for tracing the interplay and interaction between actors and strategies within a policy field – such as the battle over queer rights.

Table 1: The lawfare typology[7]

ARENA ACTORS	**Legislative**	**Administrative**	**Judicial**	**Societal**
Government & state actors (including public servants)	Weaponisation of • constitutional reform proposals • legislation • executive orders	Weaponisation of • Regulations, guidelines • policy • interpretation	• Strategic judicial appointments • Strategic alteration of jurisdictions, terms and conditions • Selective prosecution	Weaponisation of • public information • curriculum development
Political actors (politicians, parties)	Weaponisation of • constitution-making • law-making	Rights/(il)legality arguments regarding • policy • implementation	• Litigation • Judicial review • Judicial confirmations	Rights/(il)legality-talk in • electoral campaigns • public statements
Civil society actors – 'lawfare from below' (activists, churches, academia, artists, labour, business – domestic and international)	Rights/(ill)egality arguments in lobbying of • government • political actors	Rights/(il)legality arguments in • input to development/implementation of policy/regulations/guidelines • training of public servants (police, medical staff…)	• Strategic litigation • domestic courts • international courts • quasi-judicial bodies • threatened litigation • Training and sensitisation of judges	Rights/(il)legality-talk in • advocacy • civic education • media • demonstrations • art

Queer lawfare happens when the issues at stake concern rights related to non-heteronormative sexual orientations and non-cis gender identities and expressions. The overarching terms used to describe these contestations vary, globally and on the African continent, but they are commonly

7 The Table is adapted from S Gloppen 'Conceptualizing abortion lawfare' (n 6).

referred to as struggles for the rights of LGBTIQ+ (or LGBT, LGBTI, LGBTIQA) people, 'sexual and gender minorities', 'homosexuals', or 'queer'. We use the term *queer* in this volume. We do this, mindful of the more specific meaning of 'queer' as an ideological position criticising and transgressing established gender categories.[8] We also acknowledge that in most African contexts, 'queer' is not the most commonly used overarching term. However, the main catch-all terms in public debate are *homosexuality* – or *gayism,* to indicate that this should be considered an ideology. These terms are, however, generally used in a derogatory way and also reflect that sex between people (men) of the same gender is what is at the core of public and political debate, while everywhere the issues at stake are in fact wider. Trans-people, in particular, are frequently targets of hatred and have been central in legal struggles for recognition. While we use 'queer' as an overall term, the chapter authors were given free rein to use the terminology that they are comfortable with and feel is most appropriate for their context and focus, hence some use 'sexual minorities' or 'sexual and gender minorities', while others use LGBTIQ+ or aspects of this acronym (LGB, LGBT, LGBTI), or discuss the contestations in terms of (anti) homosexuality or gayism, where they see the need to reflect the common framing locally.

3 The contemporary state of the law regarding queer rights[9]

Almost half of the countries in the world that criminalise homosexuality are in Africa, and sexual intimacy between men is legal in only 22 of 54 African countries. In most cases, criminalisation of 'carnal knowledge against the order of nature', or similarly vague provisions, were introduced under colonial rule. In some countries – including many (but far from all) former French colonies – homosexuality was never criminalised: Benin, Burkina Faso, Côte d'Ivoire, Democratic Republic of Congo (DRC), Djibouti, Equatorial Guinea, Madagascar, Mali, Niger, and Rwanda. Other countries have de-criminalised homosexuality in recent decades, including all the Lusophone African countries: Guinea-Bissau

8 The latter meaning of the term is also used in some chapters. For a discussion on queer theory see J Butler 'Critically queer' in S Phelan (ed) *Playing with fire: Queer politics, queer theories* (2020) 11-29.

9 This section draws on Human Rights Watch 'LGBT Rights: #OUTLAWED "THE LOVE THAT DARE NOT SPEAK ITS NAME"' http://internap.hrw.org/features/features/lgbt_laws/ (accessed 2 August 2022); G Reid 'Progress and setbacks on LGBT rights in Africa – An overview of the last year' *Human Rights Watch* (22 June 2022) https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year; (accessed 2 August 2022). See also S Gloppen & L Rakner 'LGBT rights in Africa' in C Ashford & A Maine (eds) *Research handbook on gender, sexuality, and the law* (2020) 194-209.

decriminalised in 1993, Cape Verde in 2004, São Tomé and Príncipe in 2012; Mozambique in 2015; and Angola in 2021. In Equatorial Guinea, as noted above, homosexual relations were always legal. Other countries that have decriminalised same-sex sexual relations are: South Africa in 1998; Lesotho in 2012; the Seychelles in 2016; Botswana in 2019 (confirmed by the Court of Appeal in 2021); and Gabon in 2020. In most cases decriminalisation has been done through legislation, but in Botswana and in South Africa the courts have taken centre stage, as the chapters in this volume demonstrate. As noted, South Africa has a constitutional prohibition on discrimination based on sexual orientation and statutory provisions providing for equality of rights and treatment. Angola, Botswana, Cape Verde, Mauritius, Mozambique, and the Seychelles also have some anti-discrimination provisions in their laws.

Some countries on the continent have gone in the other direction. Burundi criminalised same-sex relations for the first time in 2009. Several countries have proposed or enacted harsher penalties for homosexual sex and have criminalised a broader range of activities, including advocacy and information about LGBTIQ+ issues. Nigeria has enacted legislation that makes it illegal to support LGBT people.[10] A heterosexual 'who administers, witnesses, abets or aids' gender non-conforming and homosexual activities could receive a 10-year jail sentence.

Interestingly, among the African countries that have decriminalised homosexuality, Botswana, Lesotho and South Africa are the only ones with a (predominantly) common law legal system. All the others, Angola, Cape Verde, Gabon, and Mozambique are broadly within the civil law tradition. The other countries with most significant queer related litigation, most notably Kenya and Uganda are also common law countries. This pattern fits with a general presumption in the literature that common law legal systems lend themselves more easily to mobilisation through strategic litigation. While there has been a convergence between civil and common law systems, and there are civil law countries globally where LGBTIQ+ rights have been advanced through the courts (including Brazil and Austria),[11] in Africa, there still is a pattern with more court-centred mobilisation in common law countries. Lesotho, however, presents

10 For a detailed discussion of these developments, see generally, A Jjuuko & M Tabengwa 'Expanded criminalisation of consensual same sex relations in Africa: Contextualizing the recent developments' in N Nicol et al (eds) *Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope* (2018) 63.

11 See A Côrtes 'Between legislation and constitutional courts: The recognition of rights for LGBT persons in countries with a civil law legal system' draft doctoral thesis. University of Coimbra, Portugal, 2022.

the possibility that legislative change can happen even in common law countries, so they do not just have the judiciary to rely on.

Penalties for homosexuality vary radically from a fine to life in prison (in Sierra Leone, Tanzania and Uganda for example) or even death (in Mauritania, Northern Nigeria, Somaliland, and until recently in Sudan). In most African countries sodomy provisions were 'sleeping' in the post-colonial era, sometimes even generally unknown.[12] With the increased politicisation of queer issues in recent years, enforcement has become more frequent in many countries. In Egypt, where there is no formal legal ban on same-sex relations, sex between men has been *de facto* illegal, and frequently enforced, since 2000.

While South Africa is the only African country that provides for same-sex marriage in the law (since 2006, albeit in a way that makes such marriages inferior to heterosexual marriages as Barnard-Naude & de Vos show in Chapter 1 of this book), several countries have enacted constitutional bans on same-sex marriage, typically stating that marriage is between a man and woman. Bans on same-sex marriage have been introduced in the Constitutions of Burkina Faso (1991): Rwanda (2003); Burundi (2005); Uganda (2005); Democratic Republic of Congo (2005); Kenya (2010); South Sudan (2011); Zimbabwe (2013), and the Central African Republic (2016). In Kenya, a proposal to introduce a constitutional prohibition on discrimination on the grounds of sexual orientation – as in the South African Constitution – was discussed in the constitution-making process, but a counter-mobilisation prevailed resulting in the adoption of the ban on same-sex marriage. This illustrates how lawfare-processes may play out – and lead to backlash – in the constitutional arena (see the chapter by Orago, Gloppen and Gichohi in this volume).

Most countries have no laws regarding intersex persons, or gender identity and expression, but some (Botswana, Kenya, Namibia, South Africa) have provisions enabling change of gender or protection against discrimination. A few countries have introduced bans against gender non-conforming expressions (Nigeria Sharia provinces, South Sudan, The Gambia).

4 Politicisation of queer identities and rights

As a result of the multiple and interlinked processes that will be explored throughout the book, we have seen an extensive and escalating *politicisation*

12 For example in Senegal, where even academic literature would assume that there were no laws against homosexuality.

of homosexuality in Africa since the mid 1990s. By politicisation we mean a process whereby latent prejudices and moral values become socially and politically salient, often through the actions of *norm-entrepreneurs*.[13] These prominently include religious and political actors who activate and transform norms for intrinsic or strategic reasons. The politicisation has deteriorated the situation for queer people in many African countries in the past decade, both regarding rights and policies, and in terms of everyday ostracism and violence. The country chapters in this book explore these politicisation dynamics as they play out locally. In some politicised contexts, such as in Uganda and Kenya, activists have engaged actively in lawfare strategies. In other politicised contexts, queer activists have adopted 'activism from the closet' strategies, as described in the chapters on Sudan and Ethiopia. In yet other contexts, politicisation has been less pronounced, as in the cases of Mozambique and Botswana, where the law has been liberalised in recent years.

In many African countries, anti-gay rhetoric is central to populist electoral mobilisation. Politicians appeal to homophobic prejudice and the threats that *gayism* poses against 'traditional values' and the *Africanness* of the society, including how it undermines African masculinities, and patriarchal family norms.[14] Homosexuals and their allies are accused of corrupting and defiling children and youth, and jeopardising the social fabric and national identity.

Religious arguments feature centrally in anti-queer rhetoric. The national identity as a Christian/Muslim nation is portrayed as irreconcilable with tolerating homosexuality. This may include arguments of divine punishment, with references to the biblical Sodom and Gomorrah, where tolerating homosexuality is alleged to have brought God's punishment. By implication, queers can be given the blame for anything from natural disasters such as floods and drought, to governance failures including crime, corruption, and lack of economic growth and development, to the COVID-19 pandemic. This alleviates governments' responsibilities for social problems and makes fighting homosexuality a good governance issue and a moral duty.[15]

13 On norm entrepreneurs see CR Sunstein 'Social norms and social roles' (1996) 96 *Columbia Law Review* 903; M Finnemore & K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organization* 887; P Awondo 'The politicisation of sexuality and rise of homosexual movements in post-colonial Cameroon' (2010) 37 *Review of African Political Economy* 315.

14 See C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018)

15 For a more in-depth discussion on the role of religion and religious leaders in sexuality politics in Africa see E Chitando & A Van Klinken (eds) *Christianity and controversies*

As noted in some of the chapters and in other literature, fast-rising Evangelical churches have been central in whipping up homophobic attitudes – and in delivering votes. They engage in politics in more direct ways than the traditional churches. Evangelical pastors in some cases serve as Members or Parliament (MPs) and Government Ministers, and the churches forge alliances with executives and first ladies, thus infusing moral renewal-theology into politics in very direct ways. This has in turn radicalised other churches who are losing ground in terms of constituents and political influence. At the same time, the Vatican's war on liberal gender ideology has radicalised the Catholic Church internationally on these issues, and in some predominantly Muslim countries, the politicisation of homosexuality seems to be associated with the rise of more radically conservative religious groups. Anti-queer politics serves as a basis for alliances and coalitions. It unites religious opinion-leaders – who may be driven by firmly held moral views or by strategic concerns – with opportunistic politicians who use it to acquire or stay in power. It also serves as a basis for coalition building with traditional leaders, who convey legitimacy on politicians and generate votes among their constituencies. And for the media, queer-bashing is good for sales, which makes them willing and useful allies for politicians and other norm-entrepreneurs.

Anti-queer rhetoric thus serves as a form of all-purpose political currency for myriad social and political actors.[16] Since first employed by President Mugabe, it has been a useful lightning rod, diverting attention from corruption scandals, increasingly autocratic rule, mismanagement, lack of delivery, and economic hardship. In a context where queer rights have been central to donor agendas, homosexuality is portrayed as an export of degenerate western values that lure the youth and destroy the fabric and traditions of African societies. This line of attack has provided a shield against international criticism on a broad range of issues, including corruption, and has in some cases turned the international criticism into an advantage. Domestic critics defending queer rights or human rights more broadly, are portrayed as foreign agents and discredited by proxy. Arguments that western donors only care about gays – and when they say human rights, they really mean gay rights – undermine the broader human rights agenda, and allow for international criticism to be countered as neo-colonial meddling and breach of national sovereignty. This has also been

over homosexuality in contemporary Africa (2016) 171; K Kaoma 'The paradox and tension of moral claims: Evangelical Christianity, the politicization and globalization of sexual politics in sub-Saharan Africa' (2014) 2 *Critical Research on Religion* 227; K Kaoma 'Contesting religion: African religious leaders in sexual politics' in K Kaoma *Christianity, globalization, and protective homophobia* (2018) 47-72.

16 See for example M Gevisser *The pink line: Journeys across the world's queer frontiers* (2020).

used as an argument for introducing or tightening NGO laws, denying registration, or restricting funding to civil society organisations.

In this situation, this volume aims to shed light on a central question that is vexing queer activists and pro-rights scholars alike: is there a causal link between the legal mobilisation of queer rights and the anti-gay politicisation on the continent? Such a link has been argued with regard to the United States, and is known as the *backlash hypothesis.*[17] Is the politicisation against queer lives and rights on the African context a backlash against the greater visibility of queer activists and domestic attempts to advance their rights? And if so, what are the triggers at play? And if not, what is then causing the counter-mobilisation?

In some African countries, there were domestic mobilisation and litigation efforts prior to politicisation, as demonstrated by the country chapters on Uganda and Kenya. Domestic mobilisation provided visibility to queer issues and could potentially be a trigger. Other possible domestic triggers include greater visibility of same-sex sexual relations with men who have sex with men (MSM) as target populations for HIV/AIDS programmes (as discussed in the Senegal chapter). At the same time, other factors might independently trigger political dynamics. One is the growth in the number of evangelical Christians and Muslims, both faiths with a strong anti-queer focus globally. This growth has led to increased competition between churches, where the traditional churches also have become more outspoken in particular their anti-queer stance. The deeply religious nature of most African societies may also lend themselves more easily to politicisation on morally charged questions by religious norm-entrepreneurs, than more secular societies. As noted above, Evangelicals also engage more directly in electoral politics.

Some scholars also point to latent homophobia in African society, based on surveys that show strongly negative attitudes towards queer people and issues across most of the continent. AR Flores at the Williams Institute of Law has combined available data across several surveys for questions regarding queer issues and rights, and based on this has ranked 175 countries according to a Global Acceptance Index. The score indicates the average LGBT acceptance in the population where 1 is totally hostile and 10 fully accepting.[18] Table 2 shows the results for the countries analysed in this book.

17 See for example: Rosenberg (n 5); Keck (n 5).

18 See AR Flores 'Social acceptance of LGBTI people in 175 countries and locations,

Table 2: Country ranking by their average LGBTI Acceptance Index score in 2017-2020 (out of 175 countries)[19]

Rank	Country	Score
# 37	South Africa	6.01
# 68	Mozambique	4.92
# 80	Botswana	4.30
#104	Uganda	3.63
#106	Kenya	3.62
#137	Sudan	2.99
#154	Ghana	2.68
#160	Gambia	2.44
#161	Nigeria	2.18
#165	Zambia	2.04
#168	Senegal	1.85
#170	Malawi	1.75
#171	Ethiopia	1.63

We see that there are considerable differences between these countries regarding the average LGBT acceptance in the population. South Africans, with a score of six, are moderately positive, raking in the top quantile of the 175 countries (#37). Mozambique (#68) and Botswana (#80) also rank in the upper half, with scores of 4.3 and 4.9, which indicates that the population is neither positive nor strongly negative. At the other end of the scale, Ethiopia (#171), Malawi (#170), Senegal (#168), Zambia (#165), Nigeria (#161), and The Gambia (#165), are all among the world's least LGBT accepting societies with scores of less than 2.5. Acceptance scores between 1.8 and 2.4 indicate that the population is radically LGBT hostile. Uganda (#104), Kenya (#106), Sudan (#137), and Ghana (#154), also rank low with scores between 2.6 and 3.7.

The predominance of negative attitudes in most of these countries, in many cases strongly hostile, suggests that there are fertile grounds for anti-queer mobilisation. But without historical data, we cannot know to

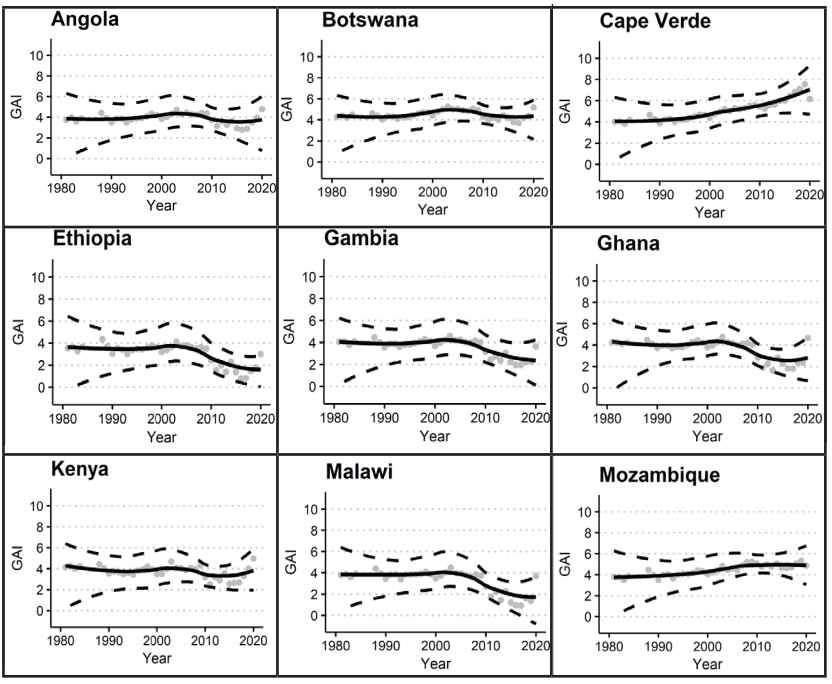
1981 to 2020' *Williams Institute of Law* (2021) https://williamsinstitute.law.ucla.edu/wp-content/uploads/Global-Acceptance-Index-LGBTI-Nov-2021.pdf (accessed 1 August 2022). In the analysis Flores draws among other on data from Pew, the World Value Survey, and Afrobarometer. See also RM Mathisen 'A postmaterialist explanation for homophobia in Africa: Multilevel analysis of attitudes towards homosexuals in 33 African countries' Master's thesis, University of Bergen, 2018 https://www.lawtransform.no/wp-content/uploads/2018/08/Master-2.0-version-3-3-min.pdf (accessed 2 August 2022).

19 The data are from Flores (n 18).

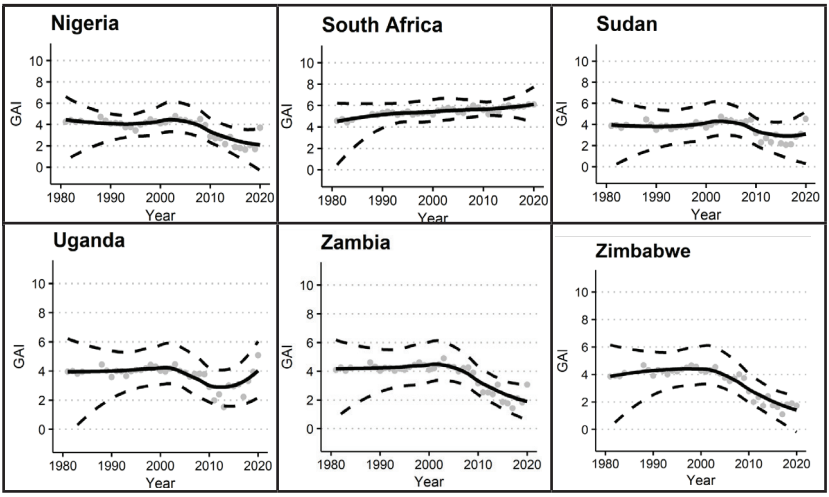
what extent the politicisation can be explained by pre-existing low LGBT acceptance, or if it is the other way around – that increasing politicisation has influenced attitudes and created more LGBT hostility.

Historical data are scarce, but Flores has also collected available material from the years 1981 to 2020 and constructed trajectories for a large share of the 175 countries, including all of the countries analysed in this volume except Senegal. Along with a few additional countries, these trajectories are shown in Figure 1. The solid lines indicate the trajectory of LGBT acceptance for each country between 1981 and 2020, while the dotted lines are the margin of error. This is in most cases quite wide, which means that there is considerable uncertainty around the data due to few or diverging sources. This is particularly pronounced for the early part of the period, but the graphs still give an interesting indication of the developments.

Figure 1: Historical change in LGBT acceptance 1981-2020[20]



20 The figures are extracted and reprinted from Flores (n 18).



While trajectories for the early period are uncertain, it is interesting that there is reason to believe that LGBT acceptance was quite similar (moderately negative) across the continent in the 1980s and 1990s, before starting to diverge around 2000. Then we start to see an increasingly negative trend in public LGBT acceptance in many countries, particularly where the political elite engage in anti-queer rhetoric. In the countries that de-criminalised homosexuality around 2000 (South Africa and Cape Verde) the population has become more LGBT accepting over time, and attitudes also remained stable or improved slightly in the countries that later in the period decriminalised same-sex relations (Angola, Botswana and Mozambique).

These patterns suggest firstly, that politisation may be driving attitudes rather than the other way around, and secondly, that legal changes may nudge shifts in attitudes. The trajectories for Kenya and Uganda are worth noting. Kenya has a relatively stable trend, without a clear rise of LGBT hostility. In Uganda – globally known for anti-homosexuality politics – LGBT acceptance in the population, after declining around 2000s, seems to have improved again after 2015. As we will see in the respective chapters, these two countries have seen considerable queer lawfare – in the courts, in the constitutional and legislative domain, in advocacy, and in public discourse. This could suggest that virulent anti-queer politicisation does create a visibility and awareness around LGBTIQ+ lives and issues that, if combined with pro-queer lawfare, might in the longer term contribute towards more positive attitudes.

We also need to bear in mind that these countries are not isolated from regional or global currents. Could politicisation and attitudinal

changes be a response to developments elsewhere rather than to domestic developments? Are they feeding off global trends of rising tolerance for queer people and advancement of their rights, and global pushback against this? All regions of the world have seen significant legal changes in response to a global rise of (anti-) queer lawfare. These might be independent developments, with similar underlying conditions triggering parallel politicisation reactions across regions. But it could also be related.

Polarisation in a particular country could be triggered by a desire to avoid – or achieve – what happened elsewhere. Local actors might be inspired by and learn strategies from developments in South Africa, Uganda or the United States of America (USA). Given that we know that there are international networks of (anti-) queer activists, and conscious efforts to export rhetoric and lawfare strategies, it is likely that what we see in part can be ascribed to transnational diffusion.[21]

In most African countries we find transnational and regional activist networks on all sides. These are involved in (anti-) queer lawfare in various ways, including in strategising and funding. Signs of transnational influences include similar lawfare strategies; transnational use of jurisprudence (for example, the Indian supreme court judgment decriminalising homosexuality was immediately used in litigation in Kenya); there are similar rhetorical strategies used across countries and regions, and similar anti-homosexuality laws are introduced in different countries. There also seem to be strong transnational movement – countermovement dynamics, for example, the legalisation of same-sex marriage in South Africa, could be seen as a factor sparking a 'pre-emptive' constitutional provisions in Uganda and Kenya stating that marriage is between man and woman. The country chapters will provide us with more insights into these dynamics.

5 Theoretical framework and methods

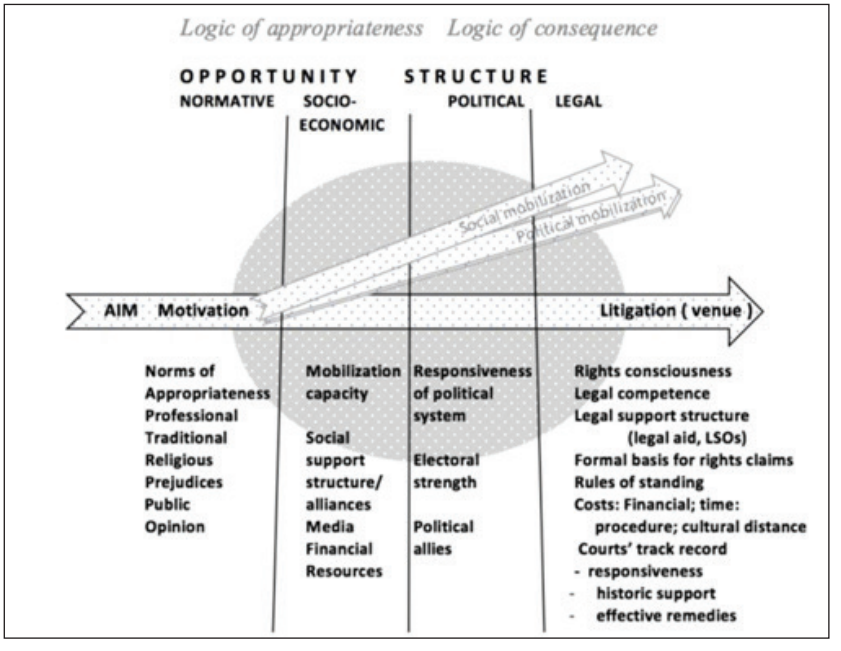
To sum up the discussion above: the chapters in this book analyse dynamics and driving forces of the legalised contestations over queer rights and lives that various actors pursue in different arenas, seeking to understand the consequences of this lawfare for queer lives. To do so, they use a combination of doctrinal analysis of the legal developments that have taken place through legislation and evolving jurisprudence, and qualitative socio-legal analysis of the mobilisation processes that have brought the changes and their social and political consequences, with a

21 See for example K Velasco 'Human rights INGOs, LGBT INGOs, and LGBT policy diffusion, 1991-2015' (2018) 97 *Social Forces* 377.

focus on the impact on the rights, health and lives of queer populations in the different countries.

To understand the various uses of lawfare in these cases, the book applies an analytical framework disentangling the different actors' *opportunity structures.*[22] The concept of opportunity structure is a heuristic tool that helps disentangle the many factors that in each context is likely to impact different actors' strategic decisions regarding how to pursue their goals. The focus in this book is mainly on queer activists' decisions and opportunity structures, but the framework is equally applicable to other actors, including governments. In the following chapters, we illustrate the framework as it is applied to analysis of activists' decisions regarding whether to engage in strategic litigation, but it is also applicable to other forms of lawfare. Figure 2 gives an illustration of some significant elements in an activist's choice situation and opportunity structure.

Figure 2: Queer activists' choice situation and opportunity structure[23]



22 For a more in-depth discussion of the analytical framework see Gloppen 'Conceptualising lawfare: A typology and theoretical framework' (n 6); and Gloppen 'Conceptualizing abortion lawfare' (n 6).

23 Reprinted from S Gloppen 'Conceptualising lawfare: A typology & theoretical framework' (2018) 17: 'Figure 2a. Activists' choice situation – ''mere'' legal mobilisation.'

A main question in the analysis of court-based lawfare will typically be why the actors in a particular context have chosen to engage in litigation instead of pursuing other possible forms of lawfare (as illustrated in the lawfare map in Table 1 – or non-lawfare strategies). When analysing such decisions, two elements are central. One is to understand the *choice situation* of the actors – how their cultural embeddedness, norms, and epistemological frames shape how they see themselves and the world, including what are possible and acceptable actions. For example, if the queer activists are predominantly lawyers, living in a society where litigation is a common form of activism, they are more likely to consider going to court than if they have no legal expertise, or if there is no tradition for strategic litigation, or if going to court is considered inappropriate. The other element in the analysis is the actors' *opportunity structure*. While the *choice situation* refers to the actors' internal limitations, norms and mental frames, the *opportunity structure* is the social, political and legal context in which they operate and that determines the possibilities for advancing their goal by pursuing different types of action. If the *legal opportunity structure* is closed – because barriers to entering the legal system are high in terms of legal requirements, monetary costs, time, or need for legal expertise, or if the probability of winning in court is low – activists are less likely to pursue strategic litigation than if the legal opportunity structure is open.

However, this also depends on whether other avenues for change are available. If change through political mobilisation is blocked because of intense anti-queer sentiments across the political elite (a closed *political opportunity structure*) or if there is intense LGBT hostility in society so that social mobilisation seems unlikely to gain ground (a closed *social opportunity structure*) litigation may still be considered the best option. The openness of the different aspects of the opportunity structure also depends on the resources available to the activists and their fit with various strategies. If activists for example have in-house legal expertise, dedicated funding for litigation, and foreign allies that provide additional legal expertise, litigation may seem a better option.

For any given actor the opportunity structure depends on other actors' behaviour and strategic choices. For example, the openness of the legal opportunity structure depends on whether judges are (perceived as) likely to rule in favour of the case, and whether a positive court decision is likely to be implemented. Whether a court is likely to accept the case and rule in its favour, in turn depends on the *judges' opportunity structure*. This depends among other factors on whether the independence of the judiciary is respected, on the nature of the law, their training, and their private convictions regarding queer rights (which in turn is influenced by

their religious and political conviction and how they think their relevant others will react to a court decision in favour of queer rights).

Opportunity structures also change over time. If the political elite becomes more LGBT accepting, the political opportunity structure for queer activists become more open and lobbying for legislative and policy change may become a better option. Favourable court decisions may make future litigation more likely to succeed. And new allies in the media or among queer-friendly celebrities, may make social mobilisation a better avenue for change.

The iterative nature of these lawfare processes, and the ways in which the actors' opportunity structures are interlinked are also important to consider. Each actor's opportunity structure and strategic choices is in part a consequence of the past and anticipated future actions of others (opposing and allied) actors in the ongoing battles.

6 The structure of the book

Following this introductory chapter, which has presented the context and history of queer lawfare in Africa, as well as the conceptual framework for the book, the first part of the book presents country cases in which court-centred lawfare and legislative processes has decriminalised same-sex intimacy, thus changing the situation for the better for queer people. These chapters inquire into the nature of the lawfare, and the legal changes brought about in Botswana, Mozambique, and South Africa, asking what the driving forces in each of the cases have been, and to what extent the lives of queer people have changed.

The second part of the book presents cases where significant and diverse queer lawfare strategies are undertaken in contexts marked by widespread anti-queer attitudes and high levels of politicisation, bringing both gains and setbacks for queer activists. The country cases in this part are Kenya, Malawi, Nigeria and Uganda.

The third part of the book analyses countries marked by high levels of anti-queer animosity, used by the political elite in nationalistic mobilisation, but with limited lawfare from pro-queer activists. The cases here are Ethiopia, Ghana, Senegal, Sudan, The Gambia and Zambia. In some cases such as Ethiopia and Sudan, we note the existence of 'lawfare from the closet', aiming primarily at internal movement-building. Finally, the conclusion engages in an analysis across the diversity of cases to identify some comparative trends and conclusions.

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PART I:

Lawfare in the context of liberalisation and protection of the sexual rights of LGBT people in Africa

1 War by other means: The law and politics of sexual minority freedom in post-apartheid South Africa

Jaco Barnard-Naudé & Pierre de Vos***

1 Introduction: Setting the scene

Michel Foucault's lecture series of 1975-1976 at the College de France (published under the title *Society must be defended*)[1] famously inverted Clausewitz's definition of war as 'the continuation of politics by other means',[2] in order to provide an analysis of power from the point of view that 'politics is the continuation of war by other means'.[3] Around the same time, critical legal thought, heavily influenced by Foucault, began to insist and illustrate that 'law is politics'.[4] Reading these two arguments together provokes the conclusion that law is inescapably implicated in the definition of politics as the continuation of war by other means. As Foucault asks in *Society must be defended*:

> If we look beneath peace, order, wealth, and authority, beneath the calm order of subordination, beneath the State and State apparatuses, beneath the laws, and so on, will we hear and discover a sort of primitive and permanent war?[5]

In this precise sense alone, Foucault is the original thinker of that which today marches under the banner of 'lawfare'. Far from relegating law to the outskirts of modernity (as Foucault is often (mis)read), the *Society must be defended* lectures show that Foucault considered law, which he did

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1 M Foucault *Society must be defended: Lectures at the Collège de France, 1975-1976* (2004).

2 Foucault (n 1) 21.

3 Foucault (n 1) 15.

4 For an overview, see P Schlag 'Notes toward an intimate, opinionated, and affectionate history of the Conference on Critical Legal Studies' 36 *Stanford Law Review* 391. Also see P Schlag 'Foreword: Postmodernism and law' (1991) 62 *University of Colorado Law Review* 439, at 448 where the author makes the direct Foucaultian link between law, politics and power: '[l]aw is politics, not because law is subject to political value choice, but rather because law is a form that power sometimes takes'.

5 Foucault (n 1) 47.

not distinguish rigorously from politics, as an indispensable modality of power in modernity.

In this chapter, we aim to show that there are critical moments in the legal discourse on sexual minority freedom in post-apartheid South Africa that are punctuated by a certain logic or mentality, no matter how subtle, of warfare – a logic which is not very far removed at all from the overt logic of warfare that permeated apartheid era law and politics. Despite the inclusion in South Africa's post-apartheid Constitutions, of 'sexual orientation' as a ground of presumed unfair discrimination, the struggle for sexual minority freedom in the postcolony has generated a protracted and equivocal judicial and legislative discourse of power from which the homosexual legal subject emerges as at once liberated and thoroughly *disciplined*, that is, put in her (heteronormative) legal place.

We begin by laying out the complex record of 'sexual orientation' as a ground of presumed unfair discrimination in the post-apartheid Constitutions. There can be no shortcuts here, since our argument turns on the idea that each judicial and, later, legislative development constituted a critical moment in the assembly of a legal discourse that remains in operation today. The historical trajectory can be summarised as the move from decriminalisation to incremental recognition – specifically of same-sex relationships and families – to legislative reform. We proceed to argue that the recognition jurisprudence (that is, the jurisprudence that followed decriminalisation) constituted a disciplinary regime of power/knowledge in relation to the homosexual legal subject. This regime revolves around two closely related discursive constructions: the 'good' homosexual subject and the 'permanent same-sex life partnership'. Having put this regime of power/knowledge to work, the Constitutional Court ironically proceeded to disavow its validity in the *Fourie*[6] case, in which it declared the heteronormative definition of legal marriage in the common law and the 1961 Marriage Act unconstitutional. However, this disavowal proved to be largely without consequence, in that the knowledge regime that had been constituted in the recognition jurisprudence dominates the legislative reform represented by the Civil Union Act.[7] We conclude that the legal history of sexual minority freedom in the postcolony period reveals a picture of South Africa as what Foucault in the above lectures called a 'binary' society;[8] the society at war with itself, the society, even, at war with its own law. In closing, we rely on Golder and Fitzpatrick's reading of Foucault's law, to argue that the legal future of sexual minority freedom

6 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

7 Act 17 of 2006.

8 Foucault (n 1) 51.

in South Africa might still be different to the heteronormative hegemony that has been imposed upon it through lawfare.

2 The political and legal history of sexual minority freedom in post-apartheid South Africa

2.1 The inclusion of 'sexual orientation' in the post-apartheid Constitutions and decriminalisation

The history of the legal recognition of sexual minority freedom in South Africa begins with the story of gay anti-apartheid activist Simon Nkoli. Jacklyn Cock remarks that, in the period between 1987 and 1990, the gay rights movement that was already established in South Africa, 'expanded and was able to place gay issues on the agenda of the anti-apartheid struggle both in South Africa and abroad'.[9] Nkoli and his prominence as a freedom fighter and openly gay black man within the struggle played a key role in forging a particularly strategic alliance between the gay rights movement and the mass democratic movement.[10] In 1987, Nkoli – at the time, a member of the Gay Association of South Africa (GASA)[11] – was arrested, detained and, along with 19 others, charged with 'high treason' in the highly publicised Delmas treason trial.[12] After his acquittal, Nkoli became chairperson of the Gay and Lesbian Organisation of the Witwatersrand (GLOW) which organised, in 1990, the first public LGBTQI parade in South Africa. In his address at the march, Nkoli said:

> I'm fighting for the abolition of apartheid, and I fight for the right of freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I am not free as a gay man.[13]

Cock convincingly argues that it was Nkoli's embodiment and assertion of a link between the black liberation struggle and the struggle for sexual minority freedom that 'shifted the attitudes of key political actors'.[14]

9 J Cock 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' (2002) 26 *Women's Studies International Forum* 35 at 36.

10 Cock (n 9) 36-38.

11 GASA, in Cock's words, was a 'largely white, middle class, and male' organisation with a pronounced apolitical stance. It's failure to support Nkoli after his arrest as well as its general failure to link the struggle for sexual minority freedom with the struggle against apartheid, resulted in its eventual expulsion from the International Lesbian and Gay Association (ILGA) in 1987. See Cock (n 9) 37.

12 Cock (n 9) 36.

13 As above.

14 As above.

This attitudinal shift became concrete when the African National Congress (ANC) included in its pre-democracy constitutional proposals[15] the following wording: 'the right to be protected from unfair discrimination must specifically include those discriminated against on the grounds of ethnicity, language, race, birth, *sexual orientation* and disability'.[16] This wording represented a clear recognition of the particularly harsh fate that sexual minorities suffered as a result of apartheid law.[17] The inclusion of 'sexual orientation' in the ANC's pre-constitutional proposals paved the way for section 8(2) of the interim Constitution of the Republic of South Africa of 1993,[18] which famously became the first constitutional provision in the world expressly to prohibit unfair discrimination, directly or indirectly, on the ground of 'sexual orientation'.[19] In 1994, the National Coalition for Gay and Lesbian Equality (NCGLE),[20] established itself with the explicit purpose of coordinating the lobbying for the retention of 'sexual orientation' in the 1996, so-called 'final', Constitution (the Constitution). The NCGLE's submissions to the Constitutional Assembly

15 ANC Policy Proposals for a Final Constitution http://www.anc.org.za/ancdocs/policy/building.html#BILL (accessed 1 October 2006). Adopted by the National Conference of the African National Congress on 31 May 2002.

16 ANC Policy Proposals (n 15) (emphasis added). For a detailed account of the way in which the sexual orientation clause found its way into the South African Constitution, see EC Christiansen 'Ending the apartheid of the closet: Sexual orientation in the South African constitutional process' (2000) 32 *Journal of International Law and Politics* 997. See also MF Massoud 'The evolution of gay rights in South Africa' (2003) 15 *Peace Review* 301; and S Croucher 'South Africa's democratisation and the politics of gay liberation' (2002) 28 *Journal of Southern African Studies* 315.

17 Examples of apartheid legislation in this regard include the Immorality Act 21 of 1950, which criminalised interracial sexual intercourse; the Prohibition of Mixed Marriages Act 55 of 1949, which prohibited interracial marriage; the Sexual Offences Act 1957, which provided for the criminal proscription of unnatural sexual acts committed between men 'at a party'; and the inclusion of the common law crime of consensual male sodomy in schedule 1 of the Criminal Procedure Act of 1977, which provided that a person who was suspected of having committed the crime of sodomy could be killed if, during the pursuit of the suspect, such suspect resisted arrest.

18 Constitution of the Republic of South Africa, 1993 (interim Constitution). This Constitution came into effect on 27 April 1994 – the date of the first democratic elections in South Africa.

19 Commentators refer, somewhat carelessly, to this inclusion as the 'key challenge to the edifice of heteronormativity through the "queering" of the Constitution'. See M Steyn & M Van Zyl 'The prize and the price' in M Steyn & M Van Zyl (eds) *The prize and the price: Shaping sexualities in South Africa* (2009) 3. As this chapter will show, it does not follow, without more, that the mere inclusion of sexual orientation as a ground for presumed unfair discrimination sparks any meaningful queering of the Constitution. A Constitution is read, interpreted and given effect to by the courts, the legislature, the executive and the body politic. Queering the Constitution – if there is such a thing – depends in the final instance on the collective (ethico-political) practices of these bodies.

20 The NCGLE represented 65 member organisations.

– the political body tasked with the drafting of the Constitution – played a central role in the retention of 'sexual orientation' as a ground of prohibited unfair discrimination in section 9(3) of the Constitution.

In the case of *S v K*,[21] the Cape High Court became the first court in South Africa to declare that the common law crime of male sodomy ceased to exist after the coming into operation of the interim Constitution on 27 April 1994. The decision, however, only applied in the geographical jurisdiction of the Cape High Court. In addition, the Constitution had not yet come into operation when the alleged offence occurred that led to the accused in *S v K* being charged (although the High Court in *S v K* held that the criminalisation of sodomy was, in any event, also inconsistent with the provisions of the final Constitution that had come into effect when the accused appeared in court for the first time).[22] By the time that the *S v K* case was decided, the NCGLE had devised a litigation strategy on the basis that it would approach the courts first to deal with the most egregious and obvious forms of discrimination, before tackling the politically more contentious forms of discrimination such as the effective legal prohibition of same sex marriage.

As a result of the unsatisfactory judicial outcome in *S v K,* the NCGLE brought a case before the Witwatersrand High Court applying for an order declaring unconstitutional the common law crimes of sodomy and the commission of 'unnatural sexual acts between men' as well as various legislative provisions in connection with such criminalisation, including the infamous 'men at a party' provisions of section 20A of the Sexual Offences Act.[23]

The Witwatersrand High Court declared the common law crimes as well as all the related statutory provisions unconstitutional.[24] The Constitution, however, provides that where a lower court declares an Act of Parliament unconstitutional, such an order, to have force and effect, must be referred to the Constitutional Court for confirmation.[25]

21 1997 (4) SA 469 (C).

22 *S v K* (n 16) para 3.

23 See in this regard see *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W) paras 7-9 and 13.

24 *National Coalition for Gay and Lesbian Equality* (n 23).

25 Section 172(2)(a) of the Constitution provides as follows: 'The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.'

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[26] the Constitutional Court held that a confirmation of the constitutional invalidity of the statutory provisions necessarily required it to pronounce on the constitutionality of the underlying common law crimes.[27] To this extent, the Court carefully considered the meaning of 'sexual orientation' in section 9(3) of the Constitution and adopted a broad and generous interpretation of the phrase:

> [S]exual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.[28]

The Court held that the phrase applied equally to bisexual orientation and transgendered individuals as well as to those who, on a single occasion, find themselves attracted to a member of their own sex.[29] The Court concluded that the discrimination represented by the legislation and the common law was unfair and therefore contrary to the right to equality envisaged in section 9 of the Constitution.[30] It also held that the criminal proscriptions violated the right to dignity under section 10 of the Constitution:

> There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.[31]

The Court furthermore held that the impugned provisions infringed on the right to privacy:

> The fact that a law prohibiting forms of sexual conduct is discriminatory, does not, however, prevent it at the same time being an improper invasion of the intimate sphere of human life … We should not deny the importance of a

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

27 *National Coalition for Gay and Lesbian Equality* (n 26) para 9.

28 *National Coalition for Gay and Lesbian Equality* (n 26) para 20.

29 *National Coalition for Gay and Lesbian Equality* (n 26) para 21.

30 *National Coalition for Gay and Lesbian Equality* (n 26) para 27.

31 *National Coalition for Gay and Lesbian Equality* (n 26) para 28. The Court also held that the constitutional right to privacy had been violated independent of the violations of the rights to equality and dignity.

> right to privacy in our new constitutional order, even while we acknowledge the importance of equality.[32]

Given that the South African Constitution introduces a legal culture of justification by virtue of its section 36 provisions, the Court was required to visit the question whether the violation of the rights mentioned above were nevertheless justifiable in 'an open and democratic society based on human dignity, equality and freedom'.[33] It held that this exercise was essentially one of the balancing of different interests:

> In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.[34]

In accordance with this approach, the Court held that no valid purpose for the limitation had been suggested and that, accordingly, there was no justification for the limitation. The Court also placed significant emphasis on the fact that the general trend in open and democratic societies had been towards decriminalisation of sodomy – a trend which provides further support for the contention that there is no legitimate purpose served by criminalisation.[35] It accordingly endorsed the order of the High Court that the common law offence of sodomy, as well as its incorporation into the relevant statutes, were unconstitutional and invalid.[36] The Court went on to declare section 20A of the Sexual Offences Act unconstitutional for fundamentally the same reasons as were advanced in relation to the common law crime of sodomy.[37]

Notably, the Court (in a concurring judgment by Sachs J) signalled its acceptance that individuals should not only enjoy protection of the constitutional rights if they conformed to a – possibly fictional but deeply embedded – heterosexual norm. Arguing that 'equality should not be confused with uniformity' and that 'in fact, uniformity can be the enemy of equality' the Court embraced the idea that individuals should be protected regardless of their differences.

> Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights

32 *National Coalition for Gay and Lesbian Equality* (n 26) para 32.

33 See sec 36 of the Constitution of the Republic of South Africa, 1996.

34 *National Coalition for Gay and Lesbian Equality* (n 26) para 35.

35 *National Coalition for Gay and Lesbian Equality* (n 26) paras 39-57.

36 *National Coalition for Gay and Lesbian Equality* (n 26) para 73.

37 *National Coalition for Gay and Lesbian Equality* (n 26) para 76.

> requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference.[38]

If this line of reasoning was going to be followed to its logical conclusion, the law would be required to protect individuals and relationships that did not necessarily conform to any idealised (often heterosexual) norm. However, when called upon to extend legal recognition of same-sex partnerships, the Court retreated from this progressive position, an aspect of the jurisprudence we return to in part 3 below.

2.2 The legal recognition of same-sex partnerships

Once decriminalisation had been secured, the NCGLE turned its attention to the question of how the new constitutional dispensation could or would legally recognise same-sex relationships in the face of: the 'sexual orientation' ground in the Constitution's equality clause, on the one hand; and, on the other hand, the implicit prohibition of same-sex marriage by the gender specific Marriage Act of 1961, which remained in force. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[39] the Constitutional Court initiated its recognition jurisprudence in a case that dealt with the immigration rights of same-sex couples. In this case the NCGLE instituted proceedings in the Cape High Court for an order declaring section 25(5) of the Aliens Control Act[40] unconstitutional in that it facilitated the immigration into South Africa of the spouses of permanent South African residents, but did not extend the same benefits to men and women in permanent same-sex life partnerships with permanent South African residents. The High Court declared the section unconstitutional, whereupon the NCGLE applied to the Constitutional Court for a confirmation of the order of constitutional invalidity.

The Constitutional Court decided that section 25 of the Act was unconstitutional in that it unfairly discriminated against same-sex relationships on the basis of sexual orientation and marital status. The Court held that the word 'spouse' in the provision complained of,[41] could

38 *National Coalition for Gay and Lesbian Equality* (n 26) para 132.

39 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

40 Act 96 of 1991.

41 Section 25 provided that only the 'spouse' or 'dependent child' of a person who is permanently and lawfully resident in South Africa can apply for an immigration permit. The applicants contended that the section was unconstitutional because it did not allow the partners of permanently resident South Africans in permanent same-sex life partnerships to also apply for such permits.

not in its context be construed as including a partner in a permanent same-sex life partnership.[42] Such a construction would 'distort' the meaning of the expression. The Court relied explicitly on what it called the 'ordinary' meaning of the word 'spouse' as denoting a husband or a wife.[43] It also emphasised that the word 'marriage' as used in the relevant legislation did not extend 'any further than those marriages that are ordinarily recognised by our law'.[44] In short, the Court's decision was that a same-sex life partnership could not be regarded as a marriage. This is not to say that the Court did not recognise that the discrimination in this case was based on 'harmful and hurtful stereotypes of gays and lesbians'[45] and accordingly

> denies to gays and lesbians that which is foundational to our Constitution … the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be.[46]

Given the Court's approach to the interpretation of the words 'spouse' and 'marriage' in the contested legislation, it held that the constitutionally defective legislation could only be remedied by reading the words 'permanent same-sex life partnership' into the statute. This remedy would afford partners in same-sex life partnerships the same statutory rights as spouses in legally recognised marriages. Although the remedy was limited to the statute only, it was clear that similar provisions in other statutes would not survive constitutional scrutiny and that the remedy would probably be the same in substance.[47] Mindful of this fact, the judgment included a list of factors[48] which would assist in the determination of whether the same-sex life partnership was 'permanent' and thus worthy of protection as a form

42 *National Coalition* (n 39) para 23.

43 *National Coalition* (n 39) para 25.

44 As above.

45 *National Coalition* (n 39) para 49.

46 *National Coalition* (n 39) para 42.

47 *National Coalition* (n 39) para 82.

48 *National Coalition* (n 39) para 88: 'Such facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another.'

of family. The long set of factors listed by the Court has the appearance of a checklist for all the requirements of a traditional, idealised heterosexual marriage. The cumulative effect of this list of factors was to send a strong signal that only those intimate relationships that were sufficiently similar to that of an idealised heterosexual marriage would qualify for recognition and protection by the courts. The judgment therefore did not fully embrace the rhetoric of the earlier judgment which embraced the 'right to be different' as being at the heart of the constitutional promise for equality. The judgment suggested that relationships which had the same structure as that of the idealised heterosexual marriage or which had the same basic functions as such a relationship could therefore be singled out as worthy of protection. Intimate relationships which did not closely resemble an idealised heterosexual marriage, would therefore apparently not be worthy of equal concern and respect. In the final analysis the Court therefore seemed to support a rather narrow conception of what would qualify as intimate relationships worthy of constitutional protection, even while it professed to endorse a more open-ended view. The judgment suggested that intimate relationships that strayed too far from the model, one man, one woman and two (and a half) children, married monogamously until death do them part, would not be worthy of recognition.[49]

A flurry of decisions, which vindicated important rights for partners in permanent same-sex life partnerships, followed the decision in the second *National Coalition* case. These developments occurred against the backdrop of a violently patriarchal society in which heteronormativity, heterosexual hyper-masculinity and extreme conservatism about sexuality and sexual orientation remained as the order of the day, while, at the same time, the state was constitutionally obligated to eradicate all forms of unfair discrimination on the ground of sexual orientation.

In *Satchwell v President of the Republic of South Africa*,[50] the Court extended spousal benefits conferred in terms of the Judges' Remuneration and Conditions of Employment Act[51] to partners in permanent same-sex life partnerships but emphasised that the equality clause does not generally require benefits extended to spouses to also be extended to same-sex life partners.[52] The Constitution will only impose these benefits on same-sex partners where reciprocal duties of support have been undertaken.

49 P de Vos 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *South African Journal on Human Rights* 179 at 197. We return to this aspect in section 3 below.

50 *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC).

51 Act 47 of 2001.

52 *Satchwell* (n 50) para 24.

Whether such duties of support exist or not depends on the circumstances of each case.[53] Accordingly the Court ordered the reading in of the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' after the word 'spouse' wherever it occurred in the challenged legislation and regulations.[54]

On the basis of *Satchwell*, the Supreme Court of Appeal subsequently extended statutory benefits for spouses of road accident victims to partners in permanent same-sex life partnerships who have undertaken reciprocal duties of support.[55] The decision also had a significant impact on the extension of joint adoption rights to same-sex life partners in the case of *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)*.[56] In *J v Director General, Department of Home Affairs*,[57] the Constitutional Court used the reading-in remedy to cure the unconstitutionality of section 5 of the Child Care Act[58] which failed to provide that a partner in a permanent same-sex life partnership who did not give birth to a child conceived by artificial insemination, could become a legitimate parent of that child. In this case, the Court made it clear that 'comprehensive legislation regularising relationships between gay and lesbian persons' had become necessary, because

> it is unsatisfactory for the Courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation.[59]

2.3 The *Fourie* judgment's invalidation of the Marriage Act

The above cases and legislative developments set the scene for the Constitutional Court's 2006 decision in which it declared the common law definition of 'marriage' as well as the 1961 Marriage Act to the extent that it relied on that definition unconstitutional.[60] The Court held that the jurisprudence on sexual minority freedom had established that the family and family life of gay men and lesbians are in all significant respects indistinguishable from those of heterosexual spouses and in human terms

53 *Satchwell* (n 50) para 25.

54 *Satchwell* (n 50) para 34.

55 *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA).

56 *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as* Amicus Curiae) 2003 (2) SA 198 (CC) para 39.

57 *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC).

58 Act 82 of 1987.

59 *J* (n 57) para 23.

60 *Fourie* (n 6) para 162.

as important.[61] Where the law fails to recognise the relationship of same-sex couples,

> the message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudice and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity.[62]

In its judgment the Court dealt with some of the most politicised and contested issues around same-sex marriage. Of these, the religious argument against same-sex marriage stands out as the main site of contestation. The conservative argument against same-sex marriage is well known: it is a widely held belief in South Africa that marriage is by its very nature a religious institution. To change its definition would violate religious freedom in a most fundamental way.[63] The Court elegantly refuted this argument. It recognised that religious bodies play a large and important part in public life and are part of the fabric of our society,[64] the open and democratic society contemplated by the Constitution requires mutual respect and co-existence between the secular and the sacred:

> [T]he acknowledgment by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. *The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected.* The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity.[65]

This entails, plainly, that the religious beliefs of some cannot be used to determine the constitutional rights of others.[66] In an open and democratic society there should be a capacity to accommodate and manage difference and not to enforce the view of the (religious) majority on marginalised minorities in ways that would reinforce unfair discrimination against a

61 *Fourie* (n 6) para 54.

62 *Fourie* (n 6) para 54, quoting from the judgment in *National Coalition v Minister of Home Affairs* (n 39) para 54.

63 *Fourie* (n 6) para 88.

64 *Fourie* (n 6) para 90.

65 *Fourie* (n 6) para 98 (emphasis added).

66 *Fourie* (n 6) para 92.

minority.[67] The Court concluded that the religious argument was based on a prejudice that is at odds with the constitutional requirements of equal treatment and respect for difference.[68] It added that granting same-sex couples the right to marry would in no way impair the capacity of heterosexual couples to marry in the form they wished and in accordance with their religious beliefs.[69]

Instead of an immediate reading-in of wording into the Marriage Act that would render the Act gender neutral and thus cure the unconstitutionality, the Court suspended the reading-in remedy for one year to give Parliament a chance to address the unconstitutional exclusion of same-sex couples from enjoying the status and entitlements coupled with responsibilities that are accorded to heterosexual couples by common law and by the Marriage Act.[70] As to the confines of this mandate to Parliament, it was very clear from the decision that the mandate was extremely narrow. The Court expressly held that whatever legislative measures Parliament takes, it could not subject same-sex couples to new forms of marginalisation or exclusion by the law, either directly or indirectly.[71] Parliament had to be

> sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation.[72]

It would therefore be completely unacceptable for Parliament to adopt a 'separate but equal' approach because this would serve 'as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation'.[73] In the Court's view:

> [T]his means that whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved. In a context of patterns of deep past discrimination and continuing homophobia, appropriate

67 *Fourie* (n 6) para 94.

68 *Fourie* (n 6) para 94.

69 *Fourie* (n 6) para 111.

70 *Fourie* (n 6) para 156. In a dissenting judgment (*Fourie* (n 6) paras 167-169), O'Regan J held that it was not appropriate in this case to suspend the order of invalidity, given that Parliament's choice was a narrow one that would be unaffected by providing immediate relief.

71 *Fourie* (n 6) para 150.

72 *Fourie* (n 6) para 150.

73 As above.

> sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples.[74]

It is within this context that the Court noted that one of the principal functions of Parliament was to ensure that the values of the Constitution, as set out in the Preamble and section 1, permeate every area of the law.[75] And it is within this context that it encouraged Parliament to consult widely before adopting legislation in this regard.

The judgment contains resounding language affirming the right of gay men and lesbians to form intimate life partnerships and to 'be different'. But there seems to be a contradiction at the heart of the rhetoric employed by the Court. It is striking to note the degree to which this judgment valorises the institution of marriage and endorses the view that legal marriage remains the only comprehensive and valid way in which two people can (and perhaps should) bestow full legal and societal recognition on their relationship. At the heart of the decision is an acceptance of the fundamental and central importance of marriage for South African society. This acceptance is, from a descriptive point of view, persuasive, but it fails to develop a more expansive and less heteronormative view of relationships which should be recognised by the law. To show that the exclusion of same-sex couples from marriage fundamentally affects their human dignity, the Court emphasises both the legal and symbolic nature of marriage and approvingly notes that marriage provides those who enter into it with a specific, somewhat exalted, status in our society. Although this valorisation of the institution of marriage by the Constitutional Court is not new,[76] it is particularly striking and somewhat jarring in this case, given the rhetoric of the Constitutional Court in both the *NCGLE v Home Affairs* judgment and later in the *Fourie* judgment about 'the right to be different'. If the test for the full recognition of equality is about the recognition of and respect for difference, then why, one might wonder, is it appropriate for the law to bestow special rights and a special status on those hetero- or homosexual couples who choose to enter into traditional marriage? The judgment thus hints at the limits of a political and legal strategy for the emancipation of gay men and lesbians based on a model of assimilation and acceptance. It seems to suggest that acceptance, true acceptance, only comes to those who wish to make or have the power to make a choice in favour of 'normality' – even though, given the economic, social or cultural position of individuals, this 'choice' might not be open

74 *Fourie* (n 6) para 153.

75 *Fourie* (n 6) para 138.

76 See for example *Dawood, Shalabi, Thomas v Minister of Home Affairs* 2000 (8) BCLR 837 (CC); and *Volks v Robinson* 2005 (5) BCLR 446 (CC).

to all. The 'right to be different' then runs the risk of becoming an empty slogan. One might even argue that it becomes merely the right not to be a heterosexual – as long as one conforms to the image of the idealised imaginary heterosexual.[77]

2.4 Legislative developments after *Fourie* – the Civil Union Act

Parliament's response to *Fourie* eventually came in September 2006,[78] two months before the deadline of 30 November 2006. The first draft of the Civil Union Bill[79] did not provide same-sex couples with the choice to enter into a marriage or to conclude a civil union. The long title of the Bill made this abundantly clear: The purpose was to 'provide for the solemnisation of civil partnerships [and] the legal consequences of civil partnerships'.[80] Another way of stating the long title of the Bill would simply have been 'to preserve the traditional, historic nature and meaning of the institution of civil marriage'.[81] The Bill repeatedly reserved the category of 'marriage' for relationships other than same-sex partnerships (that is, heterosexual relationships). This effectively meant that the legislature and the Bill's drafters ignored the re-definition of 'marriage' endorsed in *Fourie*. Ultimately, the Bill purported to create precisely the separate but equal regime declared as 'absolutely unthinkable'[82] in the *Fourie* decision. For this reason, the State Law Advisor refused to certify the Bill before it was tabled in Parliament,[83] and parliamentary legal advisors continuously advised the Portfolio Committee of Home Affairs that the Bill would probably not survive a constitutional challenge.[84]

77 P de Vos 'The "inevitability" of same-sex marriage in democratic South Africa' (2007) 23 *South African Journal on Human Rights* 432, at 457.

78 A Quintal 'Same-sex Marriages Bill tabled in Parliament' *IOL* 25 August 2006 http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20060825011114223C978307 (accessed 15 December 2006).

79 Civil Union Bill 26 of 2006.

80 As above.

81 This was in fact the long title of the Massachusetts Civil Union Bill (Senate No 2175) that was struck down as unconstitutional by the highest court of that state.

82 A Quintal 'Concern about Civil Union Bill' *IOL* 8 September 2006 http://www.iol.co.za/news/south-africa/concern-about-civil-union-bill-292875 (accessed 20 May 2017).

83 As above.

84 See Home Affairs Minutes of the Home Affairs Portfolio Committee Civil Union Bill Deliberations, 1, 7 and 8 November 2006 http://www.pmg.org.za/minutes.php?q=2&comid=11 (accessed 9 November 2007).

Unfortunately, the Parliamentary Home Affairs Portfolio Committee insisted on conducting its public participation process on the strength of a Bill that was patently unconstitutional. The result was deeply flawed, in that the overwhelming majority of written submissions and oral presentations at hearings propagated a discourse marked by the unchecked expression of naked homophobia, stereotypical misconceptions and widely accepted myths.[85] This reaction, in turn, put proponents of same-sex marriage who participated in the hearings on the back foot, forcing them into a discursive position in which they were not only subjected to openly homophobic discourse, but also compelled to repeat and emphasise, over and over again, the precise determinations of the *Fourie* judgment and its explicit instructions to Parliament. Moreover, given that the Bill was ostensibly unconstitutional, these proponents found themselves in the unenviable position of having to propose a legally workable, constitutionally sound alternative. The pressure exerted by this group, resulted in a last-minute radical redrafting of the Bill.

On 7 November 2006 the ruling ANC party tabled a proposal before the Home Affairs Portfolio Committee that would become the Civil Union Act.[86] This version of the legislation differed markedly from the first draft. Most tellingly, the proposed 'civil partnership' institution, reserved exclusively for same-sex couples, was replaced by a gender neutral 'civil union' that could be concluded by way of either a civil partnership or a marriage. While recognition of same-sex marriage was extended by the adoption of a separate law – leaving the traditional Marriage Act intact thus allowing heterosexual couples opposed to same-sex marriage to

85 See, inter alia, 'Civil Union Bill: A response by His People Christian Ministries (South Africa)' http://www.pmg.org.za/docs/2006/061016hispeople.htm (accessed 18 November 2006); 'Southern African Catholic Bishops' Conference submission to the Portfolio Committee on Home Affairs on the Civil Union Bill' http://www.pmg.org.za/docs/2006/061016catholic.htm (accessed 3 March 2007); Gereformeerde Kerke in Suid-Afrika 'Presentation to the Portfolio Committee on Home Affairs regarding the Amendment of the Marriages Act (25/1961): Reaction to the Proposed Civil Unions Bill' http://www.pmg.org.za/docs/2006/061016reformed.htm (accessed 3 March 2007); Muslim Judicial Council (SA) 'Submission on Civil Union Bill' http://www.pmg.org.za/docs/2006/061016mjc.pdf (accessed 18 November 2006); Christian Lawyers Association 'Submission to the Portfolio Committee of Home Affairs Stakeholder Public Hearings October 2006 Civil Union Bill' http://www.pmg.org.za/docs/2006/061017vilakazi.doc (accessed 19 November 2006); 'Christian Brethren on the Civil Union Bill' http://www.pmg.org.za/docs/2006/061017stakeholder.pdf (accessed 19 November 2006); 'Couples for Christ Submission to Parliamentary Portfolio Committee' http://www.pmg.org.za/docs/2006/061017couples.pdf (accessed 19 November 2006); and Christian Action Network 'Submission regarding Civil Union Bill' http://www.pmg.org.za/docs/2006/061017couples.pdf (accessed 19 November 2006).

86 Act 17 of 2006.

enter into marriage in terms of the Marriage Act exclusively reserved for heterosexual couples – it affirmed that same-sex couples would enter into a marriage with the same legal rights and the same status of 'traditional' heterosexual marriages. The ANC eventually used its political power in the committee and in the houses of parliament to pass this version of the proposed legislation in time to meet the deadline of the Constitutional Court.[87]

3 The judicial construction of a 'separate but equal' power/knowledge regime and the discourse of the 'good' homosexual subject

Golder and Fitzpatrick write that Foucault

> gives ample evidence in his writings of the mid-1970s of how disciplinary and bio-political operatives and knowledges come to invade and inscribe themselves within modern law, and of how law is co-opted by disciplinary and bio-political imperatives.[88]

Foucault himself refers, in *Society must be defended* to how 'the techniques of discipline and discourses born of discipline are invading [the concept and practice of] right'.[89] Despite Foucault's insistence, then, that law and disciplinary power should be rigorously separated from an analytical point of view, he nevertheless was himself aware of and made room for the regular overlap between legal power and disciplinary power.

In this section, we will use the above insight to trace what we believe to be the two main obstacles to the achievement of family law equality for non-heterosexual legal subjects in post-apartheid South Africa. The first of these obstacles is the construction of a 'separate but equal' disciplinary power/knowledge regime around the trope 'permanent same-sex life partnership' within the jurisprudence of the Constitutional Court. As explained above, the jurisprudence created the distinct entity of a 'permanent life partnership', ostensibly to extend partnership rights to same-sex couples who were not allowed to get married, but in effect it reinforced the notion that same-sex relationships should be legally regulated and recognised in a different way than different-sex relationships.

87 'Same-sex couples can now legally tie the knot' *SABC News* 14 November 2006 http://www.sabcnews.com/politics/government/0,2172,138457,00.html (accessed 1 August 2022); 'S Africa approves same-sex unions' BBC News 14 November 2006 http://news.bbc.co.uk/2/hi/africa/6147010.stm (accessed 11 December 2006).

88 B Golder & P Fitzpatrick *Foucault's law* (2009) 2.

89 Foucault (n 1).

This regime, once it was established, provided the conceptual apparatus for the recognition jurisprudence as it progressed. Once it had performed this work through incremental legal reform, it was judicially disavowed in the *Fourie* judgment, only to reappear in the first draft of the Civil Union Bill and to, ultimately, become entrenched in the Civil Union Act. The second of the obstacles to the achievement of sexual minority freedom is the closely related construction, during the Court's recognition jurisprudence, of a discourse of what we call the 'good' homosexual subject.

As illustrated above, it was in the second *National Coalition* judgment that the Court initiated the judicial discourse of the 'permanent same-sex life partnership'. From a legal ideology point of view, the second *National Coalition* judgment departed radically from its predecessor, the decriminalisation judgment, which overall could be described as the judgment in which the judicial discourse was organised around the 'right to be different'.[90] The Constitutional Court's ideological about-turn in the second *National Coalition* judgment became legible through its refusal in that case to recognise partners in permanent same-sex life partnerships equally as spouses for all legal intents and purposes. Despite the soaring rhetoric of the decriminalisation judgment, the right to be different, it appeared, had discretely and thoroughly delimited limits.

Apart from the ideological about-turn that this approach represented, the second *National Coalition* judgment was not sufficiently cognisant of the historical context in which it was operating, namely the aftermath of apartheid in which insidious 'separate but equal' dispensations loomed large.[91] The creation of the 'permanent same-sex life partnership' as a juridical institution alongside heterosexual marriage, invariably created the impression of yet another insidious 'separate but equal' regime, this time organised around sexual orientation. In this sense, the Court failed to heed its own emphasis on the important role of history and the past in South Africa's constitutional project.[92] That the creation of a 'separate

90 *National Coalition v Minister of Justice* (n 26) para 107.

91 De Vos (n 49) 268.

92 See *S v Zuma* 1995 (2) SA 642 (CC) para 15, where it was stated that 'regard must be paid to the legal history, traditions and usages of the country concerned'; *S v Makwanyane* 1995 (3) SA 391 (CC) para 39, where Chaskalson P held that 'we are required to construe the South African Constitution … with due regard to our legal system, our history and circumstances'; para 263, where Mahomed DP remarked that '[i]t is against this historical background and ethos that the constitutionality of capital punishment must be determined'; and para 322, where O'Regan J stated that 'the values urged upon the Court are not those that have informed our past … [and in] … interpreting the rights enshrined in chapter 3, therefore, the Court is directed to the future'. See also *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) para 61, where it was held (per Chaskalson

but equal' power/knowledge regime for same-sex couples was at stake, becomes clear once one notices how the Court lapsed into the language of marriage 'protection':

> *Protecting* the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership.[93]

These words sound as if the Court is describing a new obstacle that the discourse of the protection of traditional marriage has to overcome in a constitutional era. In other words, the protection discourse itself was tacitly accepted as constitutionally legitimate. After the decriminalisation judgment, one could reasonably have expected the exact opposite of these words. At the very least, one could reasonably have expected the Court to steer clear from language intimating that homosexuality and/or same-sex intimate partnership (still) constitutes a danger to 'the traditional institution of marriage'.

This brings us to the list of factors that the Court laid out in the judgment to determine whether a particular same-sex relationship would qualify as a 'permanent same-sex life partnership'. The list of factors clearly consists of the characteristics of an idealised heterosexual marriage. Its creation and application suggests that only marriage-like relationships would be legally protected. Although the Court was at pains to point out that none of these requirements is indispensable for establishing a relationship worthy of legal protection,[94] the cumulative effect of this set of factors suggests that relationships that do not closely map that of an idealised heterosexual marriage, will not be worthy of equal concern and respect. Kenneth Norrie has argued that there is an 'insidious danger in seeking legal legitimacy for a same-sex couple's relationship from the social similarity that that couple has with an opposite-sex couple'.[95] Such an approach risks denying real

P) that the nature and extent of the power of Parliament to delegate its legislative powers ultimately depends 'on the language of the Constitution, construed in the light of the country's own history'; *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC) fn 48, quoting LE Trakman *Reasoning with the Charter* (1991) at 201, where Sachs J said the following: 'Rights are not self-explanatory. They are principled constructions informed by social history' See also *Brink v Kitshoff* 1996 4 SA 197 (CC) para 40, where the court held that the equality provision was the product of our own particular history and that 'its interpretation must be based on the specific language of [the provision], as well as our own constitutional context', and went on to say that our 'history is of particular relevance to the concept of equality'.

93 *National Coalition v Minister of Home Affairs* (n 6) para 54 (authors' emphasis).

94 *National Coalition v Minister of Home Affairs* (n 6) para 88.

95 K Norrie 'Marriage and civil partnership for same-sex couples: The international imperative' (2005) 1 *Journal of International Law and International Relations* 249 at 269.

differences between the two types of relationship. It also suggests that the closer a same-sex relationship resembles a marriage, the easier it will be to qualify as a family and thus to access the statutory benefits available to a family.[96] As Norrie concludes, this approach has implications for equality: '[T]rue equality would require society and the law to recognise the legitimacy of a diversity of family forms.'[97]

In stark contrast to the forceful rhetoric of the Court in the decriminalisation judgment as regards the 'right to be different', the second *National Coalition* judgment in our view turns on a cynical interpretation of the right to be different as grounding a 'separate but equal' power/knowledge regime in which the 'permanent same-sex life partnership' operates as a disciplinary mechanism through which the 'good' homosexual legal subject, the subject worthy of legal protection, is discursively produced. In accordance with this regime, the judgment supports a narrow conception of family, even while it professes to endorse a more open-ended view of the legal regulation of intimate relationships. It is silent, say, on a relationship in which a gay man and a lesbian decide to have a child and to act as co-parents of that child but do not engage in a conjugal relationship traditionally associated with the joint parents of a child.

The list of determinative factors, moreover, have a clear normative dimension in that they reveal who qualifies as a 'good' homosexual in the eyes of the law. The factors – for example couples sharing a common home, joint pension rights, joint wills – mirror neo-liberal assumptions about the role of relationships in the capitalist system. Ideal homosexual relationships, it seems, will be relationships that help to facilitate the privatisation of care responsibilities and will thus shift the burden of care from the state onto individuals. This means that the 'good' homosexual envisaged by the Constitutional Court is an ideal typical neoliberal subject – a partnered middle class, if not upper middle class, man or woman who, in a country like South Africa where class continues to follow race, is almost invariably white. After all, many poor and/or black South Africans still do not have the financial resources to fully carry the burden envisaged by this neo-liberal relationship model, and may continue to rely on the state to provide access to housing and old age pensions.

As Stychin points out, implicit in the Court's imagining of the good homosexual 'may be an understanding of homosexuality as a white, middle-class phenomenon and, as a consequence, a wide array of ways

96 Norrie (n 95) 269-270.

97 Norrie (n 95) 270.

of living come to be erased'.[98] Perhaps inevitably, the relationships considered worthy of protection as 'permanent same-sex life partnerships' are relationships that 'dare speak their name'. Only those couples prepared to and capable of disclosing the nature of their relationships and who are willing to open up their lives to surveillance by the Courts or officials of the Department of Home Affairs, stand a chance of protection. This is a potentially important insight because if true, it may well suggest that the ultimate achievement of full marriage rights for same-sex couples would not necessarily be a victory that would lead to the emancipation of all (or even the majority) of gay men and lesbians in South Africa, and that its benefits would be more pronounced for middle class (and mostly white) couples whose relationships mirror the imagined characteristics of an ideal marriage.

What happens to those gay men and lesbians whose lives do not allow for the opening of joint bank accounts, the sharing of homes, the making of joint wills and the sharing in pension fund benefits? What happens to those homosexuals whose sexual identities do not facilitate the formation of permanent same-sex life partnerships or whose social and economic circumstances or cultural and familial bonds and demands make it impossible to 'come out' of the closet to claim the legal rights aimed at protecting them?

The discourse of the 'permanent same-sex life partnership' and of the 'good' homosexual subject creates a disciplinary, 'separate but equal' power/knowledge regime which renders these subjects, often society's most vulnerable, invisible and unworthy of the law's protection. There is, moreover, a double alienation at play in this regime in that the partnered homosexual subject who seeks the law's protection is not only disciplined into the same-sex life partnership – he/she/they is, at the same time, not recognised as fully equal to the partnered heterosexual, since a 'separate but equal' dispensation applies to his/her/their partnership.

For these reasons, we conclude that the logic of warfare and the binary society that it implies, undergirds this legal discourse. In the 'binary conception of society', writes Foucault, there are 'two groups, two categories of individuals' 'and they are opposed to each other'.[99] In this conception, the discourse of rights is 'marked by dissymmetry, establishing a truth bound up with a relationship of force'.[100] Foucault

98 CF Stychin '"A stranger to its laws": Sovereign bodies, global sexualities, and transnational citizens' (2000) 27 *Journal of Law and Society* 27 601 at 621-622.

99 Foucault (n 1) 51.

100 Foucault (n 1) 54.

describes a discourse that emerged in the 17th century which held that '[t]he war that is going on beneath order and peace, the war that undermines our society and divides it in a binary mode is, basically, a race war'.[101] He goes on to describe how the discourse of race struggle becomes 'the discourse of power itself', how the discourse divides society between a 'superrace and a subrace',[102] and how there emerges from this discourse eventually a state racism:

> a racism that society will direct against itself, against its own elements and its own products. This is the internal racism of permanent purification, and it will become one of the basic dimensions of social normalization.[103]

In the light of these remarks and the preceding discussion, we are compelled to suggest that the 'separate but equal' discourse of the recognition jurisprudence had a similar effect in the domain of sexual orientation as that which Foucault describes in terms of race. Separate but equal regimes create a binary rift within society between the 'superior' and the 'inferior'.[104] In the domain of sexual orientation the rift exists between 'superior' heterosexuals who are by right entitled to marriage and 'inferior' homosexuals who may access the rights, benefits and duties of marriage only through the 'permanent same-sex life partnership' and now, by way of the Civil Union Act *only.* The Constitutional Court's adoption of such a regime in the domain of sexual orientation means that the logic of warfare and of a binary conception of society persisted in its judgment.

Now, one of the objections to our argument may be that the Constitutional Court realised the error of its ways in the *Fourie* judgment when it declared the common law definition of marriage and the Marriage Act unconstitutional[105] and held that a 'separate but equal' form of recognition is 'unthinkable in our constitutional democracy today, not simply because the law has changed dramatically, but because our society

101 Foucault (n 1) 60.

102 Foucault (n 1) 61.

103 Foucault (n 1) 62.

104 Consider the Court's reference in *Fourie* to the famous apartheid era case of *S v Pitje* 1960 (4) SA 709 (A), where the appellant, an African candidate attorney, occupied a place at a table in court that was reserved for 'European practitioners' and refused to take his place at a table reserved for 'non-European practitioners'. Steyn CJ upheld the appellant's conviction for contempt of court as it was 'clear [from the record] that a practitioner would in every way be as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table'.

105 *Fourie* (n 6) para 114 .

is completely different'.[106] But the truth of the matter is that this disavowal by the Court of its own earlier discourse, proved to be ineffectual: the legislature chose not to amend or repeal the Marriage Act and adopted the Civil Union Act. The adoption of this without repealing the Marriage Act constituted a legislated 'separate but equal' regime. In the Act itself, the 'separate but equal' discourse persists. As a result, the binary rift in society and its concomitant logic of warfare has been legislatively entrenched.

While the Civil Union Act offers a 'marriage' as one form of civil union, there are good reasons to suggest that the Act does not represent substantive equality in relation to sexual orientation and still conveys the message that, in the words of Sachs, J 'gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected'.[107] This 'serves in addition to perpetuate and reinforce existing prejudice and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion'[108] of the dignity of homosexuals. In other words, there are good reasons to suggest that the Act is unconstitutional because it discriminates unfairly against same-sex couples on the ground of sexual orientation. For example, section 6 of the Act allows for the state's marriage officers to refuse solemnisation of a civil union by way of marriage or civil partnership on grounds of conscience where that civil union is proposed between two people of the same sex. Section 8(6), in addition, creates the impression that the application of the Act is limited to same-sex unions. In addition, as Berger argues in a recent contribution, the requirement that religious organisations and denominations be designated before religious marriage officers can apply to conduct civil unions has proven to be a 'key problematic provision' of the Civil Union Act.[109]

4 Foucault's law

We end this chapter with an insistence, first, on returning to 'sexual orientation' as the constitutive ground of equality for sexual minorities in South Africa. Second, we insist on the interpretation of that phrase in the queer jurisprudence of the decriminalisation discourse. We see in this twofold insistence the possibility of authentic equality but we hesitate to

106 *Fourie* (n 6) para 151.

107 *Fourie* (n 6) para 54, quoting from the judgment in *National Coalition v Minister of Home Affair*.

108 As above.

109 J Berger 'Getting to the Constitutional Court on time' in M Judge, A Manion & S de Waal *To have and to hold: The making of same-sex marriage in South Africa* (2008) 26.

suggest that such equality is possible to achieve without lawfare as we have described it in this chapter.

Golder and Fitzpatrick's reading of law in Foucault's work will guide us here. They argue that there are in Foucault 'two crucial dimensions of law' at work. The first is a 'determinate law which expresses a definite content'.[110] This is the law that is 'to be resisted and transgressed'[111] because it is law on the side of the instantiation of the disciplinary norm. The second dimension of law is that in which it is constitutively engaged with resistance and transgression in such a way that it 'extends itself illimitably in its attempt to encompass and respond to what lies outside its definite content'.[112] Thus, in Foucault

> law is not simply rendered in terms of determinacy and closure. Rather, law can be seen to engage responsively with exteriority, with an outside made up of resistances and transgressions that assume a constituent role in law's very formation.[113]

Golder and Fitzpatrick show that this 'responsive dimension'[114] of law originates in Foucault's alternative understanding of modernity not as an epoch but as 'an *attitude* that one adopts towards the present'.[115] This attitude entails a critical imagining of the present as otherwise than it is. As a critical enterprise, such an imagining requires a '*limit-attitude*' that moves beyond 'the outside-inside alternative' towards a 'crossing-over of limits'. As Foucault writes: 'we have to be at the frontiers'.[116] This, then, is modernity at the frontier, modernity 'as constituent liability and contestation, and modernity as *rupture*'.[117] From such an attitude of modernity, Golder and Fitzpatrick derive a 'sociality of law' that is dedicated to the 'unworking of the space of the social'[118]: '[t]he law of the law of modernity thus resides in law's responsive dimension, in its being able to open society to alterity, to an ethic of constantly being otherwise'.[119] We find this responsive dimension of law particularly suggestive in terms

110 Golder & Fitzpatrick (n 88) 71.
111 As above.
112 As above.
113 Golder & Fitzpatrick (n 88) 56.
114 Golder & Fitzpatrick (n 88) 71.
115 Golder & Fitzpatrick (n 88) 107.
116 Golder & Fitzpatrick (n 88) 108.
117 Golder & Fitzpatrick (n 88) 109.
118 As above.
119 As above.

of what might be entailed in overcoming a binary discourse of 'us' and 'them' in sexual minority freedom: if the critical imagining of the present as otherwise than it is, is what is at stake in this overcoming, then for sexual minority freedom it spells the juridical treatment of the 'right to be different' as a mechanism through which the 'outside-inside' alternative and the binary logic of the extant power/knowledge regime in the recognition jurisprudence may be subverted.

The responsive approach to law proceeds from the insight that resistance is constitutive of power.[120] If, as Foucault argues, power is relational and 'everywhere',[121] indeed if it defines the social,[122] then power formations exist in a constituent relationship with counter-formations of resistance. Power relations, argue Golder and Fitzpatrick, derive their very existence from 'the impelling movement of resistance'.[123] This means that resistance is never in a relationship of simple or demarcated exteriority to power, resistances 'invest and inhabit power':[124] 'Foucault thus does not posit a stable and determinate instantiation of power, but rather a mobile and constantly shifting relation between power and that which contests it from outside'.[125] Transgression thus plays a central role in the very constitution of the limit: 'a limit could not exist if it were absolutely uncrossable and, reciprocally, transgression would be pointless if it merely crossed a limit composed of illusions and shadows'.[126] From this characterisation of the constitutive relationship between power and resistance, Golder and Fitzpatrick show that Foucault derived a modality of a law 'of mutability, a law which practices an "infinitely accommodating welcome" to what lies beyond it'.[127] It is 'the darkness beyond its borders',[128] 'obsessed with exteriority'.[129] Here then we have law or at least a 'mode of becoming'[130] of law as trans-formative, as attuned to alterity, as extending itself, 'constantly opening itself to new possibilities, new instantiations, fresh determinations'.[131]

120 Golder & Fitzpatrick (n 88) 75.
121 Golder & Fitzpatrick (n 88) 74.
122 Golder & Fitzpatrick (n 88) 75.
123 As above.
124 As above.
125 Golder & Fitzpatrick (n 88) 76.
126 Golder & Fitzpatrick (n 88) 77.
127 As above.
128 Golder & Fitzpatrick (n 88) 78.
129 As above.
130 Golder & Fitzpatrick (n 88) 79.
131 As above.

The sexual orientation jurisprudence of the Constitutional Court, at first, displayed hints of what could have been (and, perhaps, can be again) if the Court had consistently engaged with the notion of sexual orientation equality in the spirit of an infinitely accommodating welcome to what lies beyond. As noted above, in its first judgment on sexual orientation the Constitutional Court embraced what one could, perhaps, call a queer definition of sexual orientation. The definition provided by the Court opened-up new possibilities for thinking about sexuality. The definition was careful not to frame sexual orientation protection in terms of a kind of homosexuality that is viewed as a universal category, without recognising its historical and cultural specificity. It seemed to be based on an understanding that when we talk about sexuality we cannot accept that all of us share an understanding of sexual identity or hetero/homo dichotomy and embraces a notion of sexual orientation that is not based on a heteronormative understanding of the world or on the heteronormative assumptions that underlie so much of traditional equality jurisprudence in which stable and essential categories of heterosexual and homosexual are set up in a hierarchical opposition to each other.

The adoption of this definition seemed to signal a refusal by the Court in the realm of sexuality to view the world simply as it is, as it has supposedly always been. Instead, it considered the possibility that the law – and the constitutional text specifically – could be deployed to begin the work of subverting the hierarchy of the heterosexual over the homosexual. This subversion, we contend, would be based on the understanding that heteronormativity flourishes on the basis of the categories of 'heterosexual' and 'homosexual', categories through which desire is often constructed in terms of power relations in society in a way that privileges certain forms of (mainly) heterosexual desire while marginalising other forms of (mainly homosexual) desire. By providing a more open-ended and fluid definition of sexual orientation, the judgment provided the possibility to imagine a different way of being in the world, in which the hierarchy of sexual orientation identities would be troubled or even dissolved, thus subverting the very foundation on which the marginalisation and discrimination of people previously categorised as 'homosexual in opposition to and as 'lesser than' people categorised as 'heterosexual'.

Unfortunately, this non-essentialist orientation towards sexual orientation did not hold up when the Court was faced with the question of legal protection for same-sex relationships. As noted above, in the second *National Coalition* judgment the Court implicitly invoked the notion of the 'good homosexual' to determine whether couples in same-sex relationships were worthy of constitutional protection. By invoking a list of factors that postulated a deeply entrenched (but idealised) heterosexual norm, the

Court implied that the type of same-sex life partnership that the law would protect had to approximate as closely as possible the idealised, ordinary – and one is tempted to add mythical – heterosexual marriage. The judgment 'emphasised that what was needed was to determine whether the same-sex partnership was sufficiently similar to that of the idealised heterosexual marriage'. It is thus as if the Court assumed here a stable sexual orientation (and consequently denied its own non-essentialist definition) from which it proceeded to impose on intimate relationships that come about as a result of the orientation, the characteristics of relationships that come about as a result of heterosexual sexual orientation.

If the Court had been willing to open itself to new possibilities, new instantiations, fresh determinations, it would have begun the task of re-imagining the way in which the law recognises different types of relationships. This would have required imagining the world differently from what it has always been thought to be. It would have required imagining a world in which significant relationships worthy of legal regulation and protection did not necessarily conform to what most people might still think of as an idealised heterosexual relationship. Moreover, it would not have posited, as a condition for the legal rights, benefits and duties to accrue, conformity with a heterosexual norm (what Judith Butler referred to in *Gender trouble* as the 'heteronormative matrix').[132]

We believe that 'sexual orientation', harnessed in the 'right to be different', holds the potential of a return to the more queer, less heteronormative, less binary logic of the decriminalisation discourse. Such a shift, however, will not be achieved on its own: for sexual minority freedom activists and litigants the challenge will be how to fashion 'sexual orientation' and the 'right to be different' in a resistant way, how to construct and plead the legal argument in such a way that it subverts the binary logic of the recognition jurisprudence. And there may very well be great resistance to such an attempt at subversion. In other words, lawfare will continue to be on the cards for sexual minority freedom and may even intensify. The hope for sexual minority freedom, however, lies in the capacity of law, at least in Foucault's understanding, to open up to alterity, to new possibilities and, ultimately, to a law that will not perpetuate outdated and insidious hierarchies and separations, hierarchies and separations that are antithetical to the very idea of the postcolonial and the post-apartheid legal order and, for that reason alone, should be afforded no place in it.

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2 Progressive legislation in the context of generalised conservative public opinion: The case of LGBT rights in Mozambique

Carmeliza Rosário & Camila Gianella***

'*Xhi esse mundo djon, ja n está prestar*'[1]

1 A ceremony and the thin line between public and private worlds

In June 2016, pictures of a purported 'gay wedding' ceremony in the coastal town of Quelimane, Mozambique, appeared on the social media platforms Facebook and WhatsApp. In them, what was perceived as two cisgender gay men (but were, in fact, a cisgender gay man and a transgender woman) stood before friends and family, exchanging vows, rings and kisses. The majority's disparaging reaction stood in contrast to the positive light cast over Mozambique for having decriminalised anti-gay laws just the year before. We knew the transgender woman in the ceremony, so we looked her up to ask her first-hand how she had experienced the public exposure of their private moment.

For the most part, she was indifferent to the reactions. She did not believe that those who took and shared the pictures did it in bad faith. The couple had friends and family who lived far away and could not make it to the ceremony. The image shared on social media was a way for them to be a part of that particular moment. She is aware that there was some expectation regarding the event. She hails from Spain, and her husband is Mozambican. Some of the guests were curious and had never participated in anything similar. Overall, guests respected both their identities and sexualities.

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1 This expression was taken out of a Facebook post, posted on 20 June 2016. The text, which is written (and largely misspelt), in vernacular Portuguese from Mozambique roughly translates to something like: 'Man, this world is lost!'

She had arrived in Zambezia ten years before to work on sexual and reproductive health issues. Before moving to Quelimane, the provincial capital, she first lived in a rural town.

Contrary to her fear of negative public reactions about her transgender identity (having been born a male and now identifying as a woman), she had a generally positive experience. She claimed that she is respected professionally and has never been shunned. Overall, she felt welcome and accepted within the Zambezian society (she does not want to generalise to the rest of Mozambique), which she considered open and accepting of difference. Her husband also confirmed that he was in no way discriminated against or treated differently by friends and family after 'formalising their relationship'.

The event, which they called the 'formalisation', was primarily for the benefit of the family to publicly acknowledge their relationship, which was three years in existence. This was an informal ceremony, somewhat above an engagement, since they were already living together but did not have the option of marriage. Same-sex unions do not have legal recognition in Mozambique and cannot be formalised in any formal venue. Same-sex couples who wish to formalise their unions tend to do it in countries where it is legal, such as South Africa. In this case, because the woman is a Spanish national, and same-sex unions are legal in Spain, she thought they could formalise it in the Spanish consulate.[2] This was denied, allegedly because the Mozambican government did not approve.[3] As such, at least for the time being, they were left only with the intimate and informal 'formalisation'.

Thanks to social media, news of the ceremony travelled far. She claimed that she received both positive and negative criticism from her homeland Spain and even as far as the United States of America (USA). She got upset only when she received what appeared to be the front page of a local newspaper equating their ceremony to the apocalypse. For her, theirs was a private affair that could not be exposed publicly without

2 It must be stressed that same-sex couples around the world have achieved major gains in making their marriages recognised in their state or country of residence, even when these same-sex marriages were not legal. One milestone case was that of *Obergefell v Hodges, Director, Ohio Department of Health* 576 US (2015), where the Supreme Court of the United States of America held that all states must recognise same-sex marriages validly performed in other jurisdictions.

3 According to the *Resolución-circular de 29 julio de 2005, de la Dirección General de los Registros y del Notariado, sobre matrimonios civiles entre personas del mismo sexo*, Spanish consulates are not allowed to perform same-sex marriages (consulate marriages) when the host country does not recognise same-sex marriages.

their consent. Social media fell under the realm of gossip, but a formal newspaper should be upheld to different ethics and standards. According to her, they had no permission to make a private matter public. She looked for the newspaper and was willing to sue for defamation. However, after some research, she realised it was a montage produced by a conservative individual bent on giving an appearance of credibility to a false narrative.

This case exemplifies the contradictory attitudes towards sexual minorities in Mozambique. On the one hand, same-sex acts are not criminalised, and the public is generally tolerant of LGBT people. On the other hand, private events such as the one described above can receive the most vicious attacks, linking same-sex relations to the world's end. In such instances, LGBT people still feel discriminated against and are thought of as (mentally) ill, misguided, immoral and even criminal. A study conducted by the main LGBT organisation in the country, LAMBDA (Mozambican Association for the Defense of Sexual Minorities) found that a reasonable number of people if confronted with a person being assaulted for their sexual orientation, would join in the assault.[4] And although most people surveyed said they would do nothing if they found their child to be homosexual, a reasonable number would try to convince them to 'change their mind' or even have them committed to a mental institution. Moreover, seemingly progressive political institutions have refused to legalise the LGBT organisation.[5] This social pact where society tolerates lesbian, gay, bisexual and trans people as long as their true nature remains invisible has successfully protected them from the levels of violence that they face in other corners of the world, including neighbouring countries.[6] However, it has a high cost of denying them their human rights, as *every lesbian, gay, bisexual and trans person is entitled to live free and equal, openly and proudly*.[7]

4 E Brás, C Rehana & M Baltazar *Atitudes Perante a Homosexualidade nas cidades de Maputo, Beira e Nampula* (2013). B Muianga *Attitudes towards homosexuality in Maputo, Beira and Nampula* (2017) https://express.adobe.com/page/1whcHk1ZoykJ0/ (accessed 20 July 2022).

5 'Governo "recusa-se" a legalizar associação das minorias sexuais' *Verdade*. 24 July 2014 https://verdade.co.mz/governo-recusa-se-a-legalizar-associacao-das-minorias-sexuais/ (accessed 20 July 2022); LUSA. 'Minorias sexuais acusam governo de estigma' *Sapo Lifestyle* 3 November 2014, 2-3 http://lifestyle.sapo.mz/glamour/celebridades/artigos/minorias-sexuais-acusam-governo-de-discriminacao-e-estigma (accessed 20 July 2022).

6 Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity *Visit to Mozambique Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* (2019) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/140/82/PDF/G1914082.pdf?OpenElement (accessed 20 July 2022).

7 As above.

Through the analysis of 25 interviews[8] with key actors involved in the debates regarding sexual and reproductive rights in Mozambique; three rounds of surveys done between 2019, and 2021; and selected media content, this article presents the possibilities and limitations of promoting legal changes to protect the rights of marginalised groups such as LGBT people, in a context with weak legal institutions, and consequently a civil society with the limites capacity to reinforce laws. The analysis also addresses the limits of foreign aid on LGBT activism in these contexts.

In this chapter, we attempt to make sense of how influential critical conservative stakeholders, such as politicians and religious leaders, have not been able to prevent this more progressive legislation from being approved. We hypothesise that given a diverse religious and socio-linguistic context, no prominent political or religious actor has been able to monopolise issues for or against LGBT rights. Instead, the government holds the most political power[9] and has instrumentalised the case differently from other countries in the region. Due to its dependency on foreign aid, it has accommodated LGBT issues in some instances, particularly related to healthcare. However, it does not allow for a more open debate to avoid political backlash from the public or influential conservative actors.

2 Mozambique in the region

Mozambique does not fit the profile of most Southern or even Eastern African countries concerning the criminalisation of same-sex relations. In these regions only Angola, Lesotho, Madagascar, Mozambique and South Africa do not have punitive laws toward homosexuality.[10] It is understood

8 Twenty-four interviews were conducted between November and December 2016 in Maputo and one in Quelimane, Mozambique. The interviews were conducted in Portuguese. The study received approval from the Norwegian Center for Research Data (NSD).

9 The ruling party, FRELIMO, has been in power before and the introduction of multiparty elections in 1994 has allowed it to establish significant control over state institutions. Power remains generally centralised in the executive branch, which dominates parliament and all other branches of government. Judicial independence is hampered by the dominance of the executive branch. The Attorney General is directly appointed by the president, with no legislative confirmation process. Besides, state-run outlets dominate the Mozambican media sector and often provide coverage favourable to the government. Freedom House 'Freedom in the World: Mozambique 2021' (2021) https://freedomhouse.org/country/mozambique/freedom-world/2021 (accessed 20 July 2022).

10 The most recent reform that has been adopted by Angola is the new Penal Code, approved in 2019, which offers protection based on sexual orientation. Botswana is another country that is on the process of recognising LGBT rights. Like LAMBDA, Botswana's LGBT association LEGABIBO also fought a long battle for their right to assembly, which was eventually successful in 2016.

that evangelical influence is a significant factor in helping to curtail the rights of LGBT minorities.[11] In Mozambique, Catholicism, Protestantism, and Islamism are the most influential, even though Neo-Pentecostal and Evangelical churches are on the rise.

According to Grossman,[12] competitive democratic processes have negatively impacted LGBT rights elsewhere in Africa, where actors have utilised political leverage to mobilise anti-gay sentiments. In the case of Mozambique, the issue has not been capitalised on by political actors because it appears to be a matter that most would prefer to keep unmentioned, and discussing it does not yield any particular political advantage. Political actors in Mozambique need to carefully balance progressive and conservative actors. Dependence on foreign aid, particularly regarding social issues such as education and health, may favour some openness regarding health issues such as those concerning HIV/AIDS, traditionally linked by international aid to LGBT people.

Similar to what has been described in Asian authoritarian regimes,[13] in the case of Mozambique, foreign aid, related to health (and response to HIV), has been instrumental in bringing LGBT issues to the table and, consequently, recognising the group's specific needs and formal improvements of their civil rights. Yet, even as extreme conservative sentiments do not seem to be able to gain traction, overt sexual expressions and identity remain taboo. This means that when speaking about family, marriage or adoption have not become an option for sexual minorities, even if they are relatively common albeit privately condoned practice. The judiciary is highly co-opted by the political elites and hence unlikely to decide progressively.

One of the few and long-lasting legal disputes has been around the legal registration of the only LGBT association, LAMBDA. As will be explored below, this case started in 2008 and has played out outside the courts. LAMBDA has filed petitions to the Ministry of Justice, the Ombudsman,

11 G Grossman 'Renewalist Christianity and the political saliency of LGBTs: Theory and evidence from Sub-Saharan Africa' (2015) 77 *The Journal of Politics* 337 https://doi.org/10.1086/679596 (accessed 20 July 2022); PR Ireland 'A macro-level analysis of the scope, causes, and consequences of homophobia in Africa' (2013) 56 *African Studies Review* 47 https://doi.org/10.1017/asr.2013.41 (accessed 20 July 2022); RR Thoreson 'Troubling the waters of a "wave of homophobia": Political economies of anti-queer animus in sub-Saharan Africa' (2014) 17 *Sexualities* 23 https://doi.org/10.1177/1363460713511098 e (accessed 20 July 2022).

12 Grossman (n 11).

13 T Hildebrandt 'NGOs and the success paradox: Gay activism 'after' HIV/AIDS in China' LSE Social Policy Working Paper 01-18 (December 2018).

and the National Human Rights Commission of Mozambique, decrying the unconstitutionality of not legalising the association. LAMBDA bases its arguments on article 52 of the Mozambican Constitution, which provides the right to freedom of association. In 2011, the UN Human Rights Council recommended that Mozambique should register the organisation.[14] The country did not take any action. The association remains unregistered, even after the Mozambican Constitutional Council confirmed, in 2017, the unconstitutionality of blocking its registration.[15]

Ultimately, we must ask what this contradictory context means for the aspirations of the Mozambican LGBT community. How safe do they feel that they will continue to be protected by law and their rights will not eventually be curtailed? Is the increasing evangelical influence likely to increase the ability of religious actors to impact the LGBT cause negatively? In the absence of an effective judiciary, should the conversation about the LGBT community focus on existing social practices rather than human rights?

3 Chronology and content of LGBT rights discussion in Mozambique

Like most of its neighbours, Mozambique inherited a colonial penal code from the 19th century that included clauses against 'those who habitually engage in vices against nature', which could lead to imprisonment from 6 months to 3 years with forced labour. For this reason, when the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) published its survey, State-Sponsored Homophobia, in 2013,[16] Mozambique was still among the countries that criminalised same-sex relations. Since its independence in 1975, there was no evidence that any case had been brought to court where the clauses were invoked. However, internment and physical abuse of members of the LGBT community occurred, at least according to the coordinator of the LGBT Group in Amnesty International Portugal.[17]

14 Z Machado 'Dispatches: Mozambique's double speak on LGBT rights' *Human Rights Watch* 25 January 2016 https://www.hrw.org/news/2016/01/25/dispatches-mozambiques-double-speak-lgbt-rights (accessed 20 July 2022).

15 República de Mocambique 'Acórdão nº 07/CC/2017 de 31 de Outubro' Concelho Institucional.

16 LP Itaborahy & J Zhu 'State-sponsored homophobia: A world survey of laws – Criminalisation, protection and recognition of same-sex love' ILGA (2013) https://www.refworld.org/docid/519b6c2f4.html (accessed 20 July 2022).

17 'Em Angola, S Tomé e Moçambique são vulgares as práticas de internamento e de abusos físicos' *Dezanove* 27 May 2010 http://dezanove.pt/36421.html (accessed 20 July 2022).

Before Mozambique's independence, a Customs Brigade (*Brigada de Costumes*) operating in Portugal from 1964 to 1974, when a coup toppled the dictatorship and liberated the remaining Portuguese colonies, planted undercover police agents posed as homosexuals to infiltrate locations frequented by the LGBT community. Many members of the community were arrested, physically and psychologically abused. Many lived in fear of their sexuality being exposed.[18] The same brigade likely operated in the colonies particularly policing the sexuality of settlers. Imprisonment and torture for political dissent were already commonplace. The same measures were used to repress homosexuality. Legislation against homosexuality for settlers and indigenous people differed in one important point. For the latter only 'those who engaged in the practice of vices against nature *for financial gain'* were criminalised.[19]

In 2014, former president Chissano made headlines by appealing to African heads of state to fight homophobia. He stated in an open letter to African leaders:[20]

> We can no longer afford to discriminate against people based on age, sex, ethnicity, migrant status, sexual orientation and gender identity, or any other basis – we need to unleash the full potential of everyone.

The same year, parliament approved a new Criminal Code and it was signed into law by the then sitting president, Armando Guebuza, sweeping away mention of 'vices against nature'. As a result, Mozambique received international recognition for decriminalising same-sex relations. After the legal waiting period of six months, the new code came into force in June 2015.

Though happy with some of the changes, civil society organisations noted that the new code was still marred with what they considered 'grave' human rights violations, lacked a gender approach and allowed gender-based violence. The code exempts perpetrators' relatives (parents, spouses

18 AC Correia 'O Estado Novo e a repressão da homossexualidade, 1933-1943' (2017) 70 *Ler História* 161.

19 GG da Costa 'Reflexões sobre o legado colonial português na regulação das práticas sexuais entre pessoas do mesmo sexo em Moçambique' (2021) 46 *Anuário Antropológico* 152.

20 J Chissano An open letter to Africa's Leaders – Joaquim Chissano, former President of Mozambique' *The African Report* 14 January 2014 https://www.theafricareport.com/4886/an-open-letter-to-africas-leaders-joaquim-chissano-former-president-of-mozambique/ (accessed 20 July 2022). 'Joaquim Chissano envia carta a líderes africanos e pede respeito para gays e lésbicas' *Dezanove* 15 January 2014 https://dezanove.pt/joaquim-chissano-envia-carta-a-lideres-598295 (accessed 20 July 2022).

and family members up to the third degree of kinship) from responsibility, even when they alter, or destroy evidence of the crime. This can decisively interfere with police investigations, increasing criminals' impunity, in cases of gender violence, including sexual violence. Article 218, excludes oral penetration and the use of objects as instances of rape. The view that the law was lacking was also shared with some of the key informants interviewed as part of this study, as is the case of one LGBT activist[21] who considers that the withdrawal of the homophobic clauses was not a real victory because this only reflected an already common practice, as they had not been used since independence; that is, there was no record of anyone being charged under those clauses.

This opinion is shared by the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, for him, there

> is no evidence of a connection between the process of decriminalisationon and a State vision aimed at combating violence and discrimination based on sexual orientation and gender identity or a concerted public policy to that effect.[22]

Another concern is the effect of international agendas and actors on the approval of legal reforms without the participation of local civil society. While there are no laws protecting against hate crimes based on sexual or gender identity in the country, nor legislation on gender recognition, in 2007 the Labour Law was reformed. It included the criminalisation of discrimination based on sexual orientation in employment. In article 4(1), this law states that the interpretation and application of the norms in the law adhere to

> among other [things], to the principle of the right to work, stability of employment and in the work post, of change in circumstances and non-discrimination due to sexual orientation, race or HIV status.[23]

In article 108(3), the law further states about remuneration:[24]

21 Inteview 16/25, in Maputo in November 2016.

22 Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (n 6).

23 In Portuguese: 'A interpretação e aplicação das normas da presente lei obedece, entre outros, ao princípio do direito ao trabalho, da estabilidade no emprego e no posto de trabalho, da alteração das circunstâncias e da não discriminação em razão da orientação sexual, raça ou de se ser portador de HIV/SIDA.'

24 In Portuguese: 'Todo o trabalhador, nacional ou estrangeiro, sem distinção de sexo, orientação sexual, raça, cor, religião, convicção política ou ideológica, ascendência

> Every worker, national or foreigner, without distinction of sex, sexual orientation, race, colour, religion, political conviction or ideology, ethnic descent or origin, has the right to receive the same salary and benefits for equal work.

The 2007 reform happened just before LGBT rights first started emerging as an issue in development programmes in Mozambique and without the participation of national LGBT organisations. According to some of our interviewees (that were not directly involved in the reform), this reform could have been related to HIV programmes and advocacy work linked to HIV. A new labour law reform has been under discussion since 2019. At least one proposal submitted to Parliament sought to do away with the protection against discrimination based on sexual orientation.

In Mozambique, LGBT issues emerged first as a health concern related to the HIV pandemic. In 2008, with Norwegian support, Pathfinder funded LGBT rights through advocacy and health promotion activities. HIV policies and poverty reduction strategies included from 2009 men having sex with men as vulnerable groups, but have kept silent on women who have sex with women and the transgender population. The latter were finally included in the latest HIV policy (PEN V), valid from 2021-2025.[25]

The inclusion of men having sex with men in policies as vulnerable groups (and targeted groups) shows that, despite the formal criminalisation of same-sex relations in the criminal code, this was not an obstacle to the approval of laws and policies (such as the National Strategic Plan for HIV/AIDS from 2010 which included men having sex with men (MSM) as a priority for prevention). Moreover, the labour law was not legally contested.

However, despite the inclusion of gay men, and now transgender women in policies, studies have found that this population still suffers from stigma and discrimination in their access to healthcare services which prevents them from using the services and limit their access to counselling, information and supplies such as condoms.[26] A study conducted by LAMBDA found that despite the anti-discrimination provision in the

ou origem étnica, tem direito a receber salário e a usufruir regalias iguais por trabalho igual.'

25 Conselho Nacional de Combate ao HIV e SIDA. (2020). *Plano Estratégico Nacional de Combate ao HIV e SIDA (PEN V), 2021-2025.*

26 R Nalá et al 'Men who have sex with men in Mozambique: identifying a hidden population at high-risk for HIV' (2015) 19 *AIDS and Behavior* 393 https://doi.org/10.1007/s10461-014-0895-8 (accessed 20 July 2022).

labour law, the LGBT community still feels at risk of being fired for their sexual orientation and as a result prefer not to disclose it.[27]

Additionally, as mentioned above, LAMBDA faces an uphill battle to register formally (see Figure 1 LAMBDA registration request timeline below). The association was formed in 2006 but first applied for formal registration in 2008. Almost 15 years after the application, it is not yet registered. For some, article 1 of Law No 8/91, Law on Association, which regulates the registration and operation of associations, is one of the reasons behind this. For this law, in order to be legally recognised, an organisation has to not 'offend public morals'. This provision has been often used to deny registration of LAMBDA.[28] In 2017, the Constitutional Council declared article 1 of Law No 8/91 unconstitutional, not only on the grounds that it broadens the limits of association set by the Constitution (namely, by extending it to limitations based on moral grounds) but also because it runs contrary to the principles of equality and non-discrimination.[29]

Despite this, and the calls by several states and United Nations human rights mechanisms for Mozambique to process LAMBDA's application for registration expeditiously,[30] LAMBDA continues without legal registration. Because of this, the association cannot get funding directly. Presently, LAMBDA activities are funded through a parent organisation, Forum Mulher – an umbrella association whose member organisations fight for women's rights.[31]

27 D de Sousa & H Mafundza *Direitos e Cidadania LGBT* (2014).

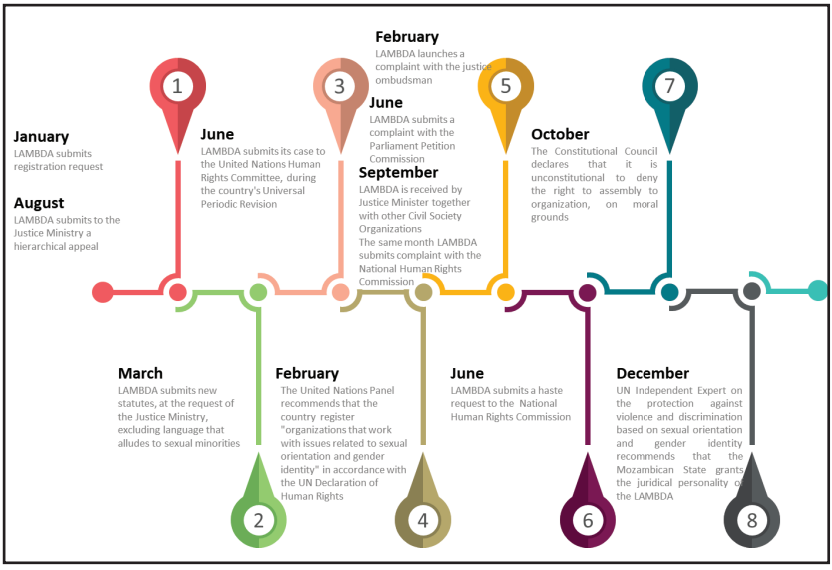
28 Human Rights Council Working Group on the Universal Periodic Review 'Summary of stakeholders' submissions on Mozambique. Report of the Office of the United Nations High Commissioner for Human Rights' (2021) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/045/89/PDF/G2104589.pdf?OpenElement (accessed 22 July 2022).

29 Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (n 6). (2019).

30 For example Canada, during the universal periodic review in 2011 (A/HRC/17/16, para 89.67), the Human Rights Committee in 2013 (CCPR/C/MOZ/CO/1, para 22) and Norway, Canada and the United Kingdom of Great Britain and Northern Ireland during the universal periodic review in 2016 (A/HRC/32/6, paras 129.34 and 130.12-130.13).

31 Interview 20/25 in Maputo, December 2016.

Figure 1: LAMBDA registration request timeline



Source: LAMBDA, 2015; OHCHR

The discussion about the rights of sexual minorities has been largely absent from the national media discussion. Notable exceptions are an in-depth article from *Jornal a Verdade*[32] accusing the Mozambican state of discriminating against the LGBT community in 2012;[33] again in 2014 exposing the state's refusal to legalise LAMBDA,[34] and the third article in 2015 denouncing the government's attempt to disguise discrimination in its Human Rights Report.[35] The latter articles were part of the newspaper's segment on democracy. Another online news outlet, *Folha de Maputo* conveyed the news about the alleged discrimination from the government faced by LAMBDA, as evidenced by statements of the justice minister

32 A free newspaper, which aims to expose controversial issues and through their discussion contribute to social and civic education.

33 R Lamarques 'O Estado discrimina' *Verdade* 4 October 2012 http://www.verdade.co.mz/temadefundo/35themadefundo/30981oestadodiscrimina (accessed 20 July 2022).

34 A Manjate 'Governo "recusase" a legalizar associação das minorias sexuais' *Verdade* 24 July 2014 http://www.verdade.co.mz/destaques/democracia/47737 (accessed 20 July 2022).

35 E Sambo 'Governo de Moçambique "maquilha" relatório sobre direitos humanos para submetêlo às Nações Unidas' *Verdade* 16 October 2015 http://www.verdade.co.mz/destaques/democracia/55347 (accessed 20 July 2022).

about the association's registration. Otherwise, the discussion is 'hidden' under the guise of entertainment news, as is exemplified by articles on the web page *Sapo Moçambique's* lifestyle section, for example, one talking about the life and career of Labiba, a trans woman,[36] one commemorating the gay pride day;[37] or another on sexual minorities' complaint about discrimination.[38]

In the print media, issues about homosexuality are featured in opinion pieces and are more conservative. The newspaper *Zambeze* is particularly prolific in conservative opinion pieces on homosexuality. On 12 January 2012 it ran an article on the international section with a title attributed to Pope Benedict XVI saying that gay marriage was a menace to humanity.[39] On 19 July 2012, the opinion column called *Muthetho* confounded violence and rape in prisons with homosexuality and claimed it as an unnatural act common to places where same sex people are forced to live together, without access to people of the other sex.[40] The author further alleged that it was necessary for the human species to protect itself against such menace to its existence. The same author offers his opinion in the same column on 26 July 2012, offering his take on homosexuality in the discussion for the new penal code. He seems to favour the criminalisation of homosexuality to account for the crime of rape of men. He alleged that the clauses on bodily harm were not enough, and rape clauses only referred to rape committed against women.[41] These examples, and another dated 20 September 2012, the national public newspaper *Notícias,*[42] were presented as instances of bias against the LGBT community in the media, at an international conference by the then director of LAMBDA, Danilo da Silva.

Other attacks in the media followed. On 16 January, 2014 Sheikh Aminuddin, in his opinion column called *Almadina,* referred to

36 'Entre a arte e a realidade' *LABIBA Sapo Life Style* 22 November 2010 http://lifestyle.sapo.mz/vidaecarreira/emfoco/artigos/labiba?artigocompleto=sim (accessed 20 July 2022).

37 'Dia Internacional do Orgulho Gay' *Sapo Life Style* 29 June 2012 http://lifestyle.sapo.mz/vidaecarreira/emfoco/artigos/diainternacionaldoorgulhogay (accessed 20 July 2022).

38 'Minorias Sexuais acussam Governdo de discriminação e estigma' *Sapo Life Style* 3 November 2014 http://lifestyle.sapo.mz/glamour/celebridades/artigos/minoriassexuaisacusamgovernodediscriminacaoeestigma (accessed 20 July 2022).

39 'Casamento gay ameaca a humanidade' *Zambeze* 12 January 2012.

40 A Ngoyene 'Projecto do Código Penal: Homossexualismo' *Zambeze* 19 July 2012.

41 As above.

42 V Milhongo 'Reflectindo sobre a homosexualidade' *Noticia* 20 September 2012

homosexuals as being worse than animals,[43] and was strongly criticised for it.[44] On 14 August, the same year he penned another opinion piece in the same column under the title: 'What rights … and what humans?'[45] Additionally, and according to Danilo da Silva, there is a 'self-censorship from journalists, when reporting issues related to sexual minorities'[46] stemming from their own preconceptions and prejudices.[47] The role of media in 'forming and informing the public opinion in Mozambique'[48] has made it a crucial battleground where to gather allies for both camps.

4 Why decriminalisation does not ensure rights

From the above, it is evident that sexual orientation and gender identity in Mozambique are still complex issues that are neither discussed easily nor openly. Comparatively with most other countries in the region, same-sex relations in the country are not criminalised, there is no overt discrimination and despite some conservative voices, there is no organised movement to suppress sexual minorities' rights. Yet, the same parliament and government officials who allowed a law that decriminalised 'acts against nature' to pass, are unable to guarantee the simple right to freedom of association. Moreover for some parliamentarians the decriminalisation did not have anything to do with 'permitting' homosexuality and therefore could not be equated with the 'legalisation' of homosexuality.[49]

In response to the recommendations of the UN Human Rights Council's Universal Periodic Review, prior to the amendment of the law, regarding the repeal of laws criminalising same-sex relations among consenting adults, the guarantee of the right to freedom of association of the LGBT community, Mozambique did not recognise that the existing

43 SA Mohamad 'A importância do casamento' *Zambeze* 16 January 2014.

44 C Capitine *Como Reportar Questões LGBT nos Mídia* (2014). *Manifestação de Repúdio ao Conteúdo do Artigo de Opinião do Ilustre Comissário Sheik Aminudin Mohamed, intitulado 'A Importância do Casamento' publicado no Jornal Zambeze, Edição do dia 16 de Janeiro de 2014* http://www.oam.org.mz/wp-content/uploads/CARTA-CDH-SHEIK-CNDH.pdf (accessed 20 July 2022).

45 SA Mohamad 'Que direitos... e que humanos' *Zambeze* 14 August 2014.

46 'Há autocensura dos jornalistas em reportar assuntos relacionados às minorias sexuais'.

47 IREX *Análise de Género na Mídia Moçambicana* (2012) https://pdf.usaid.gov/pdf_docs/PA00TRPG.pdf (accessed 20 July 2020).

48 E Lopes 'The legal status of sexual minorities in Mozambique' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 183.

49 Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (n 6)

Penal Code criminalised homosexuality, and denied that there were restrictions regarding freedom of association. However, it did admit that cultural and religious customs prevented the issue of homosexuality from being addressed. It was considered to be a novelty and required time to be discussed openly.[50]

Yet, it seems that social acceptance of same-sex sexuality is relatively widespread, albeit only to a certain degree. A study carried out by the Human Rights League (LDH) in 2006 found that 96 per cent of people surveyed in four of the biggest Mozambican towns knew a homosexual person and 80 per cent were friends with one. A follow-up study by LAMBDA, in 2013,[51] found that fewer people admitted to knowing homosexual people (39 per cent). However, the majority (60 per cent) said they would defend a homosexual person if they were being assaulted for their sexual orientation. In 2017 the percentage was 84 per cent.[52] In both studies, women were more accepting of homosexuality. Despite this apparent openness, homophobic attitudes are not uncommon. Discussing homosexuality openly seems to draw the greatest resistance. All the people we interviewed also claimed that attitudes towards homosexuality are more open in urban centres than in rural areas.

The Afrobarometer on the other hand, has found that Mozambicans are less tolerant compared to the African average in most of the researched indicators: people of other ethnicities, religion, foreign origin and living with HIV.[53] However, they were among the most tolerant towards homosexuality (56 per cent claimed they would like or not mind living next to a homosexual person), only surpassed by South Africa and Cape Verde. In this survey, tolerance was higher in urban settings and among young, more educated and male respondents.

For the most part, the discussion of homosexuality and sexual minorities in Mozambique has centred around a human rights discourse. LAMBDA and its supporters argue that the Constitution grants sexual minorities equal rights to other Mozambican citizens and the right for protection from discrimination by the Mozambican state. They also

50 See HRC 'Report of the Working Group on the Universal Periodic Review: Mozambique' UN Doc A/HRC/17/16 (28 March 2011) para 85 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/123/79/PDF/G1112379.pdf?OpenElement (accessed 20 July 2022).

51 E Brás, C Rehana & M Baltazar *Atitudes Perante a Homosexualidade nas cidades de Maputo, Beira e Nampula* (2013) 4.

52 Muianga (n 4).

53 B Dulani; G Sambo & KY Dionne 'Good neighbours? Africans express high levels of tolerance for many, but not for all' *Afrobarometer Dispatch* 74 (2016).

argue that Mozambique has ratified international conventions for the protection of human rights, which must be upheld. This discourse is the same used by Mozambican women's rights organisations, such as *Fórum Mulher* and WLSA. Since LAMBDA is funded under, and is a member of a feminist umbrella organisation, which advocates for women's rights, it is only natural that they use similar strategies and arguments. Critics to this argument, chiefly within the government argue that all Mozambican citizens already benefit from equal rights, and by considering themselves a minority the LGBT community wants to set itself apart from the other citizens and benefit from special treatment. Notably, the Mozambican state does not recognise any minority, or minority rights.

The role of foreign aid cannot be ignored in the development of LGBT activism in Mozambique and elsewhere in the region. In the case of Mozambique it has been particularly important in introducing the LGBT population as a group with specific needs in health programmes. Even in a context where there is a level of tolerance, an over focus on targeted interventions, without addressing structural factors to explain for example the higher incidence of HIV among men having sex with men, could contribute to the stigmatisation of vulnerable and marginalised populations and the LGBT population in Mozambique. Jasbir Puar's seminal work on *homonationalism* has paved an understanding of the subtle ways in which a new development focus has shifted towards incorporating the protection of LGBT rights.[54] As a non-compliant non-western space, with generalised sodomy laws inherited from colonial laws and generalised homophobia, Africa has become a 'site of anti-gay sentiment in need of Western intervention'.[55] This has meant that Mozambique, a country highly dependent on foreign aid, would have to comply, at least partially, with protecting its LGBT population, beyond health issues.

This external support further exacerbates the perception that LGBT issues are foreign based. The rights discourse seems to reinforce this view, as the rights discourse calls on Mozambique to respect its Constitution and the international conventions ratified by the country. It has been argued, for example in the case of Ghana, that the rights frame can be appropriated by opponents of LGBT rights[56] as seems to be exemplified

54 JK Puar *Terrorist assemblages: Homonationalism in queer times* (2007).

55 C Biruk '"Aid for gays": The moral and the material in "African homophobia" in post-2009 Malawi' (2014) 52 *The Journal of Modern African Studies* 447 https://doi.org/10.1017/S0022278X14000226 (accessed 20 July 2022).

56 E Baisley 'Framing the Ghanaian LGBT rights debate: competing decolonisation and human rights frames' (2015) 49 *Canadian Journal of African Studies / Revue canadienne des études africaines* 383 https://doi.org/10.1080/00083968.2015.1032989 (accessed 20 July 2022).

by Sheikh Aminuddin's opinion pieces referred to above regarding same-sex marriage and discrimination. On the other hand, Mozambique's religious diversity seems to have prevented the ability of more extreme anti-homosexual influences that have been attributed to Evangelical churches in the increase of homophobia in Africa. The different religious groups have not been able to form a united front against homosexuality. For example, the Anglican Church in Southern Africa has accepted homosexuals as members of the church, although they stopped short of condoning same-sex marriage. [57]

What is lacking from the discussion is social practice that exists and counters perception of deviance, namely, that which is accepted by immediate family and neighbours. This includes instances of *de facto* unions, informal adoptions, and identity expressions within the entertainment milieu, like the trans dance duo Labiba and Lasanta who were taken off a game show despite their popularity among contestants and viewers. If the anti-homosexual clauses were withdrawn from the law for lack of use, perhaps one should begin to argue for the inclusion of clauses that reflect actual practice. Such practice need not be grounded in past tradition. In a brilliant talk about Sexuality and Identity in Africa at the Bergen Exchanges 2016,[58] Charles Ngwena addressed the dangers of essentialising, indeed exoticising sexual practices by evoking traditional customs, as this could exclude present and common practices, identities and expressions that are not grounded on previously sanctioned behaviour. He favoured an approach that recognised new practices as deserving to be protected and accepted as much as African as other customary homosexual practices. Relying excessively on customary sexual practices to legitimise homosexuality could in fact be counterproductive, particularly in cases where they are no longer in practice or when evidence of them having existed cannot be found.

The biggest fear of the LGBT community, however, is that exposing private practices that lack majoritarian acceptance are still not accepted, could trigger more violence against LGBT persons, and contribute to making LGBT rights an arena for political disputes as have been seen in neighbouring countries.

57 See C Stewart 'Southern African Anglicans to LGBT people: Welcome' *76 Crimes* 26 February 2016 https://76crimes.com/2016/02/26/southern-african-anglicans-to-lgbt-people-welcome/ (accessed 20 July 2022).

58 Worskshop organised by the Centre of Law and Social Transformation in Bergen, Norway.

Legislation grounded in social movements stands a better chance to bridge the gap between rights and practice, and to address, from the beginning, the risk of backlash[59] (and poor implementation). In some Latin American contexts, debates on LGBT rights, including litigation in the courts, went progressively from defending individuals from state and/or private agencies' actions such as police brutality and/or discrimination, to discussion on more contested rights (such as same sex marriage and adoption). In contexts like Mozambique, with a general rejection of physical violence against the LGBT population, these debates could be a good point of departure.[60]

5 Conclusion

Presently, the LGBT community in Mozambique seems to be at crossroads. Although Mozambique appears to the outside world, in particular in the western imagination, to have a liberal approach towards sexual minorities, in reality the change in the law has meant little for the community. The association LAMBDA is still not legally registered. Overall legislation does not overtly protect against discrimination on the grounds of sexual orientation. The labour law is still the notable exception. Even the Constitution does not mention sexual orientation specifically in its anti-discrimination clause, even though it does provide for equal treatment of all citizens in terms of schooling, equal pay for equal work and health.

In the meantime, there are multiple other issues that affect the LGBT community. One of them is the desire to constitute family and freedom to develop and express one's own identity, as illustrated by the story of the couple above. Several forms of spontaneous *de facto* family institutions exist that should allow for a conversation about the next step, such as allowing for the legalisation of same-sex relations and even adoptions. However, even as homosexual family organisations exist and are relatively common, social acceptance of the practice has not spread enough to influence protective legislation. The judiciary, which could drive the process of increasing equality for the LGBT community, is highly co-opted by a political elite that does not have a vested interest in furthering the LGBT agenda.[61]

59 C Gianella Malca & B Wilson *Rainbow revolution in Latin America: The battle for recognition* (2015).

60 As above.

61 Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (n 4).

Although LGBT communities do not suffer violence, their visibility risks backlash from conservative groups. Both conservative and some of the progressive voices consider that sexualities should be confined to the private realm. Particularly, conservative actors consider that there is no need for 'special' treatment if LGBT people truly hope for equality (an argument often used against women rights defenders too). In the meantime, unable to freely express their sexualities and identities, LGBT folk rightfully feel that they are second-class citizens.

An argument for having legislation that reflects social practice, also of LGBT people, would be that Mozambique would *finally* have legislation that truly reflects social practice. The danger is that there are several harmful social practices that legislators and civil society actors alike want to keep out of the law, for example polygamy. In the likely difficult conversation about normalising homosexual acts, in accordance with privately accepted social practice, conservative actors have started arguing for the right to legalise some practices hitherto considered harmful, evoking condoned social practice. In April 2022, Muslim women gathered in Quelimane voiced their support for polygamy, as long as the rules prescribed under the religion were followed. Feminist activists were naturally concerned.[62] However, anticipating a difficult conversation should not equal avoiding it.

There was a general perception among our interviewees that Mozambicans, mostly politicians and the general population, are not ready for this conversation although members of the transgender community were of the contrary view that there has been openness from the government, and that African conservatism may at times be more of a perception than reality. A similar position is held by Awondo et al, in their piece about the nuanced undertones of African homophobia.[63] Perhaps it is time to test if such openness can begin to extend to Mozambican citizens.

The country has to its advantage occasional openness from the government, diversity of thought among potential conservative actors, and a population that despite resistance largely refrains from extreme forms of discrimination. This suggests that despite conservatism there is ample space to manoeuvre to overcome deep-seated prejudice of individuals and

62 STV Jornal da Noite 18 April 2022 https://www.youtube.com/watch?v=T7GsVUd6GLs (accessed 20 July 2022).

63 P Awondo, P Geschiere & G Reid 'Homophobic Africa? toward a more nuanced view' (2012) 55 *African Studies Review* 145 https://doi.org/10.1017/S0002020600007241 (accessed 20 July 2022).

allow for further progress towards LGBT rights, beyond their sexuality and public health concerns, towards being able to participate in society on an equal footing with everyone else.

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3 Queer lawfare in Botswana

Monica Tabengwa & Anthony Oluoch***

1 Introduction

A study by the Williams Institute ranks Botswana 80th of the 175 countries surveyed and fifth in Africa after South Africa, Mauritius, Namibia and Mozambique on social acceptance of LGBTIQ+ people.[1] A major influence in the acceptance of LGBTIQ+ people by society in general including family members, employers, clergy and government institutions are the social attitudes that exist about the population. These social attitudes are framed by, among other things, the law, politics and politicians, shared beliefs and culture, and powerful forces in society such as religion and the media.

Indeed, in Botswana, socio-political, socio-economic, and socio-cultural factors have played a role in influencing attitudes towards LGBTIQ+ people. This is not only evidenced by the positive change in jurisprudential opinions over time, but also by the utterances made by public figures, including the President.

Sections 164, 165, and 167 of the Botswana Penal Code have language that is very similar to criminal codes from countries that are former British colonies. These sections provide for what has been termed 'unnatural offences' and criminalise 'carnal knowledge against the order of nature'. The original sections only applied to men but were amended in 1998 to include women when the laws were made gender neutral by stating:[2]

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1 AA Flores 'Social acceptance of LGBTI people in 175 countries and locations 1981 to 2020' Williams Institute UCLA School of Law (November 2021) https://williamsinstitute.law.ucla.edu/wp-content/uploads/Global-Acceptance-Index-LGBTI-Nov-2021.pdf (accessed 14 May 2022).

2 Section 167 of the Botswana Penal Code.

> Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence.

Botswana derives its laws from the Constitution, customary law, common law, legislation, and judicial precedent. The country operates a dual legal system consisting of common law and customary laws. Common law is composed of a combination of legislation passed by parliament, and legal precedent which is mainly based on remnants of Roman-Dutch laws and practices passed through colonisation and judicial practices. While it is commonly accepted that the Constitution is the supreme law of the country, it should be noted that the Constitution does not expressly state this, but rather that the courts have repeatedly validated its status as the supreme law of the land and that all laws derive their validity from it. Section 86 of the Constitution gives power to parliament to make laws that are 'subject to the provisions of this Constitution',[3] the courts have declared laws that are inconsistent with the Constitution to be unconstitutional and invalid to the extent of their inconsistency.

There are several cases bearing precedence to the supremacy of the Constitution of Botswana. In *Petrus v The State*,[4] the Court of Appeal declared section 301(3) of the Criminal Procedure and Evidence Act, 1939 void on the grounds that it infringed section 7(1) of the Constitution prohibiting torture, inhuman, or degrading punishment. In the iconic citizenship case of *Attorney-General v Dow*,[5] the Court of Appeal also upheld the constitutional supremacy by declaring section 4(1) of the Citizenship Act, 1998[6] void for violating the constitutional prohibition of discrimination in sections 3 and 15 because it denied citizenship to the offspring of Botswana women married to foreigners but granted citizenship to the offspring of Botswana men married to foreigners.

Section 105 of the Constitution gives the High Court and the Court of Appeal exclusive jurisdiction to adjudicate any matter involving

3 Section 86 of the Constitution of Botswana states: 'Subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, order and good government of Botswana.'

4 [1984] 1 BLR 14.

5 [1992] BLR 119.

6 Section 4(1) of the Citizenship Act of Botswana: 'A person born in Botswana shall be a citizen of Botswana by birth: Provided that a person shall not be a citizen of Botswana by virtue of this subsection if at the time of his birth, he acquires the citizenship of another country by descent through his father.'

Constitutional interpretation. However, although this gives these courts the power to review all legislation and quash any law that infringes any constitutional provisions, it does not give them the power to nullify sections of the Constitution itself.[7]

As in most countries LGBTIQ+ persons have always lived on the fringes of society, their personhood questioned, and their rights denied by both state and non-state entities. They have had to rely on the sanctity and supremacy of the Constitution to assert their rights and have the rights respected by all. The courts have therefore been heavily guided by the decision in *Attorney-General v Dow*,[8] which stated that:[9]

> The existence and powers of the institutions of state, therefore, depend on its [the Constitution's] terms. The rights and freedoms, where given by it, also depend on it. No institution can claim to be above the Constitution; no person can make any such claim. The Constitution contains not only the design and disposition of the powers of the state which is being established but embodies the hopes and aspirations of the people. It is a document of immense dimensions, portraying, as it does, the vision of the peoples' future.

And further:[10]

> In Botswana, when the Constitution, in section 3, provides that 'every person . . . is entitled to the fundamental rights and freedoms of the individual', and counts among these rights and freedoms 'the protection of the law', that fact must mean that, with all enjoying the rights and freedoms, the protection of the law given by the Constitution must be equal protection.

In the 2016 decision of *Attorney-General v Rammoge*, the Court held that human rights group, Lesbians, Gays, and Bisexuals of Botswana (LEGABIBO) should be allowed to register as a society stating that in Botswana, all persons, whatever their sexual orientation, enjoy an equal right to form associations with lawful objectives for the protection and advancement of their interests. The Court ruled that the refusal of the Minister of Labour and Home Affairs to allow the registration of LEGABIBO was unconstitutional and stood to be reviewed and set aside on the ground of illegality.[11]

7 CM Fombad 'UPDATE: Botswana's legal system and legal research' GlobaLex (2021) https://www.nyulawglobal.org/globalex/Botswana1.html (accessed 16 May 2022).

8 Appeal Court 1994 (6) BCLR 1 (locus standi).

9 At 5.

10 At 10.

11 *Attorney-General v Rammoge* Court of Appeal of the Republic of Botswana Civil Appeal

In *ND v Attorney-General,*[12] the High Court had delivered its decision in 2017 finding that the failure of the gender marker to match ND, a transgender man's gender identity, including his physical appearance, subjected ND to severe insecurity, harm, and discrimination. In addition, the Court held that the Registrar's refusal to change the applicant's gender markers violated ND's rights to privacy, equal protection, freedom from degrading and inhuman treatment, freedom of expression, and protection from discrimination.[13]

The lawfare in Botswana culminated in 2019 when after years of incremental strategic litigation cases, the High Court of Botswana decriminalised same-sex sexual acts between adults in their judgement in *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae).*[14] The Court determined that it is not the business of the law to regulate private consensual sexual encounters between adults. It also applied the same to issues of private decency and/or indecency between consenting adults.

Yet with provisions of the Constitution entitling every person to fundamental rights and freedoms which has led to increasingly progressive jurisprudence around LGBTIQ+ issues in Botswana, there remains a need for continuous and sustained advocacy to align societal perceptions with the law. These societal perceptions, influenced by opposing players including evangelical groups, traditional leaders, and sections of the media, have encouraged cases of violation, stigma, and discrimination towards LGBTIQ+ people in the country. LEGABIBO and other civil society organisations continue to run sensitisation campaigns on the existence of, and the need to protect, the rights of sexual and gender minorities.[15]

2 An overview of queer activism

LEGABIBO is the first organisation in Botswana to work on and advocate for the rights of LGBTIQ+ persons. It was founded as a support group

CACGB-128-14 (2016).

12 *ND v Attorney-General* MAHGB-000449-11.

13 Para 198.

14 MAHGB-000591-16. 'Botswana: Criminalisation of consensual gay sex is unconstitutional' African Legal Information Institute (12 June 2021) https://africanlii.org/article/20190612/botswana-criminalisation-consensual-gay-sex-unConstitutional (accessed 16 May 2022).

15 L Pagiwa 'BOTSWANA: "Anti-rights groups are emerging in reaction to progressive gains"' *Civicus* 15 August 2019 https://www.civicus.org/index.php/media-resources/news/interviews/4005-botswana-anti-right-groups-are-emerging-in-reaction-to-progressive-gains (accessed 16 May 2022).

under the fiscal support of the Ditshwanelo Centre for Human Rights. For many years the group operated informally with a few of its members meeting irregularly. The case of *Kanane v The State* (*Kanane* case)[16] however propelled the group into the limelight, with the publicity brought by the arrests of two gay men and the ensuing legal battle through the Botswana courts meaning that LEGABIBO was also forced to 'come out'.

Many great debates and discussions were held, where many questioned and even denied the existence of gay persons in Botswana. The litigation of the *Kanane* case lasted from 1994 to 2003 when the Court of Appeal gave a ruling that society was not ready to decriminalise. While this was a disappointing conclusion to a case that had gripped the otherwise conservative nation's attention for almost a decade, it just about opened the door and left it open for further action.

LEGABIBO in the meantime was growing and with the support of Ditshwanelo, getting bolder and more strategic in their work. Across the border in South Africa the apartheid era had come to an end and a new and much more democratic Constitution had been ushered in. A proliferation of public interest cases had not only ensured that LGBTIQ+ persons were included in the constitutional protections but also that they were able to marry and enjoy family rights like everybody else. Back home President Festus Mogae (1998-2008), whose tenure had been mired in issues of discrimination and stigma from the HIV/AIDS epidemic had come to a new realisation, that complete inclusion of all persons, especially those disproportionately at a higher risk was key to HIV prevention. He advocated for a holistic approach that meant a change in attitude and policies towards sexual and gender minorities. He said this in support of inclusion for LGBTIQ+ persons:[17]

> While I admit that the West often push their agendas on Africa, which we must be wary of, I also believe that we must, as Africans, admit that the world is changing … This means often abandoning some of our long-held convictions about life.

16 High Court Criminal Trial 9 of 1995.

17 MK Lavers 'Former Botswana president speaks in support of LGBT rights' *Washington Blade* 21 January 2016 https://www.washingtonblade.com/2016/01/21/former-botswana-president-speaks-in-support-of-lgbt-rights/ (accessed 11 July 2022).

President Mogae ordered the police to never arrest people based on their same-sex sexual conduct, which meant that the arrest in the *Kanane* case was the last arrest under sections 164 and 167 of the Botswana Penal Code. A combination of these factors and support from friends and allies propelled LEGABIBO to seek legal recognition in the form of registering as a society for the first time in 2005, this would allow them to move out from under the then fiscal hosts BONELA. The application was rejected twice before LEGABIBO went to court in 2013 claiming violation of the constitutional rights by the Registrar of Societies and seeking an order to be registered forthwith. It would take another five years for the Court of Appeal to hand down a judgment declaring that the rights of LEGABIBO members to non-discrimination and to freedoms of association and expression, had been violated by the Registrar's refusal to register LEGABIBO as a society. The Court ordered that LEGABIBO should be registered forthwith.

In the meantime, the LGBTIQ+ community was growing and openly advocating for inclusion amongst other mainstream civil society organisations. Many more organisations such as Rainbow Identity Association (RIA), started operating alongside LEGABIBO thereby increasing the visibility and voice of the LGBTIQ+ community. They were now able to get legal recognition and operate as independent entities and took full advantage of that to integrate themselves into the mainstream policy actions often using HIV funding as a steppingstone. However, the criminalisation of same-sex conduct remained a dark cloud hanging over their newly clad legal recognition. LGBTIQ+ persons suffered discrimination, stigma and human rights violations regularly on account of this criminalisation. They were denied access to public services and their enjoyment of their fundamental rights diminished.

However, going to court meant proving that the social environment, and opinions had changed, that societal attitudes were such that it was time to decriminalise. According to LEGABIBO's amicus arguments in the decriminalisation case *Letsweletse Motshidiemang v Attorney General* brought through expert evidence, it was shown that LGBTIQ+ people living in Botswana experienced higher levels of violence than was reported, experienced sexual orientation and gender identity related discrimination when accessing health on account to the negative stigma, and that sections 164 and 167 of the Penal Code constituted examples of structural stigma. Further to that, the Botswana parliament through the amendment of the Employment Act of 2010 had acknowledged that discrimination on the basis of sexual orientation was possible and prohibited employment discrimination on this basis.

3 A legal analysis of developments and process

3.1 On criminalisation of consensual same-sex conduct: *Kanane v The State*[18]

The Penal Code (Amendment) Act 5 of 1998 amended sections 164 and 167 making them all gender encompassing, substituting the words 'any other' for the word 'male' in section 164 and deleting the word 'male' wherever it appeared in section 167 while inserting the words 'or her' and 'or herself' immediately after the words 'him' and 'himself' respectively.[19] This was an apparent response to the decision in *State v Kanane*, High Court Criminal Trial 9 of 1995 where the accused, one of two men who was charged with engaging in unnatural acts and indecent practices in terms of sections 164 and 167 of the Penal Code, sought the Court's interpretation that these sections were discriminatory towards male persons on the grounds of gender and that these sections hindered male persons in their enjoyment of their right to assemble freely and associate with other persons.

It is important to note that the High Court decision was handed down in March 2002, after the Penal Code was amended. The appeal to this case, and the decision of the Court of Appeal in July 2003 was undoubtedly the canon that launched queer lawfare in Botswana. In *Kanane v State*, the Court relied heavily on the approach and attitude of the society in Botswana. It stated that there was no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women required decriminalisation of those practices, even to the extent of consensual acts by adult males in private. The Court concluded that the trend was not to move towards the liberalisation of sexual conduct by regarding homosexual practices as acceptable conduct but showed a hardening of the contrary attitude.[20]

While the ruling in *Kanane* was not a favourable ruling, it did, however, highlight three key aspects of the situation at the time that are important to note. Firstly, the Court dissociated itself completely with the opinion of the High Court judge regarding the origin of homosexuality. In the High Court ruling, Judge Mwaikasu quoted literature that implied that homosexuality is a western import and a white man's influence. Secondly, while appreciating the trends in other kindred democracies

18 *Kanane v The State* 2003 (2) BLR 67 (CA).

19 Section 167 of the Penal Code of Botswana.

20 Para 79.

including England where the contested laws originated and neighbouring South Africa, the Court kept the door open for further constitutional interpretation of the law. It stated that the time had not yet arrived to decriminalise homosexual practices even between consenting adult males in private adding that gay men and women did not represent a class which at that stage, had been shown to require protection under the Constitution. Thirdly, that sections 164 and 167 of the Penal Code outlawed practices by any persons, heterosexual, or homosexual, and regardless of their sexual orientation.

3.2 On employment discrimination: Employment (Amendment) Act 2010

Before the HIV epidemic Botswana was rated as the fastest growing economy in Africa[21] but all this was lost as the HIV epidemic devastated lives, families and communities. As a result of the excessive loss of life the country suffered untold economic and developmental losses. The epidemic further contributed to a rise in existing inequalities, especially in communities where poverty, insecurity and weak infrastructure already existed. For instance, communities already living on the margins of society, in poverty and without access to basic amenities became disproportionately and increasingly at risk. Stigma and discrimination were rife, further driving the rates of infections up. This prompted HIV and human rights organisations to lobby the government to provide protection against discrimination based on HIV.

Once again, the Courts proved to be reliable and consistent in upholding human rights and affirming the supremacy of the Constitution in so far as it provided protection against discrimination. In 2010 the Botswana Parliament passed the Employment (Amendment) Act 2010, where they sought to prohibit discrimination based on HIV status. More importantly, for groups and individuals, the Act also amended section 23(d) of the Employment Act Cap 47:07 to forbid the termination of an employee's contract of employment on grounds of sexual orientation. This was all made possible, in part, because of lobbying by BONELA,

21 L Matthews 'How did Botswana become the world's fastest-growing economy? Initiative for African Trade and Prosperity (9 August 2021) https://theiatp.org/2021/08/09/how-did-botswana-become-the-worlds-fastest-growing-economy/ (accessed 16 May 2022).

Ditshwanelo Botswana Centre for Human Rights, and LEGABIBO in various fora.[22]

3.3 On freedom of assembly and association: *Attorney-General v Rammoge*[23]

More than a decade after the loss of the *Kanane* case, the LGBTIQ+ community would once again venture into the public domain and seek to have an organisation registered. The Court of Appeal in *Kanane* had ruled that there was no evidence to suggest that Botswana was ready for decriminalisation of same-sex conduct. That meant that next action in the courts had to be strategic and specifically deal with the question of society's readiness. Another loss would be detrimental and likely make life much more difficult for the small community of LGBTIQ+ activists and allies advocating for LGBTIQ+ equality. So tactically, before going back to the courts for decriminalisation an incremental approach was developed to target the low hanging fruit, that is, find cases that could be easily won with less harmful consequences.

Accordingly, in February 2012, LEGABIBO filed an application to the Department of Civil and National Registration for the registration of LEGABIBO as a society. In March 2012, the Director responded rejecting LEGABIBO's application on the grounds that Botswana's Constitution does not recognise homosexuals. LEGABIBO then appealed this decision on two occasions to the Minister, in October and November 2012, who upheld the decision of the Registrar. Thuto Rammoge and 19 others filed a notice of motion in the High Court seeking, inter alia, the setting aside of the decision by the Minister of Labour and Home Affairs and the declaration that they are entitled to assemble and associate under the name and style of LEGABIBO.

The High Court held that the objects of LEGABIBO were *ex facie* lawful, that it was not correct that the Constitution did not recognise homosexuals, that advocacy for decriminalisation of same-sex sexual relationships could not be equated with encouraging the commission of criminal offences contrary to sections 164 and 167 of the Penal Code, and that the refusal was in breach of sections of the Constitution relating

22 See for example, 'BONELA applauds new Employment Act – Government scraps sexual orientation and health as basis for dismissal' *Bonela* 30 August 2010 https://bonela.org/bonela-applauds-new-employment-act-government-scraps-sexual-orientation-and-health-as-basis-for-dismissal/ (accessed 16 May 2022).

23 *Attorney-General v Rammoge* (n 11).

to equal protection of the law, freedom of expression and freedom of association. The Attorney-General appealed this decision.

The Court of Appeal dismissed the Attorney-General's appeal stating that fundamental rights are to be enjoyed by every person. The Court also stated that while sections 164 and 167 of the Penal Code have the practical effect of limiting sexual activity, even in private, between consenting same-sex partners, it is not and never has been, a crime in Botswana to be gay. The gamble to go after the low hanging fruit proved to be a good one as the courts seemed to embrace their role in interpreting the Constitution generously in favour of minorities while upholding fundamental human rights. Judicial precedents from South Africa,[24] Kenya[25] and India and international human rights mechanisms provided much needed gravitas to the reasoning allowing the courts to expand and read in sexual and gender minorities to be deserving protection from discrimination as provided under sections 3 and 15 of the Constitution of Botswana.

3.4 On gender recognition: *ND v Attorney-General*

Stating that the refusal of the Registrar of National Registration to allow ND, a transgender man, to change his gender marker on his national identity document (*Omang*) qualified as, *inter alia,* inhuman, and degrading treatment, the Court in *ND v Attorney-General*[26] in 2017 reaffirmed the importance of interpreting constitutional provisions using a purposive approach. The Court stated:[27]

> It is well established that in interpreting the provision of the Constitution more particularly with regard to the fundamental rights, the Court must adopt a generous and purposive approach in order to breathe life into the Constitution having regard to its liberal democratic values and (where necessary) with the aid of international instruments and conventions on human rights to which Botswana has subscribed.

This ruling also highlighted the fact that the rights in the Constitution apply to every person. The Court stated that section 3 of the Constitution of Botswana protects the rights of 'every person' and that an individual

24 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

25 *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2016] High Court at Nairobi (Milimani Law Courts) 150 & 234 of 2016 (Consolidated).

26 *ND v Attorney General & Registrar of National Registrations,* HC MAHLB 000449 of 2015

27 Para 13.

human being, regardless of his or her gender identity is 'a person' for the purposes of the Constitution.[28] The Court in this case therefore showed that non-recognition of a person's gender identity denies them equal protection of law and exposes them to wide-spread discrimination, stigma and harassment.

3.5 Decriminalisation of consensual same-sex conduct: *Letsweletse Motshidiemang v The Attorney-General*

There has been sustained public advocacy work by LGBTIQ+ activists in Botswana. This has increased recognition of LGBTIQ+ people in government policies, including the National Strategic Plan to Reduce Human Rights Related Barriers to HIV and TB Services[29] which recognises gay men and other men who have sex with men (MSM), transgender people, and other LGBTIQ+ persons as key and vulnerable populations. All this, and the series of decisions highlighted, paved the way for the decriminalisation of consensual same-sex sexual acts between adults in the 2019 High Court ruling in *Letsweletse Motshidiemang v The Attorney General.*[30]

The Court in *Kanane* ruled that the time had not yet arrived to decriminalise homosexual practices even between consenting adults.[31] In saying that, the Court intimated that the society was not ready to accept homosexuality and that the social structure in place did not provide for a group of gay men who required protection under section 3 of the Constitution of Botswana. Doing this left the door open for the Court of Appeal in later decisions to look at the situation on the ground and analyse its readiness for decriminalisation of homosexuality. It did so in *Letsweletse*. To understand how the Court came to this ruling and the process with which it followed, it is important to look deeper at the judgment.

28 Para 77.

29 NAHP Botswana, The Global Fund & UNAIDS 'National Strategic Plan to reduce human rights-related barriers to HIV and TB services: Botswana 2020-2025' https://www.theglobalfund.org/media/10418/crg_humanrightsbotswana2020-2025_plan_en.pdf(accessed 16 May 2022).

30 T Esterhuizen 'Decriminalisation of Consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae)*' (2019) 19 African Human Rights Law Journal http://ref.scielo.org/3zjk92 (accessed 14 May 2022).

31 N 18.

3.5.1 The time had come

The Court cited three instances that showed that it was the right time to decriminalise same-sex conduct among consenting adults. These instances involved the three arms of government: The Executive, the Legislature and the Judiciary. In his speech during the launch of the country's 2018 commemorations of the 16 days of activism against violence on women and children, the President of the Republic of Botswana, Dr Mokgweetsi Masisi acknowledged LGBTIQ+ people's rights stating:

> There are also many people of same sex relationships in this country, who have been violated and have also suffered in silence for fear of being discriminated … just like other citizens, they deserve to have their rights protected.[32]

This was an acknowledgement by the Executive on the need to protect the rights of the LGBTIQ+ population in Botswana.

Parliament, passed the Employment (Amendment) Act, as outlined above to forbid the termination of an employees' contract of employment on grounds of sexual orientation, gender etc (section 23(d)). Legislative bodies are representative bodies that express the will of the people. Through the passage of legislation, the people's will is transferred into the will of the state. Inevitably, the source of the state's authority, is the people. In this case the people of Botswana have spoken, through the amendment of the Employment Act.[33] This was an acknowledgement by the Legislature that LGBTIQ+ people require protection in the law.

The Judiciary acknowledged the existence, the rights and freedoms, and the need to protect these for LGBTIQ+ persons in the various cases highlighted above, including and especially in the *Rammoge* case where it highlighted: 'There is compelling evidence that attitudes in Botswana have, in recent years, softened somewhat on the question of gay and lesbian rights.'[34]

In the Botswana National Vision 2016, which was adopted following nationwide consultation, the country adopted several pillars that anchor the people's Vision. The nation accepted, amongst other things, to be 'A Compassionate, Just and Caring Nation'. The nation also aspired to be

32 'New president acknowledges LGBTI people's rights' *MambaOnline - Gay South Africa online* 10 December 2018 https://www.mambaonline.com/2018/12/10/botswanas-new-president-acknowledges-lgbti-peoples-rights/ (accessed 19 May 2022).

33 'BONELA (n 22).

34 N 23.

'An Open, Democratic and Accountable Nation' and lastly 'A Moral and Tolerant Nation'. The Court noted that discrimination against a segment of the society is not compassionate. It noted that a democratic nation embraces plurality, diversity, tolerance, and open-mindedness. On this, the Court stated:

> Our shared values are as contained in our National Vision. Furthermore, the task of laws is to bring about the maximum happiness of each individual, for the happiness of each will translate into happiness for all.

The Second Pillar of the Botswana National Vision 2036 on Human and Social development states:

> Social inclusion is central to ending poverty and fostering shared prosperity as well as empowering the poor, the marginalized people, to take advantage of bourgeoning opportunities.[35]

With the three arms of government, and other government policies having highlighted this, it was the Court's opinion that the time had come for it to decide on the constitutionality of the sections criminalising consensual adult same-sex conduct.

3.5.2 The laws were not void for vagueness

To conform to the rule of law, laws must be intelligible and accessible. This is the requirement for clarity because laws must be public not only in the sense of actual promulgation. The fact that these laws exist in the Penal Code means that they are present in society and, as much as they were not used in Botswana often, can cause someone's liberty to be taken away from them. Therefore, laws, and indeed the sections criminalising same-sex conduct, must impose requirements for ordinary citizens to comply with and they need to issue instructions to officials about what to do in the event of non-compliance by the citizens. The rule of law requires that citizens be put on notice of what is required of them and of any basis on which they are liable to be held to account.[36]

The Court noted that a vague law is a violation of due process under the rule of law. The Court therefore quoted Thurgood Marshall J, in *Grayned v City of Rockford,* where the Judge stated:[37]

35 Human and Social Development 'Botswana Vision 2036' https://vision2036.org.bw/human-and-social-development (accessed 19 May 2022).

36 Philip Mullock 'The inner morality of law' (1974) 84 *Ethics* 327.

37 408 US 104 (1972) at 108-109.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply to them. A vague law impermissibly delegates basic policy matters to policemen, judges, juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application.

On the basis highlighted above, the Court, in interpreting a seemingly vague penal provision, must adopt an interpretation that favours liberty. Given the fact that the Penal Code did not define 'carnal knowledge' and the 'order of nature', the definitions of these terms were provided in *Gaolete v The State*,[38] which defined 'carnal knowledge' as sexual intercourse and 'against the order of nature' as anal sexual penetration. These definitions were also adopted in *Kanane.* The Court found that the sections of the Penal Code were not void for vagueness.

3.5.3 The right to privacy

In defining the right to privacy, the Court was guided by the ruling in *National Coalition for Gay and Lesbian Equality v Minister of Justice.*[39] The 1999 ruling in South Africa stated that there is a sphere of private intimacy and autonomy where sexual expression between consenting adults was not harmful to any person. The Court stated: 'If in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.'

The Court also considered the fact that sections 3(c) and 9 of the Constitution of Botswana, on the face of it, appear only to refer to the protection of the privacy of one's home and property. However, the Court noted that this section ought to be read together with section 3(a) which speaks to the 'security of the person' and applying the *Dow* principle of generous and expansive interpretation of fundamental rights provisions, considered the right to privacy a multi-faceted right going beyond the concept of a man's home being his castle, or merely the right to be left alone. They stated that it extends also to the protection of the right to

38 *Gaolete v The State* [1991] BLR 325 (HC) (Botswana High Court).

39 N 24.

make personal choices about one's lifestyle, choice of partner, or intimate relationships, among a host of others.

In giving a historical context of privacy, the Court stated:

> Privacy is as old as mankind. What is considered to be private and thus legally protected differs; according to era, the society and the individual. Privacy is therefore context based.

As a matter of general proposition, the Court stated, privacy, private life, honour, and image of people are inviolable. Privacy may relate to one's physical body, their personal information, and the privacy of choice. This includes the right to choose an intimate or life partner. Any violation of the right to privacy therefore must be for purposes of protecting the rights listed in section 9(2)(a) and (b) which make provision that the violation is reasonably required in the interests of, inter alia, defence, public safety, public order, public morality, and public health, and that the violation is reasonably required for the purpose of protecting the rights of freedoms of another person.

In this case, the Court found that the provisions impaired the applicant's right to express his sexuality in private, with his preferred adult partner.

3.5.4 The right to liberty, equality and dignity

> A man/woman is known by the company he/she keeps. Liberty, equality and dignity are associable friends who hobnob in close proximity, and are thus intricately and harmoniously related. The said triumvirate is what forms the core values of our fundamental rights, as tabulated and entrenched in Section 3 of the Constitution.[40]

On liberty, criminalisation of carnal knowledge against the order of nature as defined in *Gaolete* and affirmed in *Kanane* denied the applicant the right to choose his preferred intimate sexual partner and undermined his individual autonomy. The Court also stated that sexual orientation is innate to a human being and is not a fashion statement or posture but an important attribute of one's personality and identity. The right to liberty therefore encompasses the right to sexual autonomy.

40 *Letsweletse Motshidiemang* (n 14).

The Court states:

> Anal sexual penetration and any attempt thereof are prohibited and criminalised by Sections 164(a), (c) and 165 of the Penal Code. Effectively, the applicant's right to choose a sexual intimate partner is abridged. His only mode of sexual expression is anal penetration; but the impugned provisions force him to engage in private sexual expression not according to his orientation; but according to statutory dictates. Without any equivocation, his liberty has been emasculated and abridged.

On dignity, the Court relied on the rulings in, inter alia, *Rammoge* and *ND*, which stated that to deny any person their humanity is to deny such person human dignity and that gender identity constitutes the core of one's sense of being and is an integral part of a person's identity. In this case, the Court stated that procreation was not the only reason people engage in sexual intercourse and that it constitutes an expression of love and intimacy. The applicant's way of expressing his sexual feelings by the only mode available to him was criminalised. This criminalisation denied him expression of his sexual orientation which lies at the heart of his fundamental right to dignity.

3.5.5 Discrimination

The Court in *Kanane* did not consider the discriminatory nature of the sections of the Penal Code in question. The Court at that time also did not have the advantage of an expert witness submitting evidence of the effects of the laws on LGBTIQ+ people in Botswana.[41] As already discussed, the Penal Code (Amendment) Act 5 of 1998 amended sections 164 and 167 making them gender neutral and the Attorney-General in this case argued that on that ground, the laws were not discriminatory in nature. However, the substance of the case by the *amicus curiae* was that these provisions were discriminatory by denying the applicant sexual expression and gratification in the only way available to him, even if that way is denied to all.[42]

In making a ruling about the discriminatory nature of the sections of the Penal Code, the Court noted that in the *Dow* case, the enumerated grounds of discrimination in section 3 of the Constitution were not hermetically sealed, nor cast in stone. This enabled the Court to determine

41 Esterhuizen (n 29).

42 *Letsweletse Motshidiemang* (n 14) para 156.

that the word 'sex' in section 3 of the Constitution can be interpreted generously enough to include and capture 'sexual orientation':[43]

> Anal sexual intercourse, is generally, associated with gay men. According to the applicant, as a homosexual man, anal sexual intercourse is his only mode of sexual gratification and expression. Heterosexuals, according to him are spoilt for choice. Effectively, he submitted that sections 164 and 165 completely closes the door in final fashion on his face and places unconstitutional burdens on him, hence the provisions are discriminatory in effect.

The Court interrogated sections 164 and 165 of the Penal Code and noted that they have a substantially greater impact on the applicant as a homosexual, who engages only in anal sexual penetration than it does on heterosexual men and women. The Court stated that the fact that anal intercourse is the only means available to the applicant, denying him the right to sexual expression even if that way is denied to all remains discriminatory in effect.

3.5.6 The distinction between Kanane and Letsweletse

In the *Kanane* case, the Court of Appeal stated that as at that time (2003), the impugned provisions were not discriminatory to gay men, on account of the factual and legal matrix presented in the case. What was presented in *Letsweletse* was fundamentally different from the *Kanane* case. In *Letsweletse*, expert evidence was adduced to prove the case, whereas there was no such evidence in the *Kanane* case. Furthermore, in the *Kanane* case the Court of Appeal, did not deal with the issues of privacy and dignity. It also did not consider if the impugned provisions were discriminatory, in effect.

3.5.7 Public opinion, private morality and universality of human rights

In considering the universality of human rights, the High Court of Botswana was guided by the South African Constitutional Court which had stated as follows:[44]

> To penalize people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a

43 *Letsweletse Motshidiemang* (n 14) para 164

44 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 60

> level or homogenization of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference.

In essence, the Court stated that the notion of universality of human rights is fundamental and that any discrimination against a member of society is discrimination against all. Any discrimination against a minority class of people is discrimination against the majority. 'Plurality, diversity, inclusivity and tolerance are quadrants of a mature and an enlightened democratic society.'[45]

It is not easy to justify a limitation to a fundamental right because clauses that derogate from constitutional rights are to be narrowly construed while those conferring such rights receive a generous construction.[46] In attempting to justify the Penal Code provisions, the Attorney-General relied on the speculation that anal sexual penetration is contrary to public morality and public interest. The respondent did not provide reliable factual material to support these assertions and speculations.

With that in mind, the Court stated that public opinion is relevant in matters of Constitutional adjudication, but it is not dispositive. Human rights enshrined in the Constitution, liberty, equality and dignity, render the opinions of the public very small.

The Court ruled that criminalising consensual same-sex intercourse in private, between adults is not in the public interest. The evidence produced in the case shows that the criminalisation disproportionately impacts on the lives and dignity of LGBTIQ+ persons, perpetuates stigma and shame against homosexuals and renders them recluses and outcasts. There is no victim within consensual adult same-sex intercourse and in the Court's view, such penal provisions exceed the proper ambit and function of criminal law in that they penalise consensual same sex, between adults.[47]

> The impugned penal provisions oppress a minority and then target and mark them for an innate attribute that they have no control over and which they are singularly unable to change. Consensual sex conduct, per anus, in my view, is merely a variety of human sexuality … The tenor and general theme of our decision, as foreshadowed above, is that the question of private morality and decency, between consenting adults, should not be the concern of the law. Stemming therefrom, is the court justified in severing and excising from the

45 *Letsweletse Motshidiemang* (n 14) para 173.

46 *Attorney-Gneral v Dow* (n 8) 31.

47 *Letsweletse Motshidiemang* (n 14) para 189.

said provision, the word 'private', in order to remedy the unconstitutionality of private indecency.[48]

4 An analysis of effects

4.1 Legal and material effects

An urgent study needs to be conducted with the main purpose to qualitatively analyse the lived realities of Botswana pre and post decriminalisation of consensual adult same-sex conduct. This study would be targeted, not only at LGBTIQ+ persons in the country but also at the society in general. The cases mentioned, the activism that went behind them, and the continued sensitisation of the society on issues around sexual orientation, gender identity and expression has created visibility and with that, dialogue among the people of Botswana about the issues. This needs to be analysed. As the Court in *Rammoge* stated, the attitudes in Botswana have softened in terms of gay and lesbian rights.[49]

The main effect of queer lawfare in Botswana is an understanding, not only by the LGBTIQ+ community, but by the society at large, that the rights conferred to them by the Constitution are inalienable. This understanding will allow the society to fight for their rights where they have been denied and seek jurisprudential assistance when it is necessary.

Letsweletse was won not just by legal analysis, but also through empathy. People's lives were shown to have been impacted by the provisions of the Penal Code. The Court was given evidence to show the effects of these laws on actual lived realities, mental health, access to health services among other things. A change in the way activists approach the courts is important. Laws are important but judges will rule based on the effects these laws have on the lived realities of the people the laws are supposed to be governing.

4.2 Effects on attitudes, beliefs and ideas

The stigma and discrimination faced by LGBTIQ+ people in the country will not automatically end with the decriminalisation of consensual adult same sex conduct. This stigma is already entrenched in the society and in the LGBTIQ+ community who for the longest time, have believed that the existence of sections 164 and 165 in the Penal Code made it a crime for them to be homosexual. The cases in effect have clarified that being gay

48 *Letsweletse Motshidiemang* (n 14) para 190

49 N 23.

or lesbian was not and had never been a crime. The distinction between criminalisation of conduct and perceived criminalisation of individuals is important not only for the cases in Botswana but also regionally.

Thus, the engagement with government officials, state actors, religious leaders, media, and society in general needs to be taken from the premise of inalienable constitutional rights, the fact that individuals are not criminal by mere fact of being LGBTIQ+, and with the ruling from *Letsweletse,* that criminalisation of consensual adult same-sex conduct is unconstitutional on the grounds that it denies people their rights to privacy, dignity and liberty, and is discriminatory in nature.

There is a need for the ability to link people's lived experiences to the law. Making sure that people's lives are at the forefront of activism and litigation. Winning cases is an important step in realising people's privacy, dignity and liberty. The language used needs to be one that recognises that all human beings have equal rights. As was mentioned in *Rammoge,* we must be compassionate towards one another. In activism, there is need to use language that not only speaks to the courts and the legal fraternity, but language that will reach the hearts of the society. In the long term, by removing laws that are so negative in society beyond those that affect LGBTIQ+ people, the society will become better, more inclusive and empathetic.

4.3 Political effects

The ruling of the courts in *ND*, *Rammoge*, *and Letsweletse* which read sexual orientation and gender identity as protected grounds under section 3 of the Constitution, the inclusion of sexual orientation as a protected ground against discrimination in the Employment Act by Parliament and the statement by the President of the Republic of Botswana, Dr Mokgweetsi Masisi, acknowledged LGBTIQ+ people's rights saying that there are many people of same-sex relationships who have been violated and like other citizens, they deserve to have their rights protected[50] shows a political will to make things better for LGBTIQ+ people.

The independence of the judiciary is important in any democracy. This has been shown in the cases discussed herein where the government has complied with the rulings of the court therefore demonstrating the independence of the judiciary and respecting the rule of law. There are always political implications in any litigation. These implications include the registration of LEGABIBO, the changing of a trans person's gender

50 *MambaOnline* (n 31).

marker, and even the declaration of controversial sections of the Penal Code unconstitutional. A long-term political effect of queer lawfare is the recognition of the separation of powers, and the respect of the rule of law.

5 Moving beyond lawfare

The ongoing constitutional review process is one of the areas through which the LGBTIQ+ movement in Botswana can engage beyond lawfare. The Constitutional Review Commission has been mandated to ascertain from the people of Botswana their views on the operation of the Constitution, and its strengths and weaknesses, to assess the adequacy of the Constitution in relation to Botswana's identity, principles, aspirations and values; promoting and protecting peoples' rights, promoting equality, and promoting national unity and democracy, to articulate the concerns of the people of Botswana regarding the amendments that may be required; and to make any recommendation on the review or amendment of the Constitution.[51] LEGABIBO and other LGBTIQ+ rights organisations are fighting to be intentionally involved in the process.

The inclusion of sexual orientation as a protected ground against discrimination in the Employment Act is a first step for the community to ensure that anti-discrimination laws are in place. Beyond the cases that have been won, there is a need for more anti-discrimination legislation that will protect not only LGBTIQ+ people but also other minorities in the country. The recognition of gender identity in the *ND* case opens the door for further trans inclusive laws to be passed in Botswana, thereby protecting trans individuals and allowing them access to trans specific healthcare.

Finally, while there has been a lot of visibility occasioned by the queer lawfare in Botswana, there is need for further, even more targeted sensitisation of the society. Taking example from South Africa where there are non-discrimination laws in place, yet the society continues to be violent towards people based on their sexual orientation and gender identity,[52] the movement in Botswana needs to continue sensitising the community about the lived realities of LGBTIQ+ people, the fact that they are a part of the Botswana community and keep the momentum that was started in the run up to the *Letsweletse* case. *Re Batswana.*

51 BR Dinokopila 'Promise fulfilled? Botswana's first comprehensive constitutional review process gets underway' *ConstitutionNet* 25 February 2022 https://Constitutionnet.org/news/promise-fulfilled-botswanas-first-comprehensive-Constitutional-review-process-gets-underway (accessed 7 June 2022).

52 A Rakhetsi '"Hear our cry": South Africa's LGBTIQ+ Activists demand action amid homophobic attacks' *Global Citizen* 29 April 2021 https://www.globalcitizen.org/en/content/lgbtq-violence-homophobia-south-africa-action/ (accessed 7 June 2022).

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NAHP Botswana, The Global Fund & UNAIDS 'National Strategic Plan to reduce human rights-related barriers to HIV and TB services: Botswana 2020-2025' https://www.theglobalfund.org/media/10418/crg_humanrightsbotswana2020-2025_plan_en.pdf(accessed 16 May 2022)

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PART II:

Lawfare in the context of active politicisation

4 Queer lawfare in Kenya: Shifting opportunities for rights realisation

Nicholas Wasonga Orago, Siri Gloppen,** & Matthew Gichohi****

1 Introduction

Democratisation and the new transformative Constitution of 2010 have significantly improved the protection, promotion and fulfilment of human rights in Kenya. Yet some populations still face discrimination due to conservative socio-cultural and religious norms, attitudes, and practices detrimental to the enjoyment of their rights. This includes sexual and gender minorities whose rights to equality, non-discrimination, autonomy and bodily integrity are routinely violated, due in part to laws criminalising same-sex sexual conduct, as Kenya still maintains a Victorian Penal Code that criminalises 'carnal knowledge against the order of nature' in section 162.[1]

These rights violations have become a central point of political contestation. A multitude of actors in support as well as in opposition of queer rights, are engaging a range of strategies to achieve their objectives. Key protagonists advocating for rights protection for sexual orientation and gender identity minorities have been organisations such as Ishtar MSM, Gay and Lesbian Coalition of Kenya (GALCK), the National Gay and Lesbian Human Rights Commission (NGLHRC), Transgender Education and Advocacy (TEA), Minority Women in Action (WMA) among others. These have been in the forefront of advocacy, campaigns, and litigation for the protection of LGBTIQ+ rights and have been supported by progressive civil society actors such as Kenya Human Rights Commission, Kenya National

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1 Amnesty International UK 'Mapping anti-gay laws in Africa' (2015) https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon (accessed 9 October 2021).

Commission on Human Rights, Katiba Institute, CRADLE, among others. The antagonists are mainly Christian and Muslim clerics and organisations, most centrally the Kenya Christian Professional Forum. Antagonism and advocacy against LGBTIQ+ rights has also emanated from politicians, playing to conservative socio-cultural and religious sentiments to mobilise support from voters.

The protagonists have employed multiple advocacy strategies, including lawfare – the strategic use of rights, law, and courts to advance contested political and social goals against recalcitrant states and adverse popular cultures, beliefs and value systems.[2] Kenyan advocates have adopted strategic litigation to achieve legal recognition of non-heteronormative gender identities as well as to challenge legislation that criminalises same-sex sexual conduct.[3] The litigation and rights-based advocacy strategies also aims to influence socio-cultural, religious, and political norms, attitudes, and practices. Litigation strategies have achieved some level of success, as detailed in the discussions below, with several cases being positively determined to provide legal recognition of diverse gender identities and rights protection of some vulnerable sexual and gender minority groups. The antagonists have, however, also mobilised with counter advocacy and active opposition to LGBTIQ+ rights in the courts, proposed legal reforms for more stringent laws against sexual minorities, and adverse political rhetoric against sexual minority rights by senior political figures in the Executive and the Legislature. At the same time, there is greater awareness of and visibility for queer lives and concerns, and increased tolerance in some areas.

This chapter maps the use of lawfare by Kenya's LGBTIQ+ protagonists and antagonists, as they respond and adapt their strategies to shifting political, legal and social *opportunity structures*. As discussed in the introductory chapter to this volume, the concept of opportunity structure refers to actors' potential for achieving their aims through different courses of action – such as political lobbying, litigation or street action – and the gains and risks associated with each strategy. If chances are good for success via the political process, for example through building political alliances for legal reform to advance queer rights, it means that the *political opportunity structure* is open. If social norms are strongly anti-queer, so that media campaigns and street demonstrations are unlikely to

2 S Gloppen 'Conceptualising lawfare: A typology and theoretical framework' (2018) 1-31 https://www.academia.edu/35608212/Conceptualizing_Lawfare_A_Typology_and_Theoretical_Framwork (accessed 12 July 2022). See also the introduction to this volume.

3 A Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 263 at 264 & 272-273.

make any impact, and risk triggering counter-mobilisation, for example by church leaders, the *social opportunity structure* is closed. If, in this context, the cause could potentially be advanced by bringing cases to court, the *legal opportunity structure* is comparatively open. Multiple factors combine to determine how open each aspect of the opportunity structure is for actors to advance specific causes. For queer activists, the legal opportunity structure depends among others on the nature of the law (are same-sex relations criminalised, is discrimination on the basis of sexual orientation prohibited?); rules regarding legal standing (can organisations bring cases to court on behalf of others or only affected individuals on their own behalf?); the costs and procedural barriers involved; access to legal assistance and financial support; the courts' jurisprudence on similar issues; and the extent to which judgments are implemented. It should be noted that the different opportunity structures are relative to each other – even if the legal opportunity structure is relatively closed for queer activists in country A compared to country B, it may still be open compared to the political and social opportunity structure in country A, and hence the best course of action. Actors' opportunity structures are also dynamic and may shift because of external developments – electoral alternations, constitutional changes, social mobilisation, judicial appointments, and the like – or in response to actions taken by the activists themselves, for example court cases that create new enabling jurisprudence (or bad precedents), or that create new alliances (or strengthen opponents). When analysing actors' lawfare strategies the opportunity structure serves as a heuristic tool that helps organise the various considerations that weigh on their decisions.[4]

In this chapter, we argue that for queer activists, a positive shift in the legal opportunity structure with the adoption of the 2010 Constitution, followed by an adverse shift in the political climate, diminishing opportunities for political reform, has rendered litigation a critical tool. In the face of governmental recalcitrance and conservative socio-cultural, political, and religious attitudes towards queer issues and populations, litigation has been key to overcoming some important legal and policy bottlenecks. We show how, in Kenya, successful LGBTIQ+ lawfare drew strength from the vibrancy of a civil society and social movement enabled and emboldened by a successful campaign for the reintroduction of multiparty politics in the 1990s, and the successful clamour for a new and progressive constitution in the 2000s resulting in the promulgation

4 For a more in-depth discussion, see for example S Gloppen 'Conceptualizing abortion lawfare' *Revista Direito GV* 17 (2021) https://www.scielo.br/j/rdgv/a/7CV9SGHgDphL6L9TFTN6S8q/ (accessed 12 July 2022). See also the introductory chapter to this volume.

of the 2010 Constitution of Kenya. Other factors that have favourably shifted their legal opportunity structure include: reforms to the judiciary; appointment of progressive judges and chief justice; simplification of court standing rules through the Constitution allowing for representative suits and public interest litigation; and the adoption of the Chief Justice Practice Rules for the Protection of Human Rights and Fundamental Freedoms easing the procedural requirements for human rights litigation.

These critical changes altered the nation's institutional arrangements and power structures and credibly established lawfare as a new, self-reinforcing way of challenging the state and remedying previous harms. The reform of institutions through a referendum process and the subsequent transformation of the judiciary,[5] increased the legitimacy of the courts enabling them to serve as a critical space for contestation of controversial societal disagreements. With better conditions for favourable court decisions, litigation became a more promising strategy to transform substantive normative values and principles of governance and protection of fundamental rights, including the protection of rights relating to sexual orientation and gender identity.[6]

This chapter is divided into five sections starting with the introduction. Section two looks at the socio-legal and political situation in Kenya and the cases determined before the promulgation of the 2010 Constitution. Section three analyses the post 2010 period, the shift in opportunity structures created by the new Constitution, legal mobilisation from LGBTIQ+ protagonists, the court decisions, and the resulting counter mobilisation and political backlash. Section four discusses some effects of lawfare strategies for sexual and gender minority rights protection in Kenya, while section five concludes the chapter.

2 Pre-2010 legal and socio-political dynamics

2.1 The socio-legal and political situation

Kenya's 1963 Constitution, with its many limitations on fundamental rights in substance and procedures to the point of it being termed a 'Bill of

5 Reforms included the formation of the new Supreme Court, the expansion and empowerment of the Judicial Service Commission (JSC), and the establishment of the judiciary fund. The appointment of more liberal and human-rights minded judges also created space for pro-LGBTIQ+ actors.

6 Advocacy can help softening hard societal stances, making it possible for courts to make more progressive rights-enabling judgments such as that in the South African case of *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 15.

Limitations' did not create a conducive environment for rights revolutions through lawfare.[7] Its equality and non-discrimination provision in section 26 did not have 'sex' or 'gender' as prohibited grounds of direct or indirect discrimination.[8] This was extremely strange as the same Constitution in article 14, which detailed that every person was entitled to the rights and fundamental freedoms in the Constitution, indicated that the rights were to be enjoyed irrespective of a person's sex. Though amendments to the Constitution in 1997 added 'sex' to the list of objectionable grounds in section 82 of the Constitution that was now the equality and non-discrimination clause due to several amendments to the Constitution,[9] the amendment's efficacy was compromised by section 82(4) which offered exemptions that allowed for sex-based discrimination in certain circumstances, especially in relation to culture, religion, family and marriage.[10] The normative limitations were accompanied by technical and procedural limitations in undertaking rights-based strategic litigation, including a conservative legal culture and a judiciary unwilling to undertake rights-based adjudication. Procedural technicalities regarding who could bring a case before the courts, and an opaque system of access to courts for constitutional litigation due to the failure of the Chief Justice to promulgate Human Rights Practice Rules constrained possibilities for public interest litigation, as did the high costs of litigation and scarcity of human rights organisations willing to support strategic litigation. Socio-cultural, political and religious conservatism made difficult any societal dialogue on the rights of sexual minorities.

The growth, in the 1990s, of a strong civil society movement pursuing rights-based advocacy for the re-introduction of multiparty politics in Kenya, and their active engagement in the decade-long agitation for a new constitutional dispensation, paved the way for lawfare as a political strategy. The role of civil society in these processes coupled with the agency and networks of practice that were developed, generated a vibrant civil society forcefully undertaking advocacy for good governance,

7 C Moyi 'Protection of fundamental rights and freedoms vis-à-vis preservation of national security: Analysis, review and appraisal of the legal framework' (August 2016) 16.

8 Kenya's Independence Constitution, 1963 http://kenyalaw.org/kl/fileadmin/pdfdownloads/1963_Constitution.pdf (accessed 20 June 2022).

9 The Constitution of Kenya 1963, as amended (revised edition 2008) http://kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution%20of%20Kenya%20(Repealed).pdf (accessed 20 June 2022).

10 The limitation in section 82(4) of the amended Constitution was not new, as it was already part of section 26(4) of the Independence Constitution, which limited the applicability of the equality and non-discrimination clause in the context of non-citizens, adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.

democratisation, and the protection of fundamental rights for all sectors of society, including vulnerable and marginalised groups like sexual and gender minorities.

Equally important, the HIV/AIDS epidemic, and efforts to address it from a human rights perspective opened avenues to advocate for the protection of the health rights of men who have sex with men (MSM). Clinics providing specialised care to the MSM community – identified as a group in need of special programming in HIV Prevention and Response Policies – became points of organising, agitation and advocacy.[11] Following Ishtar MSM's production of the play 'Cleopatra' at the Kenya National Theatre in 1997, which created an entry point for public discussions of non-heteronormative sexuality and gender identities, the community's mobilisation took place in the spaces provided by MSM health clinics.[12] Besides providing health information and services to underserved groups affected by the HIV/AIDS crisis, the clinics provided activists with the space to build networks and learn about western gender and sexual identity terminology and the associated political organising tactics.[13] According to Mung'ala and De Jong the clinics allowed LGBT organisations to form and register as community-based organisations with the Ministry of Social Services and later the NGO Coordination Board. Ishtar MSM, for example, was registered in 2002 as a self-help group for MSM.[14]

Mobilisation through these clinics was, however, uneven. The focus of the government and donors was the exposure only to HIV of men having sex with men. Thus, the needs of lesbians, intersex and transgender communities were overlooked.[15] The lesbian group Minority Women in

11 LW Mung'ala & A de Jong 'Health and freedom: The tense interdependency of HIV/AIDS interventions and LGBTIQ activism in Kenya' (2020) 6 *Kohl: A Journal for Body and Gender Research* 133.

12 C Mugo 'Now you see me, now you don't – A study of the politics of visibility and sexual minority movement in Kenya' (2009) 42 https://open.uct.ac.za/bitstream/handle/11427/26147/Mugo_Cynthia_Now_You_see_me_now_you_don_039_t_2009_1%20%281%29.pdf?sequence=4&isAllowed=y (accessed 20 June 2022).

13 A Currier *Out in Africa: LGBT organizing in Namibia and South Africa* (2012); R Lorway et al 'Going beyond the clinic: Confronting stigma and discrimination among men who have sex with men in Mysore through community-based participatory research' (2014) 24 *Critical Public Health* 73; A Currier & T McKay 'Pursuing social justice through public health: Gender and sexual diversity activism in Malawi' (2017) 9 *Critical African Studies* 71.

14 Mung'ala & De Jong (n 11).

15 Openly gay men from Nairobi, for example, took a more prominent role in this community than did male or female sex workers in Nairobi, Kisumu, and Mombasa. EK Igonya 'My brother's keeper? Care, support and HIV support groups in Nairobi,

Action (MWA) was formed in opposition to the continued male dominance in LGBTIQ+ organisations and causes, and the intersex and transgender communities also went on to form their own organisations, championing their particular concerns and rights. This has contributed to a separation of the intersex and transgender activism from the larger movement.

In June 2006, Ishtar MSM along with several other LGBTIQ+ groups formed the Gay and Lesbian Coalition of Kenya (GALCK).[16] In December the same year, GALCK participated in the World AIDS Day march, bringing nationwide attention to the group. The following year, at the 2007 World Social Forum in Nairobi, GALCK drew international attention with its workshop on 'Sexuality and Social Justice', focusing on the social and political integration of sexual minorities.[17] LGBTIQ+ organising thus moved beyond healthcare to the larger human rights and political action arena, and the struggle for a new constitutional dispensation became a focal point. MWA and its members were involved in the 'Warembo ni Yes' Campaign (Beautiful Girls Vote Yes Campaign) in favour of constitutional reform.[18]

The open advocacy for the recognition and protection of LGBTIQ+ rights in the context of the constitution-making process, in line with the precedent set by the South African Constitution that had recognised sexual orientation and gender identity as prohibited grounds of discrimination, did not go unnoticed by Kenya's conservative socio-cultural and religious actors. Opposition grew to the point where some conservative groups actively opposed both the 2005 and 2010 Draft Constitutions for protecting sexual orientation and gender identity rights, arguing that they allowed a leeway that could be utilised to promote these rights.[19] During the 2010 national referendum, Christian churches campaigned against the passage of the Constitution, among other reasons for including gay rights.[20] Members of the Committee of Experts on Constitutional Review, when

Kenya' PhD thesis, University of Amsterdam: Amsterdam Institute for Social Science Research (UVA-AISSR), 2017; BDM Wilson et al 'The sexual health needs the of sexual minority women in Western Kenya: An exploratory community assessment and public policy analysis' (2019) 14 *Global Public Health* 1495.

16 Mung'ala & de Jong (n 11).

17 Mung'ala & de Jong (n 11).

18 AM Ocholla 'The Kenyan LGBTI social movement: Context, volunteerism, and approaches to campaigning' (2011) 3 *Journal of Human Rights Practice* 93.

19 A Wanga 'The Kenyan constitutional referendum of 4th August 2010: A case study' (2011) 1-10 https://www.democracy-international.org/sites/default/files/PDF/Publications/2011-04-28_kenyareferendum.pdf (accessed 20 June 2022).

20 D Parsitau "Law, religion, and the politicization of sexual citizenship in Kenya" (2021) 36 *Journal of Law and Religion* 105.

forced to respond to this opposition, effectively backtracked and stated that despite appeals by British MPs, 'gay rights would not be included [in the Constitution] because doing so would lead to a majority of Kenyans rejecting the draft'.[21] This reality of conservative socio-cultural, religious and political opposition to the equal protection of sexual minority rights in Kenya, rendered constitutional and legislative reform unlikely. This motivated the adoption of alternative lawfare strategies, including strategic litigation as part of the arsenal of LGBT organisations in their pursuit of effective protection, promotion, and fulfilment of the fundamental rights of sexual minorities in Kenya.

2.2 Pre-2010 court cases

The seminal pre-2010 court case, which addressed the rights of intersex people, was *RM v Attorney General* filed in 2007.[22] In 2005, RM was arraigned in court for robbery with violence, a capital offence.[23] While in remand before trial, the police discovered RM to be intersex. Unsure as to whether to hold RM in a male or female facility, the officers referred the matter to the local Magistrates' Court, who ordered a medical confirmation to determine RM's sex and subsequently ordered that they be held in a separate room in the police station during trial.[24] Upon trial and conviction, RM was committed to Kamiti Maximum Prison where RM was kept in an all-male prison facility and shared cells, beddings and sanitary facilities with male inmates and was exposed to constant abuse, mockery and ridicule.[25]

In 2007, RM petitioned the High Court for rights violations resulting from the abuse suffered while detained at the correctional facilities, due in part to the lack of provision in the Prison Act for the separation of intersex persons in boarding facilities. It was argued that this violated RM's right to human dignity, equality, and non-discrimination as well as privacy, and was in breach of the Constitution as well as international human rights law.[26] RM's case also challenged the legality of the Births and Deaths Registration Act that only recognised the male-female sex binary and provided no legal recognition for intersex as a third gender.

21 M Ringa 'Kenya: Review team rejects push for gay rights' *Daily Nation* 18 October 2009 allafrica.com/stories/200910190496.html (accessed 20 June 2022).

22 *RM v Attorney General* [2010] eKLR http://kenyalaw.org/caselaw/cases/view/72818 (accessed 20 June 2021).

23 *RM v Attorney General* (n 22) para 5.

24 *RM v Attorney General* (n 22) para 6.

25 *RM v Attorney General* (n 22) para 7.

26 *RM v Attorney General* (n 22) paras 7 & 40-41.

RM argued that the Act was discriminatory because it limited intersex persons' ability to acquire birth certificates, national identity documents and travel passports, which in turn caused further violation of rights to nationality, privacy, healthcare, education, movement, employment and political participation.[27] In its response, the state, while admitting that the Prison Act was silent on the provision of separate prison facilities for intersex persons, denied the human rights violations alleged by RM and argued that arrangements could be made administratively for secure detention.[28] It also pointed to Parliament as the appropriate authority for deciding if intersex persons were to be recognised as a third gender, and for adopting a legal framework to protect intersex rights.[29]

Interestingly, the Centre for Rights Education and Awareness for Women (CREAW), as an interested party in the case, argued for the legal recognition and protection of intersex person's rights based on Christian theology. They argued that intersex persons are similar to persons born with disabilities and should not be discriminated against based on socio-cultural constructs and pointed out that the Bible gives no strict or rigid definition of gender/sex.[30] Hence, CREAW asked the Court to issue orders that would 'heal relations between biological sex, gender identity, and cultural influences in Kenya, to safeguard the constitutional rights of intersex persons'.[31] CREAW's theologically phrased plea to do justice and manifest love by embracing intersex persons as a marginalised category of people in society illustrates the political and normative differences between intersex issues and LGBT matters in the Kenyan context.[32]

CREAW's linking of intersex with disabilities not only pathologised the identity, but also ignored the ways disabilities themselves are socially constructed hierarchies designed to disassociate from stigma.[33] The negative effects of pathologising sexual orientation and gender identity were especially evident in the United States during the 1950s and 1960s when homosexuality was included in the Diagnostic and Statistical Manual of Mental Disorders (DSM). American psychoanalysts, informed by sexologists, argued that homosexuality was an unpleasant yet curable

27 *RM v Attorney General* (n 22) paras 16-25 & 30-33.

28 *RM v Attorney General* (n 22) para 11.

29 *RM v Attorney General* (n 22) paras 11 & 67-76.

30 *RM v Attorney General* (n 22) para 55.

31 *RM v Attorney General* (n 22) para 56.

32 *RM v Attorney General* (n 22) para 57.

33 S Linton *Claiming disability: Knowledge and identity* (1998); R Kunzel 'The rise of gay rights and the disavowal of disability in the United States' in MA Rembis, CJ Kudlick & KE Nielsen (eds) *The Oxford handbook of disability history* (2018).

mental illness.[34] As a result, psychiatric professionals promoted the use of lobotomy, electroconvulsive shock, aversion therapy, hormone therapy and psychotherapy to cure homosexuality.[35] The effects of such pathologising extended beyond the medical realm; it effectively sanctioned stigmatising cultural attitudes and disenfranchising criminalising laws. Sexual psychopath laws, for example, criminalised non-normative, especially homosexual, sex.[36] The association with mental instability also led to homosexuals being barred from employment and immigration benefits.[37] CREAW's argument despite advocating for non-discrimination, therefore, left space for future stigmatisation of sexual minorities and should thus not be encouraged despite its outward support for sexual minorities.

Ignoring CREAW's religious arguments for the legal recognition of intersex persons, the Court focused its judgment on two key issues: whether RM had been denied legal recognition and, whether RM's rights had been violated when incarcerated.[38] Indicative of the Court's male-female binary conceptualisation of sex, it defined intersex as an abnormal condition of varying degree regarding a person's sex constitution.[39] While acknowledging that RM was an intersex person, the Court refused to take judicial notice of intersex persons as a group.[40] It based this decision on the reasoning that no medical or statistical evidence was placed before it to substantiate it and that there were not enough intersex persons in Kenyan society to constitute a representative class of public interest. The Court concluded that RM's condition was rare and should be treated as an isolated case.[41]

The Court furthermore held that the Births and Deaths Registration Act neither excluded nor discriminated against RM, arguing that since RM's physiology was more male than female, RM's mother had properly identified RM as being male at birth.[42] Thus, the Court did away with RM's claims of violation of rights to equality before the law, equal treatment, non-discrimination on the grounds of sex, right to education, work, housing and political rights. Further, the Court refused to broadly interpret the word 'sex' in the Constitution and in the relevant statutes

34 As above.

35 J Marmor *Homosexual behavior: A modern reappraisal* (1980).

36 As above.

37 Kunzel (n 33).

38 *RM v Attorney General* (n 22) para 98.

39 *RM v Attorney General* (n 22) para 109.

40 *RM v Attorney General* (n 22) para 111.

41 *RM v Attorney General* (n 22) paras 112-118.

42 *RM v Attorney General* (n 22) paras 128-133.

to include intersex persons. It made three arguments against this: first, that the word 'sex' strictly refers to male and female, and that all intersex persons fell within the category of being either male or female depending on their dominant physiological features;[43] secondly, that it was not within the mandate of the Court to introduce a third sex called intersex, rather this was the responsibility of the Legislature; and thirdly, that Kenya was not ready to scientifically relativise sexual identities due to its conservative traditional cultures.[44]

The Court's conservatism and its conflation of gender identity with sexual orientation that came through in the judgment was a push back to the legal recognition and protection of the fundamental rights of intersex persons in Kenya. This conflation – grouping intersex persons with LGBT in a way that raises barriers for their cause – appears to be one of the reasons for the attempts by intersex and transgender activists in Kenya to delink from the larger LGBTIQ+ struggle as discussed below.

Another noteworthy pre-2010 case is *FO v Republic.*[45] In 2006, FO had been convicted and imprisoned for six years for 'carnal knowledge against the order of nature', contrary to section 162 of the Penal Code.[46] He was convicted not because evidence had been produced to prove the charges brought against him but based on his own plea of guilt.[47] On his first appeal to the High Court in Kericho, the sentence was increased from six to 14 years imprisonment.[48] However, the enhanced sentence was, rescinded by the Court of Appeal in 2011, stating that the High Court had no mandate to enhance the sentence without an application for the same from the Attorney-General.[49] FO was thus sentenced to 6 years, still based on his plea of guilt.[50]

This case arose in the context of a still nascent and largely Nairobi-based LGBTIQ+ organising and activism that was largely unknown in the remote rural and conservative town of Kericho where the case was first heard. Hence, FO did not get the necessary legal support, guidance, and representation to protect him from self-incrimination. The case was

43 Despite international recognition that sex includes intersex persons.

44 *RM v Attorney General* (n 22) paras 130-132.

45 *FO v Republic* [2011] eKLR http://kenyalaw.org/caselaw/cases/view/74205/ (accessed 30 June 2021).

46 *FO v Republic* (n 45) para 1.

47 *FO v Republic* (n 45) paras 2-3.

48 *FO v Republic* (n 45) para 3.

49 *FO v Republic* (n 45) paras 5-6.

50 *FO v Republic* (n 45) para 6.

also determined in the context of the old Constitution and its limitations in the protection of human rights and fundamental freedoms. Efforts to rescind the damage resulting from the prosecution of FO in the subsequent appeals, taking place within the new constitutional dispensation, could only address the enhanced sentence in the High Court, and not challenge the findings of the Magistrates' Court, where the ground for conviction was FO's plea of guilt, which in all likelihood was obtained due to a lack of legal guidance and representation. The limitations exposed by the case have subsequently been addressed by the new Constitution and with legal support being provided by the LGBTIQ+ network and civil society allies. How this has changed the situation for persons accused of sodomy is illustrated in in the COL case discussed below.

3 2010 and beyond: Legal and socio-political dynamics

3.1 The socio-legal and political situation

The 2010 Constitution recognises the need to redefine and rearrange societal relations to right past wrongs, including gender inequalities.[51] It entrenches a progressive Bill of Rights as an integral part of Kenya's democratic state, providing the framework for economic, social and cultural policies.[52] It underscores that the purpose of the Bill of Rights is the preservation of human dignity, promotion of social justice and enhancement of self-fulfilment, aimed at enabling every person to enjoy their right to the greatest extent consistent with the nature of the right.[53] The courts are required to develop the law to the extent that it does not give effect to entrenched rights,[54] and state officials and organs are obliged to address the needs of vulnerable groups within society, including members of minority and marginalised groups.[55] It further improves organisations' access to the courts to undertake strategic litigation through its progressive access rules that enables class action and public interest litigation, and empowers the courts to issue remedies that enhance the vindication of rights.[56]

Article 27 provides for equality and non-discrimination:

51 The Constitution of Kenya, 2010 http://kenyalaw.org/kl/index.php?id=398 (accessed 10 June 2021).

52 Article 19(1) of the Constitution of Kenya 2010.

53 Articles 19(2) as read with 20(2) of the Constitution of Kenya 2010.

54 Article 20(3)(a) of the Constitution of Kenya 2010.

55 Article 21(3) of the Constitution of Kenya 2010.

56 Articles 22 & 23 of the Constitution of Kenya 2010.

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
(5) Any person shall not discriminate directly or indirectly against another person on any grounds specified or contemplated in clause (4).

Though this provision does not expressly include sexual orientation and gender identity as prohibited grounds of discrimination, it has been argued these could be read into the provision as analogous grounds.[57] The reason for this is that article 27(4) is based on the protection of identity and human dignity, with the expressly prohibited grounds of discrimination being drawn from the need to protect all persons regardless of their physical, economic, psychological, social or sexual characteristics. Since the need to protect sexual orientation and gender identity also has its basis on the protection of identity and human dignity broadly speaking, it can be argued that sexual orientation and gender identity are equally protected under article 27 as analogous grounds of prohibited discrimination, as the list contained in article 27(4) is not exclusive considering the provision's reference to the term 'including'.

Despite these Constitutional provisions, LGBTIQ+ persons continue to face stigma, discrimination, limited access to public services, exclusion, and homophobic violence, with a detrimental effect on their physical and psychological wellbeing, and economic and social inclusion. This continuing discrimination, despite the progressive constitutional framework has been a driver for queer lawfare as discussed below.

Under the new Constitution, LGBTIQ+ groups have organised and networked to advance their rights more effectively. In 2010, the Kenya Human Rights Commission (KHRC) in collaboration with GALCK organised Kenya's first public celebration of the International Day against homophobia and transphobia.[58] This was a concerted effort to engage the wider public in dialogue that would both deconstruct stereotypes of

57 J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 47.

58 Kenya Human Rights Commission *The outlawed among us: A study of the LGBTI community's search for equality and non-discrimination in Kenya* (2011) 6 http://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html (accessed 20 February 2021).

LGBTIQ+ persons and highlight the negative linkage between homophobia and the spread of HIV/AIDS. The event led to increased positive press, stronger alliances with other parts of civil society and improved tolerance in some sections of society.[59] To further increase awareness, KHRC and MWA published research papers highlighting the community's legal and social status, while GALCK consulted international LGBTIQ+ activists to identify the most effective strategies for decriminalisation of same-sex sexual conduct.[60] As a result, Kenyan activists started to build long-term litigation strategies by looking for good ways to incorporate evidence and documentation into their court cases to create precedents that could serve as steppingstones in the move towards decriminalisation.[61]

In this period, LGBTIQ+ organising grew and became part of mainstream social justice and human rights work. Organisations working on various aspects of LGBTIQ+ rights were registered as NGOs, while other organisations, more overtly directed towards queer activism, were denied registration. In 2012, the newly formed National Gay and Lesbian Human Rights Commission (NLGHRC), sued the NGO Board and the Attorney-General for refusing to register LGBT organisations as discussed below.

In parallel, there was a counter-mobilisation, feeding off the conservative socio-cultural, religious and political environment of Kenya. The then Prime Minister, Raila Odinga, called for the police to arrest homosexuals,[62] and when the Minister of Special Programmes called for Kenyan society to learn how to live with the MSM community, some religious leaders called for her resignation.[63] Deputy President William

59 As above.

60 As above. Minority Women in Action 'Breaking the silence: Status of women who have sex with women in Kenya' (2013) 1-51 https://www.icop.or.ke/wp-content/uploads/2016/07/Breaking-the-Silence-Status-of-Kenyan-WSW-2013-first-version.pdf (accessed 20 June 2021).

61 JW Thirikwa 'Emergent momentum for equality: LGBT visibility and organising in Kenya' in N Nicol et al (eds) *Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope* (2018) 307.

62 'Kenya: PM orders the arrest of gay couples' *All Africa* 28 November 2010 https://allafrica.com/stories/201011290110.html (accessed 20 June 2021). The Prime Minister, on the basis of national and international pressure, however, later clarified that he had not given orders for gay couples to be arrested, but had only indicated that same sex unions were unlawful in Kenya, see 'Raila denies gays arrest order' *Daily Nation* 4 December 2010 https://nation.africa/kenya/news/politics/raila-denies-gays-arrest-order-747866 (accessed 20 June 2021).

63 The remarks were made at a National HIV/AIDS Symposium targeted towards gays, lesbians and sex workers. The government continued to view the group as a risk group in need of services.

Ruto, during the 2013 Deputy Presidential Debates equated homosexuals to dogs,[64] and during US Secretary of State John Kerry's visit to Kenya in 2015, he declared that Kenya is a republic that worships God and that there was 'no room for gays and those others'.[65] When President Obama visited Kenya in July 2015, President Uhuru Kenyatta declared sexual minority rights as 'a non-issue'.[66] This negative political rhetoric may be linked to a more visible LGBTIQ+ community and organisation, but rather than seeing the counter-movement primarily as a backlash to domestic developments, it should also be understood in the context of the then prevalent political climate in the region, with several African presidents adopting incendiary rhetoric against sexual minorities and 'standing up' against western attempts to bring about pro-LGBTIQ+ changes.

The Christian caucus in Parliament, was central to the counter-mobilisation. In 2014, a group of parliamentarians launched a caucus against homosexuality that lobbied for stricter enforcement of sodomy laws, including calls for citizens to arrest suspected gays and lesbians, and triggering anti-gay protests.[67] The Republican Liberty Party proposed a law that would sentence foreigners to death for homosexuality and Kenyans to life-imprisonment.[68] Again, it should be noted that this was part of a regional trend of proposing – and in some cases adopting – harsher anti-LGBTIQ+ laws.[69] In several countries, including Uganda, Nigeria and The Gambia anti-gay bills were brought to Parliament, and resulted in persecution, prosecution and increased stigmatisation of the LGBTIQ+ community even where they eventually were not adopted.[70] In Kenya, the

64 C Stewart 'Protest over Kenyan claim that homosexuals = dogs' *76 Crimes* 15 February 2013 https://76crimes.com/2013/02/15/protest-over-kenyan-claim-that-homosexuals-dogs/ (accessed 20 June 2021).

65 '"No room" for gays in Kenya, says Deputy President' *Reuters* 4 May 2015 https://www.reuters.com/article/kenya-gay-idUSL1N0XV08M20150504 (accessed 30 June 2021).

66 UK Home Office 'Country Policy and Information Note – Kenya: Sexual orientation and gender identity and expression – Version 3.0' (April 2020) https://www.justice.gov/eoir/page/file/1269491/download (accessed 30 June 2021).

67 W Oloo 'Kenya anti-gay activists, lawmakers eye Uganda-like law' *Anadolu Agency* 26 February 2014 https://www.aa.com.tr/en/world/kenya-anti-gay-activists-lawmakers-eye-uganda-like-law/179151 (accessed 20 June 2021).

68 This was based on the conceptualisation of homosexuality as a foreign concept that was being perpetuated in Kenya by foreigners, and that heavier punishment against foreigners was to stop the spread of homosexuality.

69 J Kushner & A Langat 'Africa: Anti-LGBTI groups are making inroads across East Africa' The Ground Truth Project (15 June 2015) https://thegroundtruthproject.org/anti-lgbt-groups-are-making-inroads-across-east-africa/ (accessed 18 June 2021).

70 As above.

bill was not tabled in Parliament, as the majority leader argued that the new Constitution and Penal Code were sufficient to address homosexuality.[71]

Against this background, in response to the difficult political and socio-cultural/religious opportunity structure, and the somewhat more promising legal opportunity structure resulting from the new constitutional framework, several LGBTIQ+ activists embarked on incremental litigation. We will now show how separate strands of lawfare developed, focusing on specific groups, with transgender and intersex persons being the first to adopt litigation as a tool for the enhanced protection of rights, followed later by litigation for the protection of the rights of gay men and lesbians.

3.2 Recognition of gender identity: Intersex and transgender

Due to legal frameworks entrenching the male-female binary – such as the Kenyan Births and Deaths Registration Act – most intersex individuals are assigned arbitrary sex markers or undergo unnecessary corrective surgeries at birth without the opportunity to make an informed determination of their sex. In Kenya, the human rights violations resulting from the failure to recognise intersex as a third sex has led to litigation to enhance the registration and issuance of identity documents as well as the provision of health services specific to intersex persons.

The *Baby 'A' (suing through the Mother EA) v Attorney General* was the second intersex case to be determined by the courts.[72] Baby A was born in May 2009 with both male and female genitals.[73] This made their birth registration problematic according to the binary Births and Deaths Registration Act. Unsure how to proceed, hospital staff marked the baby's sex with a question mark ('?').[74] The lack of a sex marker led to the refusal by the Registrar of Births and Deaths to issue a birth certificate to Baby A, limiting her ability to access medical care, school admission, a passport or employment.[75] Baby A's case was taken up by John Chigiti, a human rights advocate, supported by CRADLE, a Children's Rights NGO. The case was filed in 2013 and the legal argument focused on the right to legal recognition, to be registered immediately after birth and to have a

71 As above.

72 *Baby 'A' (Suing through the Mother E A) v Attorney General* [2014] eKLR http://kenyalaw.org/caselaw/cases/view/104234/ (accessed 20 May 2021).

73 *Baby A* case (n 72) para 1.

74 As above.

75 As above.

name under national[76] and international law.[77] It was also argued that sex assignment surgery without the child's express informed consent violated their right to physical integrity and self-determination and should not be allowed.[78] The Court was requested to order the state to develop guidelines for corrective surgery and consent for this purpose.[79]

The government, through the Attorney-General, denied receiving any application for Baby A's registration and that any change in the male-female gender dichotomy in the Births and Deaths Registration Act had to be done by Parliament, and not the courts.[80] The state further argued that the Births and Deaths Registration Act effectively provided for the registration of intersex children, as they could be registered using their dominant sex as either male or female and could thus enjoy all their fundamental rights.[81]

In making its determination, the Court focused on two issues: whether Baby A was an intersex person who was not recognised; and the need for rules and guidelines for corrective surgeries for intersex children.[82] The Court found that Baby A could be properly categorised as an intersex person due to the ambiguous genitalia.[83] Further, the Court found that article 27(4) of the Constitution prohibited discrimination on all grounds, including the character of being intersex, and therefore, intersex persons ought not to be discriminated against in any way, including in the issuance of identity documents.[84] The Court then ordered Baby A's mother to make an application for a birth certificate and report to the Court within 90 days on the progress made.[85] The Court, however, refused to make orders

76 Article 53 of the Constitution of Kenya, 2010.

77 Relevant international law relied on included articles 7-8 of the UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3; and article 6 of the (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

78 Relevant international law provisions relied on included articles 2, 3, 12, and 37 of the UN Convention on the Rights of the Child; and articles 3 and 4 of the African Charter on the Rights and Welfare of the Child.

79 *Baby A* case (n 72) paras 4-6.

80 *Baby A* case (n 72) paras 8-12 & 20.

81 *Baby A* case (n 72) para 13-15.

82 *Baby A* case (n 72) para 40.

83 *Baby A* case (n 72) para 52-53.

84 *Baby A* case (n 72) para 61.

85 *Baby A* case (n 72) para 71(iv).

on the recognition of intersex as a third gender, stating that this was the responsibility of the Legislature.[86]

The Court acknowledged the need for rules and guidelines surrounding corrective surgeries, but again insisted that this was under the Legislature's purview since the courts neither had the mandate nor the technical capacity to decide such matters.[87] The Court, therefore, ordered the state, through the Legislature and with the participation of relevant stakeholders, to develop a comprehensive legislative framework to enhance the recognition and registration of intersex children as well as develop guidelines for corrective surgeries for intersex children.[88] The state had 90 days to report on the progress it had made in developing the necessary legislative and policy frameworks on intersex children.[89] The state was also ordered to designate an agency or institution to collect statistical data on intersex persons to enhance policy creation and decision-making on the rights of intersex persons.[90] The decision of the Court was implemented with the Registrar of Births and Deaths registering and issuing a birth certificate to Baby A, though the gender marker that was used remained confidential to protect the identity of the baby.[91] The 2019 Census was also used to collect data on intersex persons, with a total of 1 542 people identifying themselves as intersex during the Census.[92] With this, Kenya became the first African nation to officially document the intersex population for purposes of policy formulation and service delivery.[93]

The *Baby A* decision has led to more focused advocacy for the rights of intersex persons, with the Legislature holding a public forum on the rights of intersex persons; engaging with other civil society stakeholders to draft legislation on protection of the rights of intersex persons; and promising to prioritise and fast-track the draft legislation when it is presented before Parliament. The *Baby A* case and the undertaking from Parliament led to the establishment of a Taskforce on Policy, Legal, Institutional and

86 *Baby A* case (n 72) para 62.

87 *Baby A* case (n 72) para 65.

88 *Baby A* case (n 72) para 66-67.

89 *Baby A* case (n 72) para 71(iii).

90 *Baby A* case (n 72) paras 68 & 71(ii).

91 This was confirmed by the Kenya National Commission on Human Rights, who were uncomfortable revealing the gender marker used due to lack of permission to do so by the mother of the baby.

92 N Bhalla 'Kenyan census results a "big win" for intersex people' *Reuters* 4 November 2019 https://www.reuters.com/article/us-kenya-lgbt-intersex-trfn-idUSKBN1XE1U9 (accessed 24 June 2021).

93 As above.

Administrative Reforms Regarding Intersex Persons – a multi-agency taskforce established by the Attorney-General in May 2017.[94] The Taskforce released its report in December 2018.[95] Despite these efforts, the Kenyan government has yet to produce a draft of the legislation or guidelines it is obliged to enact.

Another category of gender identity cases concerns transgender persons, with lawfare being used as a strategy for legal recognition as well as the protection and remediation of fundamental rights. The seminal case here was *Republic v Kenya National Examination Council: Ex-Parte Audrey Mbugua Ithibu*.[96] Mbugua changed her first name from Andrew to Audrey through a gazetted deed poll.[97] On 10 December 2010, Mbugua then wrote to the Kenya National Examination Council (KNEC) requesting her academic certificates to reflect the name change.[98] The Council initially appeared to agree but later dismissed the request.[99] Mbugua then moved to court. In their defence, KNEC argued that the certificate was issued in accordance with the registration particulars 'under which Mbugua had registered for the examination'.[100] The KNEC also questioned whether Mbugua's gender transition was sanctioned by law. It argued that it had no legal mandate to change the names of those who had transitioned because this had the potential to create fraudulent certificates.[101]

In its decision, the High Court stated that Audrey, as a transgender person, had unique characteristics and was entitled to differentiated treatment. A name change on her academic certificates would affirm her human dignity, autonomy and sexual/gender self-determination.[102] The Court acknowledged that the law allowed KNEC to withdraw and

94 Kenya Law Reform Commission 'Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya' (undated) https://www.klrc.go.ke/index.php/projects/on-going-projects/612-taskforce-on-policy-legal-institutional-and-administrative-reforms-regarding-intersex-persons-in-kenya (accessed 24 June 2021).

95 Office of the Attorney General 'The Taskforce Report on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya' (December 2018) https://www.klrc.go.ke/images/TASKFORCE-REPORT-on-INTERSEX-PERSONS-IN-KENYA.pdf (accessed 24 June 2021).

96 *Republic v Kenya National Examinations Council: Ex-Parte Audrey Mbugua Ithibu* [2014] eKLR http://kenyalaw.org/caselaw/cases/view/101979/ (accessed 15 June 2021).

97 *Ex-Parte Audrey Mbugua Ithibu* (n 96) para 4.

98 *Ex-Parte Audrey Mbugua Ithibu* (n 96) para 5.

99 *Ex-Parte Audrey Mbugua Ithibu* (n 96) paras 5-7.

100 As above.

101 As above.

102 *Ex-Parte Audrey Mbugua Ithibu* (n 96) paras 10-11.

amend academic certificates where necessary, which gave KNEC enough mandate to make the necessary changes to Mbugua's certificates.[103] The Court also noted that having gender marks in academic certificates was not a legal requirement, and thus issued an order compelling the KNEC to issue Mbugua with new academic certificates that did not include gender markers within 45 days.[104]

The Court noted the importance of human dignity as the cornerstone of a democratic society and the equal enjoyment of human rights. By affirming and making the connection between gender identity, autonomy and human dignity, the Court adopted a progressive interpretation of the law that had been envisaged by the new Constitution as a transformative document. This 2014 decision went a long way in affirming the legal recognition of transgender persons and increasing their access to public services. The decision was also not in vain, as its directive has been implemented by the Kenya National Examination Council issuing Ms Audrey new academic papers capturing her new gender identity.[105] She expressed her joy at finally achieving justice by stating as follows:[106]

> I am happy KNEC complied with the orders of the court and issued me with a new certificate. I urge other transgender people who have changed their names to apply for new certificates. I thank all those who supported me and my transgender family. You chose the side of winners, and you definitely chose justice.

Such positive enforcement outcomes encourage the adoption of lawfare as a strategy to achieve positive social justice outcomes for sexual and gender minorities in Kenya.

The cases on legal recognition and protection of intersex and transgender people show the potential of litigation for improving minority rights. But despite their successes, they also illustrate limitations of litigation strategies in producing broad-based socio-legal transformation. Especially when based on individual test cases, litigation has a reductionist nature, pushing cases to be argued on narrow grounds, rendering them unlikely to produce substantive reforms. For example, the landmark *Mbugua* case, did not clarify or elaborate a legal framework for the provision of critical

103 *Ex-Parte Audrey Mbugua Ithibu* (n 96) para 12.

104 As above.

105 A Wako 'Transgender activist Audrey Mbugua gets updated KCSE certificate' *Nairobi News* 16 September 2019 https://nairobinews.nation.africa/transgender-activist-audrey-mbugua-gets-updated-kcse-certificate/ (accessed 20 June 2021).

106 As above.

health services, such as corrective or gender affirming surgeries. Litigation is thus more effective when linked to broader civil society advocacy strategies.

3.3 Right to freedom of association

The ability to associate, organise and express oneself in a legally recognised organisation is key to advocating for oppressed and marginalised communities.[107] Efforts to have sexual minority rights organisations registered in the face of recalcitrant and unwilling governmental agencies formed a second arena of battle in Kenyan activists' queer lawfare. The first case that addressed this challenge was the judicial review case, *Republic v NGO Coordination Board and the Attorney General: Ex-Parte Transgender Education and Advocacy*.[108] The Transgender Education and Advocacy (TEA) wanted the Court to order the NGO Coordination Board to register them as a non-governmental organisation, after the Board had denied their application.[109] The NGO Board argued that they did not refuse to register TEA but waited for the Court to decide on the name change of one of the organisation's officials, Audrey Mbugua Ithibu, who was the applicant in *Republic v KNEC, Ex-Parte Audrey Mbugua Ithibu*, discussed above.[110]

The High Court, in its July 2014 decision, held that the NGO Coordination Board, despite its discretionary power, had acted in an unreasonable and unlawful manner by not properly justifying its refusal to register TEA.[111] The Court also held that discrimination and infringement of rights of association based on sexual orientation and gender identity was unconstitutional.[112] As a result, the Court issued an order compelling the NGO Board to register TEA, whose objective was national and international advocacy and education on the rights of transgender persons.[113] TEA's success informed the National Gay and Lesbian Human Rights Commission's case for registration.

107 Oloka-Onyango (n 57) 54.

108 *Republic v Non-Governmental Organizations Co-ordination Board: Ex-parte Transgender Education and Advocacy* [2014] eKLR http://kenyalaw.org/caselaw/cases/view/100341/ (accessed 20 June 2021).

109 *Ex-parte Transgender Education and Advocacy* (n 108) paras 1-7.

110 *Ex-parte Transgender Education and Advocacy* (n 108) paras 8-15.

111 *Ex-parte Transgender Education and Advocacy* (n 108) paras 35-37.

112 *Ex-parte Transgender Education and Advocacy* (n 108) para 36.

113 *Ex-parte Transgender Education and Advocacy* (n 108) para 38.

The *Eric Gitari v NGO Board* case, filed in 2013,[114] challenged the NGO Board's refusal to register the NGLHRC, an organisation that proposed to advocate and lobby for gay and lesbian persons' rights.[115] Gitari argued that the NGO Board violated the organisation's members' right to freedom of association contrary to article 36 of the Constitution as well as the rights to human dignity, equality and non-discrimination.[116] The state's argument was that freedom of association was not absolute but was subject to limitation in accordance with the law. Further, they stated that the Penal Code, in criminalising same-sex sexual conduct, had legitimately limited the right to freedom of association as against gay and lesbian persons in Kenya.[117] Katiba Institute, in its *amicus curiae* brief argued that both the Constitution and international law require that freedom of association be respected and exist without limits, unless adequately justified.[118]

It is worth noting that the lodging of the *Eric Gitari* case created a fissure in LGBTI organising, networking and collective advocacy, with some activists seeking to separate gender identity contestations from sexual orientation contestations. Audrey Mbugua – who had won the school certificate case and was central in the TEA registration court case – feared that linking LGB and transgender issues would threaten TEA's registration. With other intersex and transgender activists, she petitioned the court in the *Eric Gitari* case to not consider the transgender and intersex persons as being part of the LGB group.[119] They argued that 'sexual orientation is a *choice* whereas transgender and intersex people are faced with a *medical condition*'.[120] The breaking of ranks by transgender and intersex persons in the context of this case may have been informed by the differences in societal perceptions – with intersex and transgender persons receiving more political, social and religious sympathy and acceptance due to the supposed physiological, hormonal and biological nature of gender identity, while gay and lesbian persons continue to face exclusion due to the perceived 'choice factor' in sexual orientation. This perception of sexual orientation as a 'choice factor' sees same-sex sexual orientation and conduct as a learned behaviour or an acquired lifestyle which has

114 *Eric Gitari v Non-Governmental Organisations Co-ordination Board* [2015] eKLR http://kenyalaw.org/caselaw/cases/view/108412/ (accessed 20 June 2021).

115 *Eric Gitari v NGO Board* (n 114) para 1-2.

116 *Eric Gitari v NGO Board* (n 114) para. 3 & 19-29.

117 *Eric Gitari v NGO Board* (n 114) paras 4, 11-17, 32-36 & 42-46.

118 *Eric Gitari v NGO Board* (n 114) paras 47-55.

119 *Eric Gitari v NGO Board* (n 114) paras 38-41.

120 As above.

nothing to do with the human genetic makeup, to the detriment of the protection of the rights of the LGBTIQ+ communities.[121]

In its 2015 determination, the High Court held that the case was neither about marriage nor morality, but about constitutional guarantees of freedom of association, non-discrimination, and equality before the law for sexual minorities.[122] The Court stated that everyone, regardless of gender or sexual orientation, has the right to form any association, and this right could only be limited in accordance with article 24 of the Constitution.[123] Freedom of association is inviolable even if the views expressed by the organisation are unpopular or unacceptable to the majority in society.[124] The Court, therefore, affirmed that the NGLHRC had the right to be registered and that the NGO Board, by failing to do so, was in breach of the Constitution.[125] In reaching this decision the Court held that cultural or religious norms were not legitimate reasons for the limitation of rights because they are not 'law' as required by the limitation clause in article 24.[126] The Court further held that the NGLHRC rights had been violated because the Constitution prohibited discrimination on any grounds. It stated that even though article 27, which prohibits both direct and indirect discrimination, did not contain sexual orientation as an express prohibited ground of unfair discrimination, it affirmed that the listed grounds in the article were not exhaustive and could be interpreted to include other grounds.[127]

The public uproar emanating from the High Court determination of the *Gitari* case in 2015, led to the Attorney-General appealing the case, arguing that the High Court made a mistake in law by: identifying sexual orientation as an innate attribute without sufficient medical evidence; failing to note that freedom of association could be legitimately limited to achieve societal values such as moral, religious and cultural preferences as contained in the Preamble of the Constitution; failing to uphold the provisions of the Penal Code that criminalises homosexual behaviour; and reading in sexual orientation as a prohibited ground of discrimination in the Constitution.[128]

121 *Eric Gitari v NGO Board* (n 114) para 96.

122 *Eric Gitari v NGO Board* (n 114) paras 56-58 & 99.

123 *Eric Gitari v NGO Board* (n 114) paras 71-76.

124 *Eric Gitari v NGO Board* (n 114) para 88-96.

125 *Eric Gitari v NGO Board* (n 114) paras 103-118.

126 *Eric Gitari v NGO Board* (n 114) paras 119-125.

127 *Eric Gitari v NGO Board* (n 114) paras 129-138 & 147.

128 *AG v Eric Gitari* – Memorandum of Appeal (on file with authors).

In response, Gitari and the NGLHRC argued that since sexual orientation was not the key issue in the High Court case, it should not be so in the Court of Appeal. They argued that the issue determined by the High Court was that freedom of association applied to all persons regardless of their sexual orientation.[129] The Respondents asserted the Constitution's affirmation of diversity, noting that the right to autonomy and self-determination allowed individuals to determine their own destiny unconstrained by the morality, culture or religious beliefs of the majority in the society. The Appeal Court in its 2019 judgment upheld the High Court's decision, compelling the NGO Board to register the organisation.[130]

This case shows the usefulness of litigation for advancing the rights of sexual minorities. The legal opportunity structure was sufficiently open due to associative capacity, enabling constitutional/legal frameworks and responsive judicial institutions. The court victory in the *Eric Gitari v NGO Board* case caused optimism in the LGBTIQ+ community, reinforcing the belief in litigation, and fuelled efforts to decriminalise homosexuality.

The case, however, also showed the risks of sexual minority lawfare through strategic litigation in homophobic contexts. The societal backlash against sexual minority rights in the aftermath of the 2015 High Court decision caused considerable concern. *The Weekly Citizen* newspaper, for example, published the names and photographs of 12 leading LGBTIQ+ activists, exposing them to harassment, intimidation and ostracism.[131] One of the activists stated:[132]

> If homophobes were looking to target people, if the police were looking to arrest people, if anti-gay youths were looking to attack some teens they assume are gay, they now have a face and a name.

According to a PEMA Kenya and Human Rights Watch report released in September 2015, there was an increase in attacks, threats, persecution and prosecution directed at the LGBTIQ+ community in the country by both the police and the general public, especially in the coastal region.

129 *AG v Eric Gitari* – Rebuttal of Grounds of Appeal (on file with authors).

130 *Non-Governmental Organizations Co-Ordination Board v EG* [2019] eKLR http://kenyalaw.org/caselaw/cases/view/170057/ (accessed 20 June 2021).

131 Oloka-Onyango (n 57) 56.

132 This is similar to what happened in Uganda, as described in Oloka-Onyango (n 57) 30 56-57; S Nyanzi & A Karamagi 'The socio-political dynamics of the anti-homosexuality legislation in Uganda' (2015) 29 *AGENDA* 32.

In the case of *COL v Resident Magistrate, Kwale Court* – lodged 2015, decided 2016, appeal decided 2018 – COL and another person were prosecuted for alleged consensual same-sex sexual intercourse between two consenting adults under section 162 of the Penal Code and section 11 of the Sexual Offences Act. [133] Forced anal testing was conducted as part of evidence collection to prove same-sex sexual conduct. COL argued that the practice was unconstitutional and went against the tenets of fair trial safeguards against self-incrimination.[134] They, therefore, asked the Court to declare forced anal testing as amounting to inhumane and degrading treatment due to its violation of human dignity, privacy, health and its disparate application to sexual minorities contrary to the constitutional affirmation of equality before the law.[135] The government, in response, argued that the Kenyan Sexual Offences Act, in section 36, allowed for magistrates to order those accused of sexual offences to undergo medical exams.[136] They further argued that the Applicants had consented to the tests in accordance with section 42 of the Sexual Offences Act, which states that where a person of full capacity gives consent for medical examination, state officers are immune from action resulting from injury related to the medical examination.[137]

The High Court found that the Applicants willingly agreed to the medical examination,[138] which, according to the Court, did not amount to self-incrimination according to article 50 of the Constitution.[139] It also stated that evidence-gathering in sexual offence investigations must involve some form of intrusive examination of the parts of the body most connected with the offence, be it the vagina or anus.[140] The Court held that the anal examination was in line with relevant law on sexual offences, and therefore, not a violation of the Applicants' rights.[141]

The High Court decision created international uproar, with national and international human rights actors condemning the court for its homophobic and regressive reasoning and decision-making.[142] The case

133 *COL v Resident Magistrate – Kwale Court* [2016] eKLR http://kenyalaw.org/caselaw/cases/view/123715/ (accessed 20 June 2021).

134 *COL Case* (n 133) para 1.

135 *COL Case* (n 133) paras 1 & 32-33.

136 *COL Case* (n 133) paras 21-23 & 26-27.

137 *COL Case* (n 133) paras 36-37.

138 *COL Case* (n 133) paras 38-39.

139 *COL Case* (n 133) paras 40-44.

140 *COL Case* (n 133) paras 47-51.

141 *COL Case* (n 133) paras 54-56.

142 See Human Rights Watch 'Kenya: Court to hear forced anal testing case' (3 May 2016).

was appealed to the Court of Appeal at Mombasa and was overturned in 2018, with the Court of Appeal using the rights to human dignity and privacy as anchors in declaring anal testing as being unconstitutional, unreasonable and totally unnecessary.[143] Though the High Court decision was overturned on appeal, the fear it created amongst sexual minorities of the possibility of the health system being used to gather evidence for their prosecution for same-sex sexual conduct, created fear and distrust of the health system amongst sexual minorities. This is bound to adversely affect the health-seeking behaviour of sexual minorities for a long time to come, with the fear that it would have a cumulative detrimental outcome to the health and wellness of sexual minorities in Kenya.

The stigma and ostracism directed at sexual minorities in Kenya has also been instrumentalised in other social settings, including within the church, to malign and exclude others in leadership contests. In one instance an Anglican Bishop accused opponent clerics of homosexuality and suspended them from the Church. This led the suspended clerics to sue for reinstatement (*JMM v Anglican Church* (filed 2015, decided 2016)).[144] In deciding the case, the Court held that the clerics were unfairly terminated, because their 'sexual immorality' was unproven given sections 162 and 163 of the Penal Code's requirement for proof of penetration.[145] The Court thus ordered the clerics to be reinstated as well as to have their 'back salaries' paid.[146] The Court of Appeal affirmed the reinstatement orders of the High Court and sentenced the Bishop to civil jail in July 2018 for failure to reinstate the clerics and pay their court-awarded compensations.[147] The malicious use of perceived sexual orientation in this context created stigma and animosity in the church towards the targeted clerics, leading to their exclusion from the church and subsequent persecution by the congregants.[148] The court order of reinstatement was

https://www.hrw.org/news/2016/05/03/kenya-court-hear-forced-anal-testing-case (accessed 20 June 2021).

143 *COI v Chief Magistrate Ukunda Law Courts* [2018] eKLR paras 22-27 & 32, http://kenyalaw.org/caselaw/cases/view/171200/ (accessed 20 June 2021).

144 *JMM v The Registered Trustees of The Anglican Church of Kenya* [2016] http://kenyalaw.org/caselaw/cases/view/127235 (accessed 24 June 2021).

145 *JMM* case (n 144) paras 7-12.

146 *JMM* case (n 144) para 12.

147 C Stewart 'Kenya church must reinstate 3 allegedly gay priests' *76 Crimes* 7 August 2017 https://76crimes.com/2017/08/07/kenya-church-must-reinstate-3-allegedly-gay-priests/ (accessed 30 June 2021).

148 'Anglicans not ready to take back priests accused of being gay, court told' *Daily Nation Newspaper* 28 September 2016 https://nation.africa/kenya/counties/nyeri/anglicans-not-ready-to-take-back-priests-accused-of-being-gay-court-told-1242884 (accessed 30 June 2021).

completely rejected by the Anglican church and its congregants.[149] This case evidences the deep entrenchment of homophobia in socio-cultural and religious attitudes and practices in Kenyan society. Further lawfare – especially challenging the criminalisation of same-sex sexual conduct between two consenting adults – was one of the strategies attempted to move forward.

3.4 Recognition of sexual orientation

Homophobic and transphobic attitudes are codified in the country's Penal Code, which criminalises same-sex sexual conduct. Section 162 titled 'unnatural offences' provides:

> Any person who –
>
> (a) has *carnal knowledge of any person against the order of nature*; or
> (c) permits a male person to have *carnal knowledge of him or her against the order of nature*,
>
> Is guilty of a felony and is liable to imprisonment for *fourteen years*:
> Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for *twenty-one years* if—
> (i) The offence was committed without the consent of the person who was carnally known; or
> (ii) The offence was committed with that person's consent, but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

Section 163 provides that any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for *seven years*. Further, section 165 provides:

> Any male person who, whether in public or private, commits any act of *gross indecency* with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another

149 L Nyawira 'ACK Clergy facing oblique future after reinstatement court ruling' *The Standard Newspaper* 30 July 2018 https://www.standardmedia.co.ke/central/article/2001290069/ack-clergy-struck-by-gayism-rumours-fighting-for-acceptance (accessed 30 June 2021).

> male person, *whether in public or private*, is guilty of a felony and is liable to imprisonment for *five years* [our emphasis].

The law, however, does not define 'unnatural acts', 'carnal knowledge against the order of nature' or 'gross indecency'. This vagueness makes the misuse of these provisions by law enforcement officers to either extort or persecute sexual minorities possible, as was evidenced by the *COL* case discussed above.

The criminalisation provisions of the Kenyan Penal Code had not been widely used to prosecute sexual minorities in Kenya in the past.[150] However, with the increasing politicisation of homosexuality from conservative socio-cultural, religious, and political opposition, more arrest and prosecution of sexual minorities using these provisions increased. According to GALCK, there were eight prosecutions of gay men on indecency charges in the period 2012 and 2014 – all without conviction.[151] The aim of these persecutions is mainly to instil fear and silence LGBTIQ+ rights advocacy and lifestyle in Kenya. In this reality of increasing persecution and prosecution using these provisions, lawfare through litigation has been substantively adopted to challenge the constitutionality of these provisions and possibly have the courts declare the relevant sections as unconstitutional

Two decriminalisation cases were lodged in 2016: *Eric Gitari v the Attorney General* (Petition No. 150 of 2016); and *John Mathenge & 7 others v Attorney General* (Petition No. 234 of 2016), subsequently consolidated.[152] They challenged the vague and expansive nature of the Penal Code sections 162-165, arguing that they are in breach of the legal principles of certainty and of the Constitution article 23(3)(d).[153] That the sections also go against the rights of equality and non-discrimination, human dignity, bodily integrity, privacy and health.[154]

The High Court decided to focus on three issues: the criminality of private sexual conduct between two adults of the same sex; the

150 KHRC (n 58) 21-23.

151 Commonwealth Lawyers Association 'The criminalisation of same-sex sexual relations across the commonwealth – Developments and opportunities' (2016) 160 http://www.humandignitytrust.org/uploaded/Library/Other_Material/HDT_Commonwealth_Criminalisation_Report_2015.pdf (accessed 2 March 2021).

152 *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* 2019 eKLR http://kenyalaw.org/caselaw/cases/view/173946/ (accessed March 2021).

153 *EG v AG* case (n 152) paras 1 & 58.

154 *EG v AG* case (n 152) paras 24 & 59-64.

constitutionality of sections 162 and 165 and whether they meet the threshold for limiting other rights; and the correct interpretation of these sections considering the Constitution and the rights it confers to sexual minorities.[155] The decision, delivered in May 2019, was a disappointment to the queer community who had hoped that the Court would declare these criminalising provisions to be unconstitutional, as the court failed to declare the criminalising sections of the Penal Code to be unconstitutional.[156] This, in essence, meant that same-sexual conduct remains criminalised in Kenya, with the Penal Code provisions limiting the sexuality rights of sexual minorities. Efforts to appeal the case were discussed extensively, but an appeal was not filed because the legal opportunity structure had shifted with the appointment of a more conservative Chief Justice with a strong Christian bias. Broad attacks on the judiciary by political actors targeted judicial officers and undermined the courage and independence of the judiciary.[157] This was further exacerbated by the hostility expressed against gays and lesbians by senior political figures in the country with the President indicating in several media interviews that sexual minority rights were a 'non-issue', and the Deputy President expressly speaking against sexual minority rights as discussed above. Together, this constrained the environment for strategic litigation as an avenue for the continued protection of sexual minority rights. The erosion of these opportunity structures thus necessitated a change in strategy, with LGBTIQ+ organisations and their networks engaging more in advocacy and community building to counter the increased homophobia and hostility, and consolidating previous gains made in the protection of sexual minority rights.

4 Effects of queer lawfare on the enjoyment of LGBTIQ+ rights

The most immediate effects of litigation are the legal changes ordered by the court – for example regarding gender markers and the right to register organisations, which in turn may have positive material, political and ideational effects for affected groups. Though negative court outcomes may cause setbacks, litigation processes could still have positive outcomes in terms of movement building and awareness. In the sections below we

155 *EG v AG* case (n 152) para 242.

156 *EG v AG* case (n 152) paras 278-279, 299, 308, 314 & 405-406.

157 Kenya Human Rights Commission Press Release 'We stand against President Uhuru's attacks on the Judiciary; We support the court action by Katiba Institute, ourselves among others' (8 June 2021) https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/748-we-stand-against-president-uhuru-s-attacks-on-the-judiciary-we-support-the-court-action-by-katiba-institute-ourselves-among-others.html (accessed 10 July 2021).

look at the effects of legal recognition and decriminalisation litigation in Kenya.

Lawfare strategies have played an important role in improving service delivery for sexual minorities in Kenya. Litigation has generally had a positive impact for intersex and transgendered persons. It has enhanced visibility and knowledge of the innate nature of gender identity, leading to socio-political empathy for intersex and transgender persons. Empathy and societal understanding reduced stigma and ostracism, leading to better access to necessary healthcare services and opened avenues for access to medical procedures affirming and enhancing sexual identities. In the *Baby A* case, the courts affirmed the need for legal review to ensure that intersex children can opt for consensual corrective surgeries with informed consent. The intersex cases led to the creation of the Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding the Intersex Persons in Kenya**.** The Taskforce was tasked with investigating and collecting data about the Kenyan intersex community, with the aim of enhancing access to critical socio-economic goods and services, with healthcare the priority. This led to the inclusion of the intersex community in the 2019 Census, which gives the government grounds to allocate funds to the group based on their numbers. On the legal reform front, lawmakers have hinted at amending the Registration of Births and Deaths Act and the Registration of Persons Act to accommodate intersex persons as a third sex. This would ease the process of applying for government documents and accessing government services. Other proposals made by the taskforce call for the government to provide free medical insurance cover for sex-reassignment surgery for intersex persons.

Lawfare has enhanced the treatment of LGBTIQ+ persons in the context of detention. The Independent Policing Oversight Authority has called on the government to establish intersex cells in police premises. This recommendation complements the National Polices Service Standing Order that gives detained individuals the right to choose the sex of the officer who will search them. Litigation has also deemed unconstitutional forced anal examination in cases of suspected same-sex sexual intercourse. Despite these orders, there are still reports of continued harassment of LGBTIQ+ persons at the hands of the police and government officials. In October 2020, for instance, a judge in Eldoret ordered the prosecutor to respect the self-identification of an accused transgender woman who was on trial for fraudulently obtaining registration documents. The prosecutor had addressed her by her deadname – the name used prior to transitioning – which her lawyer considered as being akin to psychological torture. The court agreed and issued a directive for the prosecution to respect her gender identity.

Queer lawfare strategies have also enhanced the collective organisation through the establishment and registration of organisations and associations for the advocacy for the rights of the LGBTIQ+ community. The *TEA* case led the way, securing such rights for the transgender community and the *Eric Gitari* case for the broader LGBTIQ+ community. Collective advocacy and networking have expanded the space for the enjoyment of the human rights of the LGBTIQ+ community and has formed a platform for engagement with and response to the opposition. It has also created safe spaces for association, service delivery and socialisation for different sexual minority groups in Kenya.

5 Conclusion

Litigation has been an important tool in the fight for legal recognition and equal treatment of LGBTIQ+ persons in Kenya, and the queer lawfare trajectory in the country brings out important lessons regarding the circumstances under which lawfare strategies are useful, as well as their limitations and risks.

Of profound importance is the watershed that the 2010 Constitution represented. This carries important lessons. Firstly, the involvement of the queer community in the democratisation and constitution-making process was central to community building as well as in forging links with the broader human rights and social justice community, in Kenya and internationally. This provided an important platform and toolbox for devising effective advocacy, including diverse lawfare strategies. Secondly, the changes in the constitutional dispensation radically shifted the legal opportunity structure. Even in the absence of explicitly recognising gender identity and sexual orientation as prohibited grounds for discrimination, it provided a much more solid legal basis for queer rights litigation. The changes in the judiciary that followed, with a new and progressive chief justice, appointment of more progressive judges to courts at all levels, reforms improving judicial independence, integrity, and sensitivity, and easing of access to justice and conditions for public interest litigation, further improved the legal opportunity structure for LGBTIQ+ activists.

That the positive shifts in the legal opportunity structure coincided with a deterioration of the political environment, with increased politicisation and harsh anti-gay rhetoric, rendered litigation as the most attractive – and to some extent – the only viable strategy to advance queer rights.

However, we also see that negative shifts in the political environment over time spilled over into the legal sphere, with politicisation of the judiciary and changes to the composition of the judiciary negatively

impacting the legal opportunity structure. In this context strategic litigation of morally sensitive issues is riskier. It should, however, be noted that the politicisation of the judiciary seems to have little if anything to do with its decisions in the field of LGBTIQ+ rights, and more with its active stance in electoral politics.

More generally, while some see the politicisation as being a result of the increased visibility of the LGBTIQ+ community, and as a backlash against their successes in court, we argue that this explanation is too simple. When anti-gay sentiments rose in Kenya, around 2010 and peaked in the years up to 2015, this was at the height of anti-gay politics in the region (and beyond). Norm entrepreneurs across the continent – politicians, church leaders and journalists – at this time used the same anti-gay rhetoric and strategies, also in countries with very little domestic queer organising or visibility, which indicates that international diffusion played a very important role. Rather than seeing this as a domestic – or even regional – backlash to increased queer visibility and rights, it should be seen as a reaction by conservative actors to a global trend.

In the larger perspective, the Kenyan judiciary has led the way in enhancing the legal recognition of sexual minorities as a marginalised and excluded group that needs special protective measures to enhance the enjoyment of their rights. Through litigation, the courts have affirmed that intersex and transgender persons are a special category and that special measures in relation to registration at birth, legal framework to change names and identity documents in the process of transition, the control of non-therapeutic surgery until a child is able to make informed decisions, enhanced access to hormonal therapy in the transition process and the registration of an organisation to champion the rights of intersex and transgendered persons in Kenya have been achieved. Further, in relation to gays and lesbians, the courts have recognised the right to freedom of association. Litigation has also been employed as a tool for the de-criminalisation of consensual same-sex sexual conduct between two consenting adults, though so far without success.

The mixed outcomes of litigation in a society that remains homophobic, means that activists need to carefully consider the use of strategic litigation. It should be considered in tandem with other strategies such as sustained advocacy and public education on sexual minority rights, and to seek to do so in collaboration with mainstream human rights organisations. Currently, Kenya queer activists are reconsidering their lawfare strategies, and whether new shifts in the judiciary may again open up space for litigation.

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5 Court focused lawfare over LGBT rights: The case of Uganda

Adrian Jjuuko & Stella Nyanzi***

1 Introduction

World over, the law is used as a weapon to promote or hinder the realisation of sexual and reproductive health (SRHR) rights. Of recent, the struggle over lesbian, gay, bisexual and transgender (LGBT) rights has taken centre stage. Uganda, perhaps more than any other country in Africa has in the past 20 years been actively employing lawfare to realise/hinder LGBT rights. The main avenue for the anti-LGBT groups has been through the legislature and the executive, while that of the pro-gay groups has been through the judiciary. In 2005, anti-gay groups managed to push through a constitutional amendment prohibiting same-sex marriages, which was supported by the executive as part of an omnibus Constitutional Amendment Bill, and which was passed by the legislature almost without debate. The then nascent LGBT movement responded in 2007 by filing their first court case challenging the searching of the house of an LGBT activist, and the arrest and mistreatment of a guest that was found in the house. Since then, 12 cases have been brought before Ugandan and other courts by Ugandan pro-LGBT groups, with mixed results. At the same time, anti-LGBT activists have actively defended a few of these cases also with mixed results. They also went beyond court cases and took the offensive and drafted and secured the passing of the Anti-Homosexuality Act, 2014 (AHA) and have managed to have restrictive provisions included in other laws such as the Non Governmental Organisations Act, 2016. They have also made efforts to have the Constitution amended to prohibit same-sex conduct. LGBT activists have responded by fighting these developments mainly using judicial means. This chapter explores the increasing significance of the LGBT debate in Uganda showing why there is increased contestation and the politics around LGBT rights. It discusses how both sides of the LGBT divide have used the courts of law to further their ends and what influences the

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choice of court cases and other legal actions taken. It concludes with the impact of this lawfare and a peek into the future of lawfare on LGBT rights in Uganda.

2 The state of LGBT rights in Uganda

The current President of Uganda, Yoweri Museveni came to power in 1986 after a protracted civil war, and mass violations and restrictions of human rights in earlier regimes. He delivered on a new Constitution in 1995, which increased protections for human rights, and thus allowed for emergence of an active civil society.[1] A more independent judiciary also emerged that could protect the human rights of all persons.[2] However, increasingly, the President has presided over a corrupt and autocratic government that largely controls the legislature and even the judiciary, and clamps down on the opposition and civil society.[3] This has led to a regression in all the political and human rights gains that had been made earlier, including restriction of civic space and curtailing judicial independence. LGBT rights have therefore been a victim of this regress, and more so, they have been used as a bargaining chip with the United States of America and other western countries that are interested in the protection of LGBT rights, largely to the detriment of LGBT persons.[4]

At present, Uganda's Constitution prohibits same-sex marriages,[5] and consensual same-sex relations are primarily criminalised through section 145 of the Penal Code as 'carnal knowledge against the order of nature'. Nevertheless, there are protections of LGBT persons that have been won through court action, including nullification of the Anti-Homosexuality Act, 2014 which had made 'homosexuality' a crime and criminalised LGBT organising.[6] The Constitutional Court also upheld the right to a fair

1 See chap 4 of the Constitution of Uganda, 1995, which under article 29 provides for among others the right to freedom of association.

2 For a history of the judiciary in Uganda before the 1995 Constitution, see J Oloka-Onyango 'Judicial power and constitutionalism in Uganda: A historical perspective' in M Mamdani & J Oloka-Onyango (eds) *Uganda: Studies of living conditions, popular movements and constitutionalism* (1994) 463.

3 For a discussion of how the judiciary currently operates see, B Kabumba 'The practicability of the concept of judicial independence in East Africa: Successes, challenges and strategies' Paper presented at the 2016 Conference of the East African Magistrates and Judges Association (EAMJA), 30 October-2 November 2016, Speke Resort, Munyonyo (2016) 14-19. Also see, American Bar Association 'Judicial independence undermined: A report on Uganda' (2007) for the period before 2007.

4 See for example S Nyanzi & A Karamagi 'The social-political dynamics of the anti-homosexuality legislation in Uganda' (2015) 29 *Agenda* 24-38, 32-35.

5 Article 31(2)(a) of the Constitution.

6 This was in the case of *Prof J Oloka Onyango v Attorney General* Constitutional Petition

hearing for all persons including those regarded as 'immoral and socially unacceptable'.[7] The High Court has upheld protections for LGBT persons against hate speech,[8] violations of their privacy[9] and of recent the right to liberty as well as the right to a fair hearing.[10] There is a ministerial directive on non-discrimination in the health sector and it expressly includes sexual orientation among grounds upon which health service providers cannot discriminate.[11] The HIV Strategic Plan 2020/21 - 2024/25 also expressly provides for services for men who have sex with men and transgender persons.[12]

Despite this, violations of LGBT rights are commonplace, and largely go without redress. In 2020 alone, Human Rights Awareness and Promotion Forum (HRAPF) recorded 398 violations against LGBT persons, based on their sexual orientation and/or gender identity.[13] COVID-19 exacerbated the situation as it made it easier for LGBT persons to be arrested on the pretext of 'doing a negligent act likely to spread infection of disease' under section 117 of the Penal Code, and also making it difficult for LGBT groups to access redress and legal representation due to the lockdown measures.[14]

No 8 of 2018 (*AHA* case).

7 This was through the case *Adrian Jjuuko v Attorney General* Constitutional Petition 1 of 2009 (*Equal Opportunities Commission* case).

8 This was in the case of *Jacqueline Kasha Nabagesera v Rolling Stone Ltd & Giles Muhame,* Miscellaneous Cause 163 of 2010 (*Rolling Stone* case).

9 *Victor Mukasa & another v Attorney General* (2008) AHRLR 248 (*Victor Mukasa* case).

10 *Mukiibi & othersv Hajji Abdul Kiyimba & others* High Court Miscellaneous Cause 179 of 2020.

11 Republic of Uganda, Ministry of Health 'Ministerial directive on access to health services without discrimination' (2014) https://www.scribd.com/document/233209149/MoH-Ministerial-Directive-on-Access-to-Health-Services-Without-Discrimination-19-June-14 (accessed 22 July 2022).

12 Uganda AIDS Commission 'National HIV and AIDS Strategic Plan 2020/21-2024/25' 5.

13 Human Rights Awareness and Promotion Forum (HRAPF) 'The Uganda Report of Human Rights Violations Based on Sexual Orientation and Gender Identity' (2020) 22.

14 See generally, Human Rights Awareness and Promotion Forum (HRAPF) 'The impact of COVID-19 related restrictions on access to justice for key populations in Uganda: A case study of LGBT persons and sex workers in Kampala and Wakiso districts' (June 2021) https://www.hrapf.org/index.php/resources/research-reports/202-report-on-the-impact-of-covid-19-restrictions-on-access-to-justice-for-key-populations-in-uganda-a-case-study-of-lgbt-persons-and-sex-workers-in-kampala-and-wakiso-districts/file (accessed 22 July 2022).

3 Setting the scene for LGBT lawfare in Uganda

Within President Museveni's current 36 year-old regime, early articulations of anti-homosexuality rhetoric comprised the 1990 amendment of the Penal Code to increase the punishment for consensual same-sex relations from 14 years' imprisonment to life imprisonment,[15] and the President's public denial of the existence of homosexual people in the country in 2002.[16] In 2004, the then Minister of Information, James Nsaba Buturo cautioned the Joint United Nations Programme on HIV/AIDS (UNAIDS) Office against organising LGBT people to discuss prevention of HIV/AIDS among homosexual people.[17] In May 2008, Dr Kihumuro Apuuli, the then Director-General of the Uganda AIDS Commission publicly declared that no funds would be redirected to targeting HIV/AIDS services for men who have sex with men (MSM), although he acknowledged that they were among the key drivers of the epidemic at the time.[18] LGBT activists demonstrated against this decision by storming an international conference while holding placards and distributing leaflets, leading to the arrest and detention of three of them.[19]

Alongside these early official public discourses were reports in the newspapers about and the first publicised marriage between two Ugandan men in 1997, allegations of homosexuality among students in single-sex boarding schools, and Anglican bishops' preparation for the 2008 Lambeth Conference that came at the backdrop of a discussion on allowing gay clergy in the Anglican church, alongside pro and anti-LGBT letters from readers, and news articles in the daily newspapers which were collected in Sylvia Tamale's *Homosexuality: Perspectives from Uganda*.[20] Framed within the spheres of health rights – specifically access to HIV/AIDS services – the initial politicisation of homosexuality appropriated the official denial of homosexuals' existence, criminalising appropriate sex education, and refusal to prioritise MSM as key populations deserving targeted intervention.

15 The Penal Code Amendment Statute, 1990.

16 'Uganda has no homosexuals, says Museveni' *The Monitor* 6 March 2002.

17 'Govt warns UNAIDS over gays' *The Monitor* 29 November 2004.

18 'Gays excluded from HIV work in Uganda' *Pink News* 2 June 2008 https://www.pinknews.co.uk/2008/06/02/gays-excluded-from-hiv-work-in-uganda/ (accessed 22 July 2022).

19 International Gay and Lesbian Human Rights Commission and Sexual Minorities Uganda 'Human Rights Groups demand immediate release' (5 June 2008) https://outrightinternational.org/content/uganda-lgbt-arrested-international-hivaids-meeting (accessed 22 July 2022).

20 See generally, S Tamale *Homosexuality: Perspectives from Uganda* (2007).

The greatest setback, however, was the systematic introduction of state-sponsored homophobia that relied upon the complicity and collaboration of the legislature and Executive. For five years, members of parliament with the support of members of the Executive debated and revised the Anti-Homosexuality Bill, 2009[21] which in its original form inter alia proposed the offence of homosexuality which had been defined widely to include touching with the intention of committing the act of homosexuality,[22] and sought to create the offence of aggravated homosexuality punishable by the death penalty,[23] imposing reporting obligations on lawyers, doctors and other 'persons in authority',[24] as well as nullifying international instruments that were seen to be in favour of homosexuality.[25] In February 2014, President Museveni assented to the Anti-Homosexuality Act, amidst claims that his decision was informed by the findings contained in a scientific report produced by a multi-disciplinary committee of experts in Uganda which had concluded that homosexuality was neither entirely an outcome of nature or nurture.[26]

As homophobic discourses were reproduced and circulated in Ugandan society as part of the conversations surrounding the Bill, LGBT individuals and groups increasingly experienced actual or threatened violations of a range of their human rights.[27] The multitude of human rights violations reported during this period include outing of LGBT persons in the public media, arbitrary arrests, blackmail and extortion, corporal punishment – beatings, mob violence, eviction from accommodation, expulsion from school, termination from employment, and forced heterosexual marriages.[28] Sexual Minorities Uganda, an LGBT umbrella organisation,

21 The Anti-Homosexuality Bill 18 of 2009, Bills Supplement to the Uganda Gazette 47 Volume CII, 25 September, 2009. This Bill was tabled before Parliament by Ndorwa West Member of Parliament, Hon David Bahati in October 2009.

22 Clause 2(1)(c) of the Anti-Homosexuality Bill.

23 Clause 3(2) of the Anti-Homosexuality Bill.

24 Clause 14 of the Anti-Homosexuality Bill.

25 Clause 18 of the Anti-Homosexuality Bill.

26 'Battle of scientists as gay law storm persists' *The Observer* 16 March 2014 https://www.observer.ug/viewpoint/guest-writers/30702--battle-of-scientists-as-gay-law-storm-persists (accessed 22 July 2022).

27 For a discussion of the implications of the Bill on human rights, see S Tamale 'A human rights impact assessment of the Ugandan Anti-Homosexuality Bill 009' (2009) 4 *The Equal Rights Review* 49.

28 See Sexual Minorities Uganda (SMUG) 'From torment to tyranny: Enhanced persecution in Uganda following the enactment of the Anti-Homosexuality Act' (2014); Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'Uganda report of violations based on sex determination, gender identity and sexual orientation' (2015) http://hrapf.org/?mdocs-file=1600&mdocs-url=false (accessed 25 July 2017).

was denied registration while others feared to register with their actual names, and organisations that were part of the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) that had been formed to oppose the Bill were threatened with deregistration.[29] The operations of the host organisation of the coalition, Refugee Law Project were suspended for some time.[30] These varied forms of persecution partly led to the exodus of a considerable number of members of the local LGBT community including activists to second countries of refuge, or else third countries where they were resettled after obtaining asylum.[31]

Many others who remained in Uganda mounted a range of strategies to challenge, contest and resist the varied forms of state-promoted homophobia. The most visible of these were through the use of courts. The strategies were undertaken in collaboration with allies formed at the local, national, regional and international levels. While this chapter mainly focuses on forms of court lawfare, there were other forms of resistance that were undertaken, including: advocacy and lobbying via key stakeholders; formation of support organisations, alliances, networks and coalitions; establishment of security and emergency response mechanisms; public media engagements to enhance accurate representation of issues and sustained social media engagement; public demonstrations such as the annual Pride March, but also joining other annual marches such as the annual AIDS Day Marches; creation of parallel health services provided by LGBT support organisations – especially for safe sex education, and provision of safe sex commodities, as well as accessing mainstream inclusive health service providers such as Most At Risk Populations Initiative (MARPI) that is run under a public-private partnership by the Ministry of Health and headquarted at the national referral hospital at Mulago; inclusion in the National HIV/AIDS policy and programme; targeted training, information and communication to key stakeholders such as public health-carers, police officers; and local production of

29 '38 NGOs to be de-registered for promoting homosexuality' *Uganda Radio Network* 20 June 2012 https://ugandaradionetwork.net/story/38-ngos-to-be-de-registered-for-promoting-homosexuality (accessed 22 July 2022).

30 'Ugandan government launches investigation of leading NGO for "promoting homosexuality"' *BuzzFeed News* 5 June 2014 http://www.buzzfeed.com/lesterfeder/ugandan-government-launches-investigation-of-leading-ngo-for#.fjLpvP3Dd (accessed 22 July 2022).

31 For details on some of these see, A Jjuuko & F Mutesi 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda' in N Nicol et al (eds) *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, resistance and hope* (2018) 269, 271-272.

creative productions in the arts, music, drama, film and literature which address issues of homosexuality.[32]

4 How is sexuality constructed?

The matrix of politicised issues discussed above reveals the multiple layers through which human sexuality including non-heteronormative sexualities are locally constructed. Uganda is predominantly a patriarchal and heterosexist society.[33] Binary polarisation of gender prescribes fixed gender roles that assign men the duties of protector and provider, while women are nurturers and caregivers. Thus non-conforming gender identities are widely denigrated and pathologised for going against these rigid gender norms. Heterosexual marriage which can be customary, civil, Hindu, 'African', Christian or Mohammedan takes the forms of monogamy or polygyny and is socially valued and legally sanctioned.[34]

Reproduction is firmly tied to local notions of masculinity and femininity. Procreation is socially rewarded with improved status that comes with transitioning into the maturation stage of adulthood. It is socially valued because it extends generations of patrilineal and matrilineal kinship. Inversely, homosexuality is disparaged because of erroneous beliefs that homosexual people cannot reproduce. Reproductive heterosexuality is an important anchor for establishing the future of Uganda. Thus, homosexuality is perceived as a threat to Uganda's future existence. This perception is enhanced by claims that promoters of homosexuality specifically target children for recruitment into the homosexual agenda.[35]

The framing of homosexuality as an importation from the West reinforces its associations with neo-colonialism, foreignness, and un-Africanness. Fighting against homosexuality is thus projected as a form of patriotically protecting Uganda's sovereignty from the infiltration

32 For details of these approaches, see A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381, 400-406.

33 S Nyanzi 'Dismantling reified African culture through localised homosexualities in Uganda' (2013) 15 *Culture, Health and Sexuality* 955.

34 The different types of marriages are regulated under the Marriage Act Cap 251; Marriage and Divorce of Muhammedans Act Cap 252; Hindus Marriage and Divorce Act Cap 250; the Customary Marriage (Regualtion) Act Cap 248 and the Marriage of Africans Act, Cap 253.

35 See for example '90% of Ugandan Children "Recruited into homosexuality"' *Business Focus* 19 July 2017 https://businessfocus.co.ug/90-of-ugandan-children-recruited-into-homosexuality/ (accessed 22 July 2022).

of neo-colonisers.[36] Similarly, among conservative Christians, fighting homosexuality is constructed as combating sin and immorality.[37]

5 Court focused LGBT lawfare in Uganda

Gloppen and St Clair use the term lawfare to mean the use of courts of law, and other legal process to advance or resist a particular cause.[38] Lawfare is thus not only about court action but also about other legal processes. In Uganda, both court action and other legal processes have been employed in the struggle for and against the realisation of LGBT rights. However, court action has been employed more, and it has been opined that this has to do with the legal opportunity structure that at the moment favours courts over the legislature and the executive.[39] The legal opportunity structure thesis is to the effect that strategies employed are in line with the level of access that the persons employing these strategies have to the legal system.[40] Just like in Costa Rica,[41] activists in Uganda can access the courts more than any other avenue, as unlike parliament or the executive, which are far more hostile and depend on the individual goodwill of those who occupy offices, courts are bound to hear cases and make a binding decision, and the courts have proven themselves capable of upholding the Constitution and delivering justice for LGBT persons despite the general hostility to LGBT equality in the country.[42]

As at 2022, it has been 16 years since the first LGBT case, *Victor Mukasa & Yvonne Oyoo*, was filed before the High Court in 2006. This period has seen twelve cases on LGBT issues filed in courts in Uganda, in

36 S Tamale 'Confronting the politics of non-conforming sexualities in Africa' (2013) 5 *Africa Studies Review* 31; S Nyanzi 'Queer pride and protest: A reading of the bodies at Uganda's first gay beach pride' (2014) 40 *Signs: Journal of Women in Culture and Society* 36.

37 J Sadgrove et al 'Morality plays and money matters: Towards a situated understanding of the politics of homosexuality in Uganda' (2012) 50 *Journal of Modern African Studies* 103.

38 *S Gloppen* & AL *St Clair* 'Climate change lawfare' (2012) 79 *Social Research* 899-930 at 899.

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

40 G Fuchs 'Strategic litigation for gender equality in the workplace and legal opportunity structures in four European countries' (2013) 28 *Canadian Journal of Law and Society* 189 at 192.

41 BM Wilson & JC Rodríguez 'Legal opportunity structures and social movements: The effects of institutional change on Costa Rican politics.' (2006) 39 *Comparative Political Studies* 325.

42 For more discussions on how strategic litigation can lead to social change in common law in Africa, including Uganda, see generally, Jjuuko (n 39).

federal courts in the United States of America (USA), and at the regional East African Court of Justice, all concerning LGBT rights in Uganda. The cases are exclusively filed by the pro-LGBT groups, comprised of LGBT led groups and allies, usually in reaction to a legislative, executive or individual action. The anti-LGBT groups, composed of some persons who refer to themselves as 'ex-gays', conservative churches and some state officials, have always intervened in these cases through lobbying the executive, attending court and through religious sermons and preaching. However, of late, they have also directly moved into the court arena and have actively started to oppose the cases through legal processes including applying to be joined as parties to cases, as it was in the *AHA* case,[43] or actively attending court and observing court processes as they did in the *Equal Opportunities Commission* case. They also use legislative and citizen mobilisation efforts to counter/reverse the gains made in court as well as demonstrate their positions while in court. Both sides mobilise constituents to attend court sessions, and as such outside the courtrooms, there are usually arguments and clashes between the two sides and sometimes demonstrations.

The courts cases can be classified into three categories: those filed in courts and before quasi-judicial bodies in Uganda; those filed in courts of other countries; and those filed in international courts.

5.1 Cases before Ugandan courts

Ten cases in total have been filed before courts in Uganda. Of these at the textual level, five cases have so far been won, three have been lost, of which two of which are on appeal, and two cases are pending determination by the High Court.

5.1.1 Successful cases

The successful cases (at the textual level) from the latest to the earliest are:

***The Access to Lawyers* case**[44]

On 29 March 2020, just a day before the President of Uganda announced a complete ban of all 'non-essential' vehicles on Uganda's roads due

43 See *Inter Religious Council of Uganda (IRCU), the Family Life Network and the Uganda Centre for Law and Transformation v The Attorney General of Uganda* Miscellaneous Constitutional Application 23 of 2014.

44 *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General and The Commissioner General of Prisons* High Court Miscellaneous Cause 81 of 2020.

to COVID-19, 25 youths were arrested from a crisis shelter run by the Children of the Sun Foundation (COSF). They were arrested for 'being homosexuals' and 20 of them were eventually charged with 'doing a negligent act likely to spread infection of disease' contrary to section 171 of the Penal Code on the basis that there were many of them staying in one house. Lawyers from HRAPF were denied access to the 20 in prison, because the Commissioner General of Prisons had issued a directive restricting access to prisons to the public, including lawyers, due to COVID-19. HRAPF challenged this decision before the High Court. The Court declared that the refusal amounted to a violation of the accused persons' non-derogable right to a fair hearing and the right to liberty. For these violations, the Court awarded 5 million Uganda shillings (about USD 1 340) to each of the accused persons. This is an outstanding victory as pro-LGBT groups successfully fought back against state excesses that were perpetrated in the name of fighting COVID-19.

The Equal Opportunities Commission case[45]

In 2007, the Equal Opportunities Commission Act (EOC Act) was passed by the Parliament of Uganda. The Equal Opportunities Commission is constitutionally mandated to investigate and provide redress for cases of discrimination against marginalised persons. Section 15(6)(d) of the EOC Act however stopped the Equal Opportunities Commission (EOC) from investigating any matter involving behaviour considered to be 'immoral and socially harmful', or 'unacceptable' 'by the majority' of the 'cultural and social groupings in Uganda'. Homosexuality had been expressly pointed out as the reason why this provision was included in the Act as there was a need to lock out 'homosexuals and the like' from claiming marginalisation.[46] The petitioner argued that the section inter alia violated the constitutional guarantees of the right to a fair hearing. The Court agreed and nullified the provision on the basis that it violated the right to a fair hearing, which it stated was 'at the heart of the very foundation of the Equal Opportunities Commission'.

The case is significant to lawfare since it is a Constitutional Court pronouncement on issues of marginalisation. Also, the evangelical groups had clearly identified it as a case to closely watch and follow. Whenever hearings would take place, the evangelicals, usually represented by Pastor

45 *Adrian Jjuuko v Attorney General* (n 7).

46 For a full discussion of the process that led to the inclusion of the provision in the Act, see S Tamale 'Giving with one hand, taking away with the other: The Ugandan Equal Opportunities Commission (EOC) Act, 2007' in Human Rights Awareness and Promotion Forum (HRAPF) '"Still nowhere to run": Exposing the deception of minority rights under the Equal Opportunities Commission Act' (2010) 19.

Martin Sempa,[47] and his followers would throng the court wearing T-shirts with messages against 'sodomy'.

The Anti-Homosexuality Act petition[48]

This is undoubtedly the biggest legal victory for the pro-LGBT rights groups in Uganda. This is because the case led to the nullification of the biggest legal obstacle to the enjoyment of human rights by LGBT persons in Uganda. It challenged the constitutionality of the Anti-Homosexuality Act (AHA). The AHA was passed as an Act of Parliament on 20 December 2013 during a parliamentary session that had less than the constitutionally mandated number of Members of Parliament (MPs). It was assented to by the President on 24 February 2014 and it came into force on 10 March 2014. It had provisions that expanded criminalisation of consensual same-sex relations through the creation of offences such as 'homosexuality' and 'aggravated homosexuality'. The offence of homosexuality covered a wide range of conduct beyond sexual penetration, which included things like 'touching'. The offence of aggravated homosexuality included having 'homosexuality' repeatedly, or with a minor, a person with disabilities or where the offender was a person living with HIV. It also created the offence of operating brothels, which virtually turned every house accommodating persons who engaged in same-sex relations into a 'brothel'. It also criminalised aiding, abetting and promotion of homosexuality which were defined in very broad terms that could easily encompass legitimate civil society activities like sex education, and advocacy as well as philanthropy work. The Act was challenged on ten grounds. The first one concerned the failure by the Speaker of Parliament to follow the procedure laid down in the Constitution as regards enactment of a law by parliament, and the other nine were concerned with the inconsistence of the law with various constitutional provisions protecting human rights including the rights to: equality and freedom from discrimination; freedom from inhuman and degrading treatment; privacy; fair trial; and protection of minorities. The Court found that the procedure used to pass the Act was not in accordance with the constitutionally mandated procedure as there was no requisite quorum and therefore found the Act unconstitutional and a nullity. The Court did not determine the issues on violation of human rights as this was deemed to be a merely academic exercise as the finding on the procedure

47 Pastor Martin Ssempa is a Ugandan-US citizen. He is the founder of the Makerere Community Church, and one of the leading anti-gay crusaders in Uganda. As a US citizen, he was subpoenaed to give evidence in the case of *Sexual Minorities Uganda (SMUG) v Scott Lively* which was by then ongoing in the federal courts in Massachusetts, USA. He has rarely appeared in public during the period when the case was ongoing.

48 *Prof J OlokaOnyango & others v Attorney General* Constitutional Petition 008 of 2014.

of passing the Act disposed of the matter of the constitutionality of the Act.

This is the most contested case in the history of lawfare in Uganda. Two things that are relevant to lawfare stood out in this case. The first was the formal application by anti-LGBT groups to be added to the cases as parties to the petition.[49] They argued that they wanted to defend the petition since they played a crucial role in the passing of the Act. This was an express admission of their role in pushing for the Act, and it also marked the first time in the history of LGBT lawfare in Uganda that the evangelical groups directly intervened in the formal court processes. The second was the uncharacteristically short time taken to hear the petition and the Court's disregard of any attempts to delay the case. The case only spent three months in the Court, and it took the Court only three days to hear the case to conclusion and deliver judgment.[50] Although the Constitution requires constitutional matters to be heard expeditiously, the huge case backlog in the Court makes it difficult for this to be achieved, and some constitutional cases are known to take many years to be determined including a case concerning LGBT issues. For example the Equal Opportunities Commission case,[51] took eight years before judgment was delivered. Some commentators point to the fact that the President was due to travel to the US for the US-Africa Summit as perhaps having been the factor that determined the extra-ordinary speed with which the case was heard,[52] and if this is true, it shows the high stakes involved in this case and also exposes the weakened state of the judiciary in Uganda.[53]

49 *The Inter Religious Council of Uganda, Family Life Network and the Uganda Centre for Law and Transformation (UCLT) v The Attorney General of Uganda & others* Miscellaneous Constitutional Application 23 of 2014.

50 For a detailed discussion of how the petition was swiftly heard and decided see generally, A Jjuuko & F Mutesi 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda' in N Nicol et al (eds) *Envisioning global lgbt human rights: (Neo)colonialism, neoliberalism, resistance and hope* (2018) 269.

51 N 8.

52 See for example F Golooba-Mutebi 'Why was Uganda's anti-homosexuality law struck down?' *Al Jazeera* 15 August 2014 http://www.aljazeera.com/indepth/opinion/2014/08/why-was-uganda-anti-homosexuali-201481194426136709.html (accessed 22 July 2022).

53 Indeed, the fact that the Court was presided over by the Deputy Chief Justice, Steven Kavuma, a former long serving minister in the Museveni government and the then Deputy Chief Justice, seems to support this view. During his tenure, he issued controversial interim orders in favour of the state and was largely seen as a stooge of the regime. See for example 'Political judge Steven Kavuma, a disgrace to justice' *The Spear* 25 February 2017 http://thespearnews.com/2017/02/25/political-judge-steven-kavuma-disgrace-justice/ (accessed 22 July 2022).

Rolling Stone **case**[54]

On 2 October 2010, the Rolling Stone newspaper was published with the headline, '100 pictures of Uganda's Top homos leak' and the sub headline 'Hang them'. The newspaper also contained allegations that gays had a grand plan to 'recruit children' and were targeting schools. They published names, pictures, and addresses of LGBT persons and suspected LGBT persons, and promised to release more pictures, names, and addresses in the next edition. The case was brought by three LGBT activists who were among those named in the publication seeking damages for the violation of their rights, and an injunction to stop the newspaper from publishing further details. The newspaper argued that they had a duty to inform Ugandans about criminal activity and since homosexuality was a criminal act in Uganda, their publication was in public interest. On 30 December 2012, the High Court issued its decision. Justice Musoke Kibuuka agreed with the applicants and awarded them damages for the violation of their rights as well as an injunction stopping further publication of the personal details of real or suspected LGBT persons. The Court found that the publication of the information violated the applicants' rights to dignity and privacy. The case also defined the scope of section 145 of the Penal Code, which criminalises same-sex conduct as applying only when one has committed a prohibited act and not 'gayism' generally.

This was the second case in Uganda in which the rights of LGBT persons to privacy and dignity were upheld. Unfortunately, a few weeks after the case was decided in the applicants' favour, one of the applicants David Kato was found murdered in his home, and one of the respondents, Giles Muhame, the editor of *Rolling Stone* newspaper issued a statement celebrating his death.[55]

Victor Mukasa **case**[56]

On 20 July 2005, Local Council (LC) officials forcefully entered the house of Victor Mukasa, an LGBT activist without a search warrant or an arrest warrant. They searched the house and took away documents. They also ordered the second applicant, a guest whom they found in the house to dress up and go with them. They took her to a place she assumed was

54 *Nabagesera & others v Attorney General & another* (Miscellaneous Cause 33 of 2012) [2014] UGHCCD 85 (24 June 2014).

55 See X Rice 'Ugandan "hang them" paper has no regrets after David Kato death' *The Guardian* 27 January 2011 https://www.theguardian.com/world/2011/jan/27/uganda-paper-david-kato-death (accessed 22 July 2022).

56 *Victor Juliet Mukasa & another v Attorney General* High Court Misc Cause 247 of 2006.

the LC chairman's office, and while there, they denied her toilet facilities, and later made her go to an open toilet with a male local defence officer keeping guard. After some time, she was physically manhandled and taken to an unknown place, and later to Kireka Police Post. At the police post, the chairman informed the police that he had found 'this creature' in his area and arrested her. The Officer in charge asked her whether she was male or female and despite being informed that she was 'male', the police officers undressed her and fondled her breasts. She was released without any charges. The two applicants filed the case seeking damages for violation of their rights. The respondents stated that the arrest was carried out in order to rescue the second applicant whom the residents wanted to lynch because she and the first applicant had been seen kissing in the area. They denied the allegations of illegal search and entry as well as the sexual violation and humiliation. Justice Arach Amoko found the true facts to be as stated by the applicants. She found that the applicants' rights to privacy and dignity had been violated. She found that the rights in the Constitution applied to all Ugandans without discrimination. She also emphasised that the case was 'not about homosexuality but about human rights'. They were awarded compensation and costs of the suit.

This was the first case on LGBT rights in Uganda. It is the foundation upon which all the other cases are based. This victory however whipped up anti-gay sentiments and is thought to be the real reason why the AHB was tabled the next year.[57]

5.1.2 Unsuccessful cases (so far)

There have so far been three unsuccessful case concerning LGBT rights in Uganda at the time of writing. These are:

***The COSF-20 private prosecution* case**[58]

As a follow up to the *Access to Lawyers* case, six of those released from prison brought private prosecution proceedings against then Kyengera Town Council Mayor, Hajji Kiyimba and Prisons Principal Officer Philemon Woniala, who had inflicted torture/inhuman treatment against them

57 See A Jjuuko 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in Common Law Africa' LLD Thesis, Centre for Human Rights, University of Pretoria, 2018, 84-85 https://repository.up.ac.za/handle/2263/68335 (accessed 22 April 2022). Also see A Jjuuko & F Tumwesige 'The implications of the Anti-Homosexuality Bill 2009 on Uganda's legal system' Evidence Report 44: Sexuality, Poverty and the Law (2013) 7.

58 *Mukiibi Henry & others v Hajji Abdul Kiyimba & another* Criminal Case 505 of 2020 (Wakiso Chief Magistrates' Court).

during their arrests and while they were detained in Kitalya Mini-Max prison respectively. This was under the provisions of sections 12(1)(c) and 12(3) of the Prevention and Control of Torture Act, 2012 which allows private individuals to institute criminal cases against officials accused of torture. The case was filed in Wakiso Chief Magistrates' Court, which exercised jurisdiction over Kitalya prison. However, on 19 January 2021, the matter was summarily dismissed by the Magistrate on grounds that the court lacked jurisdiction. This was done without hearing any of the parties.

The matter was important since it was the first time that LGBT persons had brought private criminal proceedings against state officials who had violated their rights based on their sexual orientation and gender identity. The dismissal was done by the magistrate without hearing the parties and in contravention of the law which clothed the court with the requisite jurisdiction as Kitalya Mini Max Prison is located within the territorial jurisdiction of the court.

***The SMUG Registration* case**[59]

This case was decided on 27 June 2018. On 16 February 2015, the Uganda Registration Services Bureau (URSB) wrote to HRAPF, the lawyers of the promoters of Sexual Minorities Uganda (SMUG) stating that the name 'Sexual Minorities Uganda' had been rejected under section 36 of the Companies Act 2012, which gives the URSB powers not to reserve a name if in their opinion, it is 'undesirable'. The applicants who were SMUG's promoters brought the application before the High Court contending that the URSB's refusal to reserve the name violated their constitutional rights to equality and freedom from discrimination as well as freedom of association, while the two-year delay to make and communicate a decision on registration constituted a violation of their right to a fair hearing. The URSB responded that the name 'Sexual Minorities Uganda' was undesirable and un-registrable under section 36 of the Companies Act, 2012, as the proposed company was formed to advocate for the rights and well-being of people engaged in activities labelled 'criminal acts' under section 145 of the Penal Code Act, including lesbians and gay persons.

Justice Patricia Wasswa Basaza held that the refusal of the URSB to reserve the name, and consequently to register the proposed company, did not contravene the Constitution of Uganda. This is because the rights claimed were subject to limitation as provided for under article 43 of the

59 *Frank Mugisha & others v Uganda Registration Services Bureau* Miscellaneous Case 96 of 2016.

Constitution. The article subjected human rights to the public interest. The proposed company was formed to promote prohibited and criminal acts since article 31(2)(a) of the Constitution, as amended by section 10 of the Constitution (Amendment) Act, 2005, prohibits same-sex marriages, and section 145 of the Penal Code Act prohibits 'having carnal knowledge against the order of nature'. The Court further ruled that the proposed company's objectives go against the values and norms of the Ugandan people and are prejudicial to the public interest.

The case was a shocking check on the hitherto winning streak by LGBT groups as it was the second time in three months that LGBT groups lost a High Court case. It also demystified reliance on international and even regional decisions on LGBT rights, as it relied on the European Court on Human Rights' margin of appreciation decision in *Schalk and Kopf v Austria*,[60] and rejected progressive precedents from Kenya and Botswana stating that 'what happens or is allowed in other jurisdictions … does not apply here and indeed in most African States'.[61] The Court agreed with the earlier judgment of Justice Stephen Musota in the *Lokodo* case, which was issued only three months earlier in which he had held that the Minister of Ethics and Integrity was justified in stopping an LGBT skills training workshop, and also distinguished the *Rolling Stone* case[62] where section 145 of the Penal Code was held to apply to specific sexual acts rather than being gay generally.

***The Lokodo* case**[63]

On 14 February 2012, the Minister of State for Ethics and Integrity, Rev Fr Simon Lokodo stopped a 'Project Planning, Advocacy and Leadership' workshop organised by Freedom and Roam Uganda (FARUG) for LGBT persons. He alleged that the workshop was an illegal gathering of homosexuals, and that it sought to promote homosexuality, which is contrary to the laws in Uganda. He also made attempts to arrest the organisers of the workshop. The applicants argued that the Minister's actions violated their rights to freedom of expression, association and assembly, the right to political participation, and equality before and under the law. The applicants sued the Attorney-General and the Minister in his personal capacity. The respondents argued that the meeting was convened for a criminal purpose since homosexuality is criminalised in Uganda and thus LGBT people cannot be said to be covered under

60 Application 30141/04.

61 *Frank Mugisha & others* (n 59) para 40.

62 Miscellaneous Cause 163 of 2010 (High Court of Uganda).

63 *Nabagesera & others* (n 54).

the said rights. The High Court (Justice Stephen Musota) agreed with the respondents and stated that although LGBT persons are entitled to the rights in the Constitution, the limitation clause in article 43 of the Constitution limits the rights and the protection of morals is a legitimate reason to limit rights. They also relied on articles 17, 27 and 29 of the African Charter on Human and Peoples' Rights (ACHPR)[64] to show that promotion and protection of moral values is a responsibility of the state and that the criminal law can be a valid reason to limit rights. The Court also used the provisions of the Penal Code on parties to an offence to assert that those organising meetings to train LGBT persons on safe gay sex and other such actions could be covered under section 145 as they were party to a conspiracy to commit carnal knowledge against the order of nature. It also held that the minister could not be sued in his individual capacity as his actions were not taken for his personal benefit but he acted in his official duties as a government minister. The suit was dismissed with costs awarded against the applicants.

The Minister of Ethics and Integrity and the Attorney-General worked with religious leaders and the 'ex gay' movement and collected affidavits to the effect that FARUG and other LGBT organisations were involved in 'promotion of homosexuality'. This was classic lawfare and the anti-LGBT groups came out victorious on all fronts. It also marked a check in the lawfare as it was a wakeup call for pro-LGBT groups that victory was not always guaranteed and the law could be interpreted differently depending on the perspectives of the judge and the arguments put forward by the other parties. Perhaps, another mistake made by the pro-LGBT groups was suing the Minister in his personal capacity, as that meant that individual actions of the minister were brought into the spotlight and the Minister had to take a personal interest in the matter. Another point to note is how the judge distinguished the different progressive decisions of the African Commission on Human and Peoples' Rights as well as the provisions of the African Charter on Human and Peoples' Rights to limit rights.

5.1.3 Pending cases

Four cases are pending before different courts of law.[65]

64 OAU, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

65 There are two other cases pending before the Uganda Human Rights Commission which is Uganda's national human rights institution. It has a tribunal that hears and determines cases involving human rights violations. It has the powers of a court to summon witnesses, and issue binding decisions under article 52 of the Constitution of the Republic of Uganda (1995).

COSF-20 Torture case[66]

This is a case filed before the High Court of Uganda in 2020. It was brought under section 10 of the Human Rights Enforcement Act, 2019 which allows a person to sue both the state officials directly responsible for the violations as well as the responsible state agencies. The case seeks a declaration that the various forms of violence perpetrated against the 20 youths – beatings, burnings, and anal examinations committed during their arrest in Kyengera and detention at Kitalya Mini-Maxi Prison amount to a violation of their right to freedom from torture, inhuman and degrading treatment; their right to privacy; and their right to freedom from discrimination. The applicants also seek compensation for the human rights violations suffered by the 20 youths. The case is pending hearing.

The 'rogue and vagabond' case[67]

This case was filed before the Constitutional Court in 2019. It challenges the constitutionality of sections 168(1)(c) and 168(1)(d) of the Penal Code Act Cap 120 which criminalise specific acts regarded as being 'rogue and vagabond' for contravening and violating various provisions of the Constitution of Uganda, 1995. Section 167(1)(c) provides that 'every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself or herself' shall be deemed to be a rogue and vagabond, and commits a misdemeanour and is liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for one year. Section 167(1)(d) provides that a person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, commits a misdemeanour and is liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for one year. The petitioner argues that the provisions contravene articles 28(12), 28(3)(a), 21(1), 21(2), 23(1)(c) and 23(4)(b) of the Constitution as they are too vague and facilitate arbitrary arrests of people who have not committed any criminal offences, targets people of low means and social status, disregards the presumption of innocence and does not define the prohibited criminal conduct with the clarity required under the Constitution. The case is still pending hearing. It is significant since LGBT persons are among groups that are usually arrested and charged under these provisions.

66 *Mukiibi* (n 10).

67 *Francis Tumwesige v Attorney General* Constitutional Petition 36 of 2019.

Frank Mugisha & others v Uganda Registration Services Bureau[68]

This is the appeal in the *SMUG Registration* case. It was is also pending before the Court of Appeal. This is pending before the Court of Appeal. It challenges the decision of the High Court in as afar as it applied the limitation clause to make the right to freedom of association illusory.

Kasha Nabagesera & 3 others v The Attorney General and Hon Rev Fr Simon Lokodo[69]

This is the appeal in the *Lokodo* case. The appeal was filed in 2014 challenging the High Court's decision on the grounds that the Court erred when it found that the Minister of Ethics and Integrity was justified in stopping the skills training workshop.

5.2 Cases filed in courts of other countries

Ugandan LGBT activists have gone across borders and filed a case in the United States of America (US). This is the case of *Sexual Minorities Uganda (SMUG) v Scott Lively.*[70] In March 2009, Scott Lively of Abiding Truth Ministries in the US, spoke at an anti-gay conference organised by Family Life Network headed by pastor Steven Langa. While in Uganda, Lively met with Ugandan lawmakers including David Bahati who was later in the year to table the Anti-Homosexuality Bill, 2009. Lively later described his activities as a 'nuclear bomb' on LGBT organising in Uganda. He was sued by SMUG on claims of persecution of LGBT persons through his conspiracy with Ugandan actors to strip away fundamental human rights of LGBT persons in Uganda, which led to the tabling of the Anti-Homosexuality Act 2009 and its effect of spurring violations against LGBT persons in Uganda. The case was brought under the US Alien Torts Statute which makes it possible to hold American citizens liable for actions oversees that lead to crimes against humanity and persecution is one of these. The US District Court in Springfield, Massachusetts, condemned the actions of Scott Lively as amounting to persecution as defined in international law, but he did not find sufficient activity carried out on US soil by the pastor to invoke the court's jurisdiction under the Alien Tort Statute. Scott Lively appealed against the criticism of his actions by the judge and the appeal was thrown out in August 2018 since a winning party had no right of appeal. (*Sexual Minorities Uganda v Scott Lively*, No 17-1593

68 *Frank Mugisha & others* (n 59).

69 Civil Appeal 195 of 2014.

70 *Sexual Minorities Uganda v Scott Lively* Civil Action 3:12-CV-30051-MAP.

(United States Court of Appeals for the First Circuit) – The *Scott Lively* Appeal).

This was the first time that African LGBT activists were taking a case challenging actions of American evangelicals before the US courts.

5.3 Cases filed before international courts

LGBT lawfare in Uganda has also moved to the international arena. LGBT activists brought a case challenging Uganda's Anti-Homosexuality Act at the East African Court of Justice (EACJ). The case, *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)*[71] was filed almost simultaneously with the challenge to the AHA at the Constitutional Court of Uganda. It originally challenged certain provisions of the AHA as being contrary to the rule of law and good governance principles of the East African Community Treaty. After the nullification of the AHA by the Constitutional Court of Uganda, the reference was amended to limit it to challenging the enactment of the Act with three specific sections which were stated to be directly in violation of the fundamental principles of good governance, rule of law and human rights, enshrined in the Treaty for the Establishment of the East African Community. UNAIDS was admitted as *amicus curiae*. The Attorney-General raised a preliminary objection that the reference was moot as the AHA had been nullified by a competent court of a member state of the East African Community, and as such the matter was only of academic importance. HRAPF argued that they were not challenging the Act but the passing of the Act with the three provisions that led to the violation of the rights of LGBT persons during the period when the law was in force, and that in any case, this was a matter of public interest that the Court could hear as an exception to the mootness rule. The Court decided that the amendment was not validly done, and as such it was struck out. Therefore the case was moot since the reference challenged a law that had been nullified by the Court. The Court considered the public interest exception to the general rule and found that it did not find the evidence sufficient to 'establish the degree of public importance attached to the practice of homosexuality in Uganda'.

This was the first time that an international human rights court in Africa decided a case concerning violations against LGBT. The case thus took LGBT lawfare in Africa to the international arena, and despite failing

71 Reference 6 of 2014.

to proceed on the substantive grounds, showed that LGBT activists will not sit by as governments violate their rights through such laws.

6 Key features of the Uganda LGBT lawfare

Ugandan LGBT lawfare is quite unique from that of many countries in Africa. Uganda has the highest number of cases brought before courts in Africa on LGB rights, except for South Africa, which has a completely different legal situation as LGBT persons are expressly protected from discrimination in the Constitution.[72] This exceptional set of circumstances perhaps arises from Uganda being the first country in Africa to table comprehensive legislation further criminalising same-sex relations, and criminalising all other actions done in support of or in relation to same sex-relations. The 2008 court victory in the *Victor Mukasa* case spurred a set of reactions from the evangelical groups and their political allies that resulted in the Anti-Homosexuality Bill (AHA) being tabled the following year. The rest of the cases are connected to the AHA. The AHA was the Anti-LGBT group's ultimate weapon, which would have the impact of imposing a chill on all pro-LGBT activities in the country. This was clearly discernible to the pro-LGBT groups, and they thus staged a strong, no holds barred defensive campaign that put litigation as strategy since the more populist legislative and executive routes were largely cut off from them. The battlelines were thus drawn and the lawfare raged. Below are the key features of this lawfare.

6.1 The issues

The main ground of contestation is the scope of human rights *vis-a-vis* reified religious and cultural values. The anti-LGBT group regards homosexuality as immoral, unnatural, unAfrican and against the values of Ugandans.[73] They assert that it is against religious and cultural values and therefore unacceptable and criminal and that human rights should be limited by laws criminalising consensual same-sex relations. They thus support the criminalisation of same-sex relations. The pro-LGBT groups on the other hand regard homosexuality as a matter of human rights rather than morality or religion. As far as religion and culture are concerned, they see them as being capable of changing and embracing diversity. The inclusive language of human rights appeals to these groups more, and all

72 For a comparison of the number of cases in the different countries in Common Law Africa, see A Jjuuko 'Strategic litigation and the struggle for lesbian, gay and bisexual equality in Africa' (2020) 24 -51.

73 See generally, S Kaduuli 'Perceptions of LGBT in Uganda and Africa' (2009).

cases without exception are based on human rights. Criminalisation of same-sex relations is thus opposed and seen as anti-human rights.

This struggle between human rights and reified religious and cultural values also manifests in the contest over the origin of homosexuality and homophobia. The anti-LGBT groups firmly believe that homosexuality is a western import as Africa had no homosexuals before colonialism. On the other hand, the pro-LGBT groups regard homosexuality as being part of human sexuality and therefore incapable of being imported. They instead assert that it was homophobia that was imported into the country by the colonialists through the criminal laws. The fact that pro-LGBT groups get western funding and use adversarial approaches that are largely viewed as western in origin portrays them as the local fronts for a western campaign to spread homosexuality in Africa. However, the anti-LGBT groups themselves get funding and support from western groups making the argument applicable to both sides.

Another argument concerns the widely held perception of homosexuals as evil persons, who recruit children into homosexuality and are paedophiles.[74] This is perhaps the most compelling explanation for homophobia in Uganda, and it explains why the occasional criminal case involving homosexual sex with a child attracts far much more attention than the everyday cases of men having sex with underage girls.[75]

These issues underlie every single case before the courts, even if the case does not acknowledge them. They are the proverbial elephant in the room. They surface in the courtroom in form of the normative content of the right, and the extent of the limitation to the rights. The court judgments that give recognition to the rights are usually in favour of the pro-LGBT groups and those that apply the limitations are in favour of the anti-LGBT groups. The two Kasha Jacqueline Nabagesera cases at the High Court – the *Lokodo* case and the *Rolling Stone* case – clearly show how these battles manifest. Whereas the judge in the *Rolling Stone* case gave full extent to the rights to freedom from inhuman and degrading treatment and the right to privacy, the judge in the *Lokodo* case recognised the rights and subjected them to the limitation and found the limitation applicable in the situation.

74 Above.

75 For example, the case of *Uganda v Christopher Mubiru Kisingiri* Crim Case 0005/2014, where the facts show that he had a non-consensual same-sex relations with a person below 18 years, attracted a lot of media attention, far more that the many cases of 'defilement' of girls under 18.

6.2 The actors

The pro-LGBT actors are mainly LGBT activists and organisations, supported by some sections of the broader civil society.[76] At the height of the AHB, the groups supportive of LGBT rights came together in a loose Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL). The Coalition through its Legal Committee which was chaired by HRAPF[77] used to determine the cases to be taken to court, the issues to pursue, the lawyers to engage and the courts to go to. The choice of petitioners was determined strategically – sometimes having openly LGBT applicants like in the *Lokodo* and *Rolling Stone* cases, and sometimes non-LGBT identifying persons like in the *Equal Opportunities Commission* case, and in others a mix of LGBT persons, and non-LGBT persons like in the *AHA* case. In all the struggles however, persons who identify as LGBT are at the forefront. The lawyers used in the court cases are lawyers who have handled LGBT cases before or those sympathetic to the LGBT cause and who understand the issues.[78] The group relies quite heavily on foreign support in terms of provision of funds, and technical and diplomatic support.[79]

The anti-LGBT group is led by charismatic, conservative religious[80] and political leaders.[81] It is these same leaders who take keen interest in the legal processes, attend court, and counter-mobilise. Another group that is interested in the legal process is the 'ex gay movement'.[82] These

76 A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human Rights, sexual orientation and gender identity in The Commonwealth: Struggles for decriminalisation and change* (2013) 381-408.

77 And is made up of lawyers from member organisations of the Coalition and is advised by Makerere University Professors, Sylvia Tamale and Joe Oloka Onyango.

78 Usually, it is Ladislaus Rwakafuuzi, Henry Onoria, Francis Onyango, Adrian Jjuuko, Fridah Mutesi, Patricia Kimera, Francis Tumwesige, Caleb Alaka and Nicholas Opiyo.

79 For a discussion of the role of international solidarity in the pro-LGBT struggle in Uganda, see A Jjuuko 'International solidarity and its role in the fight against Uganda's Anti-Homosexuality Bill' in K Lalor et al *Gender, sexuality and social justice: What is the law got to do with it?* (2016) 126.

80 Those that have directly participated in court processes are: Pastor Martin Sempa who attended court in the *Lokodo, AHA, Rolling Stone and EOC* cases; Pastor Solomon Male who attended court in the *Rolling Stone* case; Pastor Joseph Serwadda and Stephen Langa both of whom who swore affidavit in support of the application to join the *AHA* case.

81 Led by former Minister of Ethics and Integrity, the late Rev Fr Simon Lokodo, his immediate predecessor, Hon NsabaButuro and the sponsor of the Anti-Homosexuality Bill, Hon David Bahati.

82 These claim to have been cured of their homosexuality and claim that they used to recruit children and that they were misled into homosexuality. The most prominent

swear affidavits stating that they have been part of the LGBT movement and therefore are aware of the agenda and negative actions of the LGBT movement.[83] The anti-gay group is much more organised, mainstream and entrenched in the day-to-day life of the nation. The Inter-Religious Council of Uganda (IRCC) which brings together all Abrahamic religions in the country strongly supports this movement and took an active and visible role in the lawfare when they filed an application in court to join the *AHA* petition and they swore an affidavit admitting that they were behind the drafting of the AHA. They were joined by the family Life Network[84] and The Uganda Centre for Law and Social Transformation (UCLT) which was founded under the auspices of the Watoto church also joined the application.[85] There is a coalition known as the National Coalition Against Homosexuality & Sexual Abuses Uganda (NCAHSAU) led by Pastor Solomon Male. The conservative side receives support from conservative American and other western groups.[86] This group is actively supported by anti-gay politicians, usually the ministers of Ethics and Integrity, as well as MPs who see themselves as champions for their religions such as David Bahati[87] and Latif Ssebaggala.[88]

6.3 The motivation

Each side regards itself as justified and right. The pro-LGBT groups include LGBT persons and organisations who are directly affected by violations of their rights based on their sexual orientation, gender identity or their work on these issues. It also includes those individuals and persons who believe in equality of all persons, as well as those who are employed in

ones are: George Oundo and Paul Kagaba and of late Elisha Mukisa.

83 Both Oundo and Kagaba swore affidavits in the *Lokodo* case in support of the respondents' case.

84 Whose vision is 'to restore the family values and morals in our society' www.familylife.ug/about/ (accessed 2 April 2017).

85 It was founded at Watoto Church Central to among others ensure a prosperous Uganda that upholds and defends moral conduct as being indispensable for the wellbeing and survival of society https://www.facebook.com/uclt.org/ (accessed 2 April 2017).

86 For example, Pastor Sempa was supported by Pastor Rick Warren, see Max Brumenthal 'Warren's Africa problem' *The Daily Beast* 7 January 2009 http://www.thedailybeast.com/articles/2009/01/07/the-truth-about-rick-warren-in-africa.html (accessed on 25 July 2013).

87 He is the MP who introduced the Anti-Homosexuality Bill, 2009. He is said to be a member of the Family, a powerful conservative US religious group. See 'Museveni, Bahati named in US "cult"' *The Observer* 25 November 2009 http://www.observer.ug/component/content/article?id=6187 (accessed 22 July 2022).

88 He was the imam of Parliament at the time, and championed efforts to have the Anti-Homosexuality Bill retabled. See 'MPs start process to re-table gay bill' *The Daily Monitor* 3 September 2014.

organisations that are pro-LGBT equality. Therefore, the motivations for the pro-LGBT groups are different but they are driven by the need to stop violations against LGBT persons. Courts remain the only viable option left to LGBT groups as the legal opportunity structure and the political opportunity structure at the moment favour that. The court victories further motivate the groups as they realise the possibility of actually achieving their aims through litigation as the victories set precedents that should ideally be binding in future cases.

Different motivations also drive the anti-gay groups. For church leaders, they see opposition to homosexuality as an easy way to fame, and eventually to funding from anti-gay groups in the west.[89] Political actors on the other hand seem more interested in the political gains that they get out of being on the 'right side' of public opinion and influential groups such as the churches. There is a fusion between the churches and government officials with leading opponents of LGBT rights within the political actors having strong ties to the churches.[90] There are also direct tangible benefits for political leaders, one of which is being assured of re-election in reward for the campaign against LGBT persons, and the other is catching the eye of the President who may promote one to become a Minister. An inspiration for this is David Bahati who was re-elected unopposed as Member of Parliament for Ndorwa West constituency, later elected as the Vice Chairperson of the National Resistance Movement caucus in parliament and was later appointed State Minister of Finance in charge of Economic Planning, and was as of 2022 the Minister of State for Trade, Industry and Cooperatives. All the appointments happened after his tabling of the AHB. Although, not all politicians who publicly oppose LGBT rights have been able to rise to the stature of Bahati, the hope remains for many, who think that that would be an easier way to attract the President's attention.

As a collective, the government seems to want to play off the calls from other countries, more especially the US and allies in the west, to protect LGBT rights while at the same time maintain the foreign support and funding it has become accustomed to. As such court battles come in handy as the government can always use the court cases to stave off the extra pressure. An example is when the Constitutional Court suspiciously

89 For a discussion of this, see Jjuuko (n 76) 239 -240.

90 For example, both President Museveni and the mover of the AHB, David Bahati are said to belong to a powerful US evangelical lobby known as the Family. See for example *The Observer* (n 87). Rev Fr Simon Lokodo was a catholic priest and the first lady and Minister of Education Janet Museveni is an avid Pentecostal Christian.

rushed the hearing and decision in the *AHA* case just ahead of the US-Africa Summit in the US that President Museveni was poised to attend.[91]

There are also persons who have been 'victims' of homosexuality related offences including rapes, and defilement of children and these therefore have a genuine motivation to fight 'homosexuality'. There are also 'ex-gays' who allege to have been recruited into 'homosexuality' and abused and who now want to help to end the 'vice'. There are also conservative believers in religion and culture who believe that homosexuality is against their value systems and thus have an interest in fighting it through whatever means possible and indeed there are also those who work for entities that are anti-LGBT and thus have no option but to toe the line. The courts are seen as an avenue that can legitimate LGBT rights and therefore increasingly the conservative groups are paying more attention to the courts.

6.4 The strategy

The pro-LGBT groups use the courts more than legislative means or executive action. The court action is based on an unwritten loose strategy developed, agreed upon and revised by the LGBT groups from time to time, which is ultimately aimed at decriminalisation of same-sex relations.[92] Not every case of violation is taken to court by the pro-LGBT groups, but only a few strategically selected ones. During the time of the CSCHRCL, these cases were discussed by the Legal Committee and in legal strategy meetings by the different stakeholders and agreed upon. After the CSCHRCL, legal strategy meetings continue to be held with different stakeholders in order to agree on the way forward. Almost all these cases are reactive, coming after a particularly bad case of violation of LGBT rights. The Anti-LGBT groups also pay attention to only those cases that they think threaten their gains, for example the *EOC* case and the *AHA* case. Each case has its own legal and advocacy strategy meetings involving different stakeholders. The choice of the court to go to is determined by what the group seeks – if it is broader protections then the choice is usually the Constitutional Court, and if it is enforcement of rights, then it is the High Court.

The anti-gay groups rely more on the legislative and executive avenues and only attend to court action in a reactionary offhanded way. As such their actions are usually in response to what the pro-LGBT groups do, and are usually not very effective. Until recently, their involvement in cases lay in them mobilising people to attend court and show opposition to some of

91 See Golooba-Mutebi (n 52).

92 See Jjuuko (n 75).

the cases. Pastor Sempa was more successful in this, mobilising university students to come to court and engage LGBT activists. However, recently the groups have become more proactive in the courtrooms, with the application to take over the *AHA* case from the Attorney-General. They also use the Legislature and the Executive to reverse the court gains. For example, there is a real connection between the court victory in the *Victor Mukasa* case and the tabling of the AHA. They also held a demonstration outside the court after the *AHA* victory and also criticised the judges who made the *AHA* decision.

7 The trends of court decisions and attitudes in LGBT cases

LGBT cases in Uganda are generally treated by the courts like any other cases, and usually legally sound decisions are given by the courts. Despite this, a few trends stand out that may distinguish them from other cases – these are: courts being apparently eager to avoid the issues of homosexuality; and the odd timeframes that the cases sometimes have.

7.1 Courts are apparently uncomfortable discussing homosexuality

Many of the judges prefer to avoid the issues of homosexuality whenever it is possible to do so. In the *Victor Mukasa* case, the judge stated that the case was 'not about homosexuality. The judgment is therefore strictly on human rights'. She indeed went ahead and decided the case as if there was no allegation of homosexuality involved. Similarly, in the *AHA* case, homosexuality was avoided as the court ordered the parties to only address them on the issue of quorum. In the *EOC* case, homosexuality was not at all mentioned despite the petitioner referring to the Hansard records showing the motivations behind the provision in their submissions. In cases where homosexuality was at the centre of the case like in both *Kasha Jacqueline* cases, the judges certainly addressed it, but in the *Rolling Stone* case, the judge had to repeat that the case was still not about homosexuality. In the *Access to Lawyers* case, homosexuality was not mentioned at all despite the records showing that the persons had been arrested because of their sexual orientation and/or gender identity. In an ideal situation, this would be a good thing, as it implies that the courts pay no regard to sexual orientation or gender identity, and treat everyone equally. However, in a country with a lot of homophobia, violence and violations based on one's sexual orientation and/or gender identity, the root causes of the violations which

is the sexual orientation and gender identity of the applicants, needs to be expressly addressed by the judiciary.

7.2 Odd timeframes in handling LGBT cases

The *EOC* case took eight years to decide while the *AHA* case took three months from the time of filing to the time it was decided, by the same Constitutional Court. This shows that for some reason the former case was not seen as a priority and for some other reason the latter case was seen as a priority. Normally, cases in Ugandan courts are delayed, but an eight-year delay at the Constitutional Court was too long, and a decision given three months after filing of the case was too fast. Either way, there seem to be extraneous factors that lead to such cases being treated the way they are and these factors are unique to cases concerning LGBT issues and other issues seen as controversial, and may be indicative of the lawfare nature of these cases. The *Lokodo* case appeal and the *SMUG Registration* case appeal have been pending before the Court of Appeal since 2014 and 2016 respectively – and strictly speaking these are the first LGBT cases to go to the Court of Appeal.

8 The impact of LGBT lawfare

LGBT lawfare in Uganda has had a lot of impact on the protection of LGBT rights. The impact is both positive and negative.

8.1 Legal changes

LGBT rights activists have through litigation managed to keep the legal status on same-sex relations as it has always been – criminalised only in the Penal Code. This was through nullifying the highly repressive and restrictive Anti-Homosexuality Act, 2014. They have also managed to gain positive protections despite the criminalisation, with the Constitutional Court declaring section 15(6)(d) of the Equal Opportunities Commission Act, which stopped the commission from investigating matters regarded as 'immoral or socially unacceptable' by the majority, unconstitutional. The Commission can now investigate matters concerning marginalisation of LGBT persons. They have had the High Court declare that the rights to dignity, privacy, liberty and fair hearing apply to all persons and therefore their houses cannot be forced open or their bodies touched; or personal details published and hate speech used against them based on their sexual orientation or gender identity; or them being denied access to their lawyers. Although the same High Court has also declared that a skills training workshop organised for LGBT persons can be legally stopped by a minister it made it clear that LGBT persons have the same rights as

everyone else and these rights can only be limited in light of the limitation clause in article 43 of the Constitution.

Nevertheless, there is still a long way to go as the Constitution prohibits same sex marriages; the Penal Code provisions remains fast in place; and more restrictive laws like the NGO Act 2016, the HIV Prevention and Control Act, and of recent the Sexual Offences Bill, 2019 continue to be passed. Also parliamentarians and citizens continue to push for and support laws that seek to further criminalise same sex relations; and the President and cabinet remain firmly against legalising same-sex relations.

8.2 Political changes

There have been several visible positive changes in the political environment for LGBT persons in Uganda. More government agencies have been actively involved in discussions on protection of LGBT rights, including the Uganda Human Rights Commission,[93] the Uganda Police Force,[94] the Ministry of Health,[95] and the Equal Opportunities Commission.[96] The Uganda AIDS Commission expressly targets stigma and discrimination against key populations who include men who have sex with men.

However, generally the government remains hostile to LGBT rights, with continued police arrests,[97] which have of recent taken the form of mass

93 The Uganda Human Rights Commission is the national human rights institution. It publicly opposed the Anti-Homosexuality Bill on human rights grounds. see generally Civil Society Coalition on Human Rights and Constitutional Law 'Living up to our human rights commitments: A compilation of recent statements by the Uganda Human Rights Commission on Sexual Orientation and Gender Identity and the Anti-Homosexuality Bill' (2012). The Commission also carries out awareness campaigns on marginalisation among judges, civil society and the Uganda Police Force focusing on LGBT rights. Two cases are pending before the Commission concerning the violations of the rights of LGBT persons in police custody.

94 The Directorate of Legal and Human Rights of the Uganda Police Force partners with the HRAPF and the Uganda Human Rights Commission to hold trainings on LGBT rights.

95 The Ministry of Health has guidelines for non-discrimination in provisions of health services including on grounds of sexual orientation and gender identity, and runs the Most at Risk Populations Initiative (MARPI) which provides specialised treatment for LGBT persons.

96 The Commission has met with LGBT persons and invited them to file complaints in cases of violations.

97 It is documented that in 2014 alone, 47 arrests against LGBT persons were verified in Uganda. See The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'Uganda Report of violations based on gender identity and sexual orientation' (2015) https://www.outrightinternational.org/sites/default/files/15_02_22_lgbt_violations_report_2015_final.pdf (accessed

arrests, and more targeted arrests more especially during the COVID-19 lockdown. Politicians including the President have also recently made statements linking LGBT persons to terrorists.[98] Since the Ministerial Directive on Non Discrimination, no more firm directives have been made on non-discrimination by state agencies, except perhaps for the Uganda AIDS Commission's HIV/AIDS Strategic Plan.

8.3 Social changes

The media is less hostile to LGBT persons than before, with the *Observer*[99] and the *Independent* newspapers being more open and the *New Vision* and the *Red Pepper* publications being more hostile.[100] A number of mainstream civil society organisations continue to protect LGBT rights, including HRAPF, DefendDefenders, and the Uganda Network on Ethics, Law and HIV/AIDS (UGANET). Many LGBT persons have as a result come out of the closet and even Pride celebrations have been held every year since 2012 in different forms and in many cases with the police being aware.

Despite the victories and progress made, on the other hand homosexuality continues to be hugely unpopular in Uganda. The latest Afrobarometer survey on this issue found that 95 per cent of Uganda would not welcome a homosexual neighbour,[101] while the Pew Research Centre found that 96 per cent of the population was against homosexuality.[102] This implies that LGBT rights are far from being realised. They are still seen by the majority as unacceptable. The lawfare is largely seen as elitist

22 July 2022). See also Sexual Minorities Uganda 'From torment to tyranny: Enhanced persecution in Uganda following the passage of the Anti-Homosexuality Act 2014' (2014) https://sexualminoritiesuganda.com/wp-content/uploads/2014/11/SMUG-From-Torment-to-Tyranny.pdf (accessed 22 February 2022).

98 See for example 'Museveni warns protestors over attacking NRM supporters' *Observer* 20 November 2020. See also 'Government investigating People Power links with "hybrid" terror group called Red Movement' *Nile Post* 4 October 2019 http://nilepost.co.ug/2019/10/04/government-investigating-people-power-links-with-hybrid-terror-group-called-red-movement/ (accessed 22 February 2022).

99 The Observer usually features LGBT-friendly articles.

100 The Vision Group's Editorial Policy stops the group from publishing content on homosexuality except when it is from the President, parliament or the courts, and they have largely lived up to it. Vision Group 'Editorial policy' (2014) https://issuu.com/newvisionpolicy/docs/243661083-editorial-policy-complete (accessed 22 February 2022).

101 B Dulani, G Sambo & KY Dionne 'Good neighbours? Africans express high levels of tolerance for many, but not for all' Afrobarometer Dispatch 74 (2016) 12.

102 'The Global Divide on homosexuality: Greater acceptance in more secular and affluent countries' *Pew Global* 4 June 2013 http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-2013.pdf (accessed 22 February 2022).

pursuing elitist aims and objectives which are quite hazy to the common person. The battles are fought by organisations led by elites, and lawyers, judges, and government officials. So, in most cases, the battle is lost on the public. The impact of court cases on the people is limited since court cases usually only directly affect the litigant, and also the law is largely disconnected from reality – understood by lawyers and such other similarly elite persons.

9 Conclusion

The legal opportunity structure and the political opportunity structure prevalent at the time in Uganda have ensured that Ugandan LGBT activists resort to the courts of law as their main avenue of ensuring protection of their rights. The courts are bound to receive cases and make decisions and in many cases the courts have made positive decisions based on sound legal reasoning. At the same time, anti-LGBT groups have reacted to the gains made through court by directly descending into this arena and opposing cases brought by pro-LGBT groups. They have also hastened to use their political opportunity structure which favours the use of the legislature and the executive to block LGBT rights. The Anti-Homosexuality Act was one such huge attempt which if it had fully succeeded would have had the effect of largely stifling LGBT organising in Uganda. Nevertheless, new and proposed laws such as the NGO Act 2016, and recently the Sexual Offences Bill 2019 contain provisions that seek to have the same effect as provisions of the AHA. The Executive led by the President also seems to be engaged in its own struggle mainly targeted at foreign (state and supra national organisations) supporters of LGBT rights, in a high-stakes game of balancing international support for the current regime while at the same time not doing enough to protect the rights of LGBT persons. What is clear is that LGBT lawfare in Uganda is far from over, and it remains to be seen what direction it will take now, with increasing losses in the courts of law, and delayed decisions.

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6 LGBT+ RIGHTS LAWFARE IN MALAWI

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1 Introduction

LGBT+ rights remain highly contested in Malawi since the arrest of Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa in December 2009, when they held a traditional wedding ceremony (*chinkhoswe*). The last decade has seen public contestations over the acceptability of non-conforming sexualities and legitimacy of human rights for LGBT+ persons.

Emerging LGBT+ research in Malawi has focused on access to HIV and AIDS health services among men who have sex with men (MSM),[1] blackmail and extortion of MSM,[2] civil society activism around LGBT+ rights,[3] and the epistemological ambiguities in the 'homosexuality debates'.[4] Previous studies about Soko and Kachepa's case (*Republic v Soko*)[5] have focused on the unfair treatment of the accused during their arrest and trial[6] and how the judgment was bad law for overlooking critical human rights questions (for example, the right to a fair trial or rights to

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1 See for example, C Beyrer et al 'Bisexual concurrency, bisexual partnerships and HIV among Southern African men who have sex with men' (2010) 86 *Sexually Transmitted Infections* 323.

2 See for example, W Chibwezo 'Blackmail among gay people in Malawi' in R Thoreson & S Cook (eds) *Nowhere to turn: Blackmail and extortion of LGBT people in sub-Saharan Africa* (2011) 74.

3 See for example, A Currier & T Mckay 'Pursuing social justice through public health: Gender and sexual diversity activism in Malawi' (2017) 9 *Critical African Studies* 71.

4 See for example, A Msosa 'Human rights and same-sex intimacies in Malawi' PhD thesis, University of Essex, 2017 http://repository.essex.ac.uk/21553/1/180216%20PhD%20Thesis%20Alan%20MSOSA.pdf (accessed 29 April 2022).

5 *Republic v Soko* Criminal Case 359 of 2009 at Blantyre Chief Resident Magistrate Court.

6 U Mwakasungula 'The LGBT situation in Malawi: An activist perspective' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 359.

privacy).[7] So far there has not been adequate interrogation of the role of the courts as the arena for contesting issues of sexual orientation and gender identity. Beyond the litigation in the courtroom, there has also been little consideration of how the public debates and advocacy around and outside the courtroom have influenced the formal court proceedings, or have been influenced by them.

This chapter discusses cases from the Malawian courts to explore how decisions by judicial officers have constrained or sustained the views on LGBT+ rights. We conclude that contrary to the common assumption that judicial officers are independent and impartial players during court proceedings, they are active lawfare actors who deploy their own strategies in support or against LGBT+ rights. We begin this chapter by revisiting the key issues that dominated the local debates since the arrest of Soko and Kachepa in 2009. We indicate that Malawi is faced with a paradox of having anti-gay laws within a progressive constitutional Bill of Rights and international human rights obligations. This is followed by a brief examination of the concept of LGBT+ lawfare, and the need to draw attention to the issues under contestation and the role of subtle actors. We then discuss the cases showing how some judicial officers have overlooked the law to advance homophobic attitudes, used technicalities to discontinue or refuse constitutional considerations, or tolerated judicial inefficiencies to perpetrate delays in concluding cases. We acknowledge the challenges faced by LGBT+ persons during the COVID-19 pandemic and recommend research on its impact in the Malawian context. We conclude that the lawfare for the protection of LGBT+ rights in Malawi will depend on the extent to which actors deploy 'positive lawfare' over its negative counterpart.

2 The paradox in LGBT+ rights in Malawi

The Malawian context offers an important case study for studying LGBT+ rights lawfare in several ways. Firstly, Malawi is a legal paradox when it comes to LGBT+ related laws and policies in the context of conflicted social and cultural values influenced by a tension between 'tradition' and 'modernity'. Sections 153 and 156 of the Penal Code criminalise carnal knowledge and indecent practices respectively.[8] These provisions were initially enacted in the British-colonial penal code, inherited from

7 MR Phooko 'Homosexuality and privacy: *Rep v Soko & Another* under the magnifying glass' (2011) 5 *Malawi Law Journal* 55.

8 Mwakasungula (n 6) 359.

the Empire's template and first introduced to Malawian laws in 1930.[9] However, Danwood Chirwa has opined that section 20(1) of Malawi's Republican Constitution which guarantees equal and effective protection against discrimination of any kind extends to sexual orientation and gender identity.[10] The Constitution's article 211(1) renders international treaties ratified prior to its commencement as part of Malawian domestic laws. According to the United Nations, international instruments such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[11] the Convention on the Rights of the Child (CRC),[12] the International Covenant on Civil and Political Rights (ICCPR),[13] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[14] ought not to exclude their protections on the basis of sexual orientation and gender identity.[15] Further, the country's HIV and AIDS Policy which was initially adopted in 2003 has recognised that people who engage in same-sex sexual relations need protection for effective access to health services.[16] Secondly, previous court proceedings and decisions have influenced adoption of new laws that have further criminalised sexual and gender non-conformity. Notable is the amendment of the Penal Code in 2010,[17] to introduce a new section 137A to expand criminalisation towards 'indecent practices between females' which reads:[18]

9 See generally Human Rights Watch 'This alien legacy: the origins of 'sodomy' laws in British colonialism' in Lennox & Waites (n 6) 83.

10 D Chirwa *Human rights under the Malawian Constitution* (2012) 147.

11 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, p 13.

12 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3.

13 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999, p 171.

14 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993, p 3.

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16 Malawi National AIDS Policy *Assessment of legal, regulatory & policy environment for HIV and AIDS in Malawi* (2012).

17 Mwakasungula (n 6) 359.

18 Malawi Penal Code of 1930 (as amended) Cap 7:01 Laws of Malawi, Mwakasungula (n 6) 341-362.

> [A]ny female person who, whether in public or private, commits any act of gross indecency with another female shall be guilty of an offence and liable to a prison term of five years.

During the passing of the amendment, parliamentarian and prominent politician Dr George Chaponda called the new law 'gender sensitive' as it aimed to criminalise homosexuality for both males and females 'without discrimination'.

In 2015, the Marriage, Divorce and Family Relations Act was enacted, following the announcement of a moratorium on gay arrests a year earlier, for the first time annulling any legal recognition of any gender identity other than that assigned at birth.[19] This new law renders it impossible for transgender or intersex persons to claim any gender identity other than that imposed on their birth certificates. Thirdly, the courts have themselves acknowledged that they are 'social animals' who are prone to rely on societal and political trends as portrayed in 2012 when they played the role of catalysts of social change by unilaterally calling parties to join a case as *amicus curiae* to review the constitutionality of section 153 of the Penal Code.

Whether in pondering legal or policy paradoxes, or the contested issues within and around the LGBT+ rights, the various actors that have been involved in the Malawian context include non government organisations (NGOs), donors, local foreign diplomatic missions and agencies, faith-based movements, cultural movements, government, academics, influential personalities, politicians, institutions and actors from abroad, and the courts themselves. The contestations have been open to all and disorderly. Importantly, the rise in social media has increased public participation, mostly among elites, in publicising their views of the various issues being contested. We aim to understand at what point various participants get involved, what their motivations and expectations are, what risks they incur and how their participation influences the lawfare processes and outcomes.

Does understanding of LGBT+ lawfare in the Malawian context offer any conceptual or political utility for a better understanding of contestations about issues of sexual orientation and gender identity more broadly, or about the use of courts as an arena for contesting social and political issues? Firstly, just as in other African contexts where criminalisation exists such as Kenya, Nigeria and Uganda, LGBT+ rights

19 The Marriage, Divorce and Family Relations Act, 2015, defines 'sex' in relation to the gender of a person, as the sex of that person at birth.

issues remain fiercely polarised socially and politically. The assumed high attitudes against homosexuality in most African societies have compromised the prospects of formal state institutions to fairly and objectively arrive at solutions that in the end protect the rights and welfare of LGBT+ individuals who are usually at an actual or potential risk of homophobic stigma, discrimination and violence.[20] Secondly unlike cases where there is broad public support for the rights in question (such as rights of people with albinism, child rights and women's rights), highly contentious issues where there is no consensus offer an opportunity to interrogate the strategies that actors deploy to solicit public support towards their viewpoints. Especially in non-Western contexts, they offer an opportunity to understand the circumstances and premises that are used (with or without good reasoning) in the contestation of the concept of rights. Lastly, understanding LGBT+ rights as lawfare is important intrinsically as it remains marginalised in mainstream legal or human rights research about Malawi, particularly among Malawian human rights and legal scholars. Beyond being significant academically, such scholarship can itself be considered a form of LGBT+ rights lawfare.

3 LGBT+ rights lawfare: Concept, praxis and utility

Gloppen's definition of LGBT+ rights lawfare as the use of rights and law as a strategy to socially or politically contest issues about same-sex sexualities[21] offers an important framework for exploring how 'lawfare actors' navigate values and strategies for strengthening or weakening advancement of LGBT+ rights. Actors may draw from formal rules clarifying laws and values that recognise and protect LGBT+ rights, or indeed codes that dismiss existence of such rights. For example, conservative groups may cite anti-gay laws to justify their homophobic attitudes or to seek the court's intervention to reinforce the anti-gay laws. Informal sentiments against LGBT+ rights are usually drawn by actors to inspire populist rejection of LGBT+ rights as commonly cited by influential politicians under the mistaken assumption that their rejection of LGBT+ rights is in line with majority opinion.[22]

20 B Dulani, G Sambo & KY Dionne 'Good neighbours? Africans express high levels of tolerance for many, but not for all' Afrobarometer Dispatch 74 (March 2016) https://www.afrobarometer.org/wp-content/uploads/migrated/files/publications/Dispatches/ab_r6_dispatchno74_tolerance_in_africa_eng1.pdf (accessed 24 June 2022).

21 S Gloppen 'Conceptualising lawfare: A typology and theoretical framework' (2017).

22 The Other Foundation 'Under wraps: A survey of public attitudes to homosexuality and gender non-conformity in Malawi (2019) https://theotherfoundation.org/wp-content/uploads/2019/09/Other-Foundation-Malawi-Paper-v7.pdf (accessed 4 May

Analysis of any lawfare ought to pay attention to the conceptual issues being contested. As will be shown when discussing *Republic v Soko* later in this chapter, the debate in Malawi has often focused on the rhetorical question of whether non-conforming persons have a right to same-sex sexual relations as opposed to whether LGBT+ people are equally entitled to all human rights enshrined in the laws of Malawi (including relevant international human rights treaties). As will be shown when discussing *Republic v Soko*, the presiding magistrate's outrage over the idea of a marriage between two Malawian men, not equal entitlement to human rights, led him to impose what he called 'a scary sentence'. A contextual understanding of LGBT+ lawfare in the Malawian context therefore necessitates conceptual understanding of homosexuality, LGBT+ rights and the debates that have so far ensued in the Malawian context, and the challenges in the diversity of meanings that arise when sexual or gender non-conformity is applied.[23]

As the definition of LGBT+ lawfare focuses on actors who deploy strategies to contest LGBT+ rights, there is a risk of focusing attention on active contestants such as complainants or defendants, civil society, politicians or the public. The significant role of obscured actors such as judges or magistrates in determining the final outcome of court cases is often overlooked because they are assumed to be independent in their conduct and impartial during proceedings. To an inattentive mind, judges or magistrates only look at facts and the law to come up with a decision. However, the cases discussed in the section that follows indicate that formal rules and informalities can influence court decisions. To understand the concept of lawfare, interests of actors and their incentives, explicit or implicit strategies, expected outcomes, and underlying values, more focus needs to be placed on the role of magistrates and judges in court cases and proceedings.

4 LGBT+ rights in Malawi's case law

Although *Republic v Soko* is the most reported case about same-sex activities, there is rich case law involving same-sex conduct that has been decided by the Malawian courts. The significant difference in the cases is that preceding cases were not about activities involving consenting adults.

2022).

23 A Msosa 'Chilungamo and the question of LGBTQ+ Rights in Malawi' in J Johnson & G Hamandishe *Pursuing justice in Africa: Competing imaginaries and contested practices* (2018) 115.

Additionally, the previous cases did not arouse the same media interest as seen in 2009.

4.1 *Republic v Soko*

The case of *Republic v Soko (also known as the Republic v Steven Monjeza Soko & Tiwonge Chimbalanga Kachepa)*[24] has been widely discussed as a key case study of the courts overstepping legal principles in support of populist public opinion against LGBT+ rights.[25] The case arose from a newspaper headline in December 2009 of a traditional wedding between Soko and Kachepa, both born male, resulting in their immediate arrest and clampdown of any activism for LGBT+ rights.[26] The two were charged with buggery or having carnal knowledge against the order of nature and indecent practices between males.[27] They were denied bail ordinarily guaranteed in section 42(2)(e) of the Malawian Constitution which provides that every person who has been arrested or accused of committing an offence is entitled to be released from custody with or without bail unless the interests of justice require otherwise. Section 118(1) of the Criminal Procedure and Evidence Code also provides entitlement to bail for every person who has been arrested or charged with any offence unless the person is answering the offence of murder or treason or where the punishment for the offence is death.[28] In delivering his bail ruling, Magistrate Usiwa-Usiwa said that he could not grant bail to protect the couple from angry Malawians.[29] This was despite court precedent where bail had been granted to persons answering more serious charges such as murder and treason.[30]

Secondly, when the court found found Soko and Kachepa guilty in May 2010, the magistrate ignored the sentencing guidelines in sections

24 Criminal Case 359 of 2009 at Blantyre Chief Resident Magistrates Court.

25 Phooko (n 7) 55.

26 'Men wed in Malawi's first gay ceremony' *Mail & Guardian* 28 December 2009 https://mg.co.za/article/2009-12-28-men-wed-in-malawis-first-gay-ceremony (accessed on 11 July 2018).

27 Sections 153 and 156 of the Malawi Penal Code, Chapter 7:01 of the Laws of Malawi.

28 Chapter 8:01 of the Laws of Malawi.

29 D Smith 'Malawi gay wedding couple denied bail for "own protection"' *The Guardian* 4 January 2010 https://www.theguardian.com/world/2010/jan/04/malawi-gay-wedding-couple-bail (accessed 26 June 2022).

30 *R v Mvahe* Malawi Supreme Court of Appeal Criminal Appeal 25 of 2005; *McWilliam Lunguzi v The Republic* Malawi Supreme Court of Appeal Criminal Appeal 1 of 1995; *John Tembo and 2 Others v the DPP*, Malawi Supreme Court of Appeal Criminal Appeal 16 of 1995; *The Republic versus Dr Cassim Chilumpha and Yusuf Matumula* High Court of Malawi Criminal Case 13 of 2006.

337, 339 and 340 of the Criminal Procedure and Evidence Code, which guide the courts in Malawi and which prevent imposing maximum sentences to first offenders,[31] encourage consideration of non-custodial sentences,[32] and give due regard to youth, old age, character, antecedents, home surroundings, health or mental condition of the accused.[33] However, the magistrate imposed the maximum 14 years' imprisonment with hard labour.

The underlying reasoning behind the harsh sentence is evident in the magistrate's hard-line sentiments that the *chinkhoswe* was 'bizarre' and 'grossly wrong' because, in his view, Malawi was not ready

> at this point in time to see its sons getting married to other sons, or cohabiting or conducting engagement ceremonies. I do not believe Malawi is ready to smile at her daughters marrying each other. Let posterity judge this judgment.[34]

He also stated:

> So this case being 'the first of its kind', to me, that becomes 'the worst of its kind'. I cannot imagine more aggravated sodomy than where the perpetrators go on to seek heroism, without any remorse, in public, and think of corrupting the mind of a whole nation with a *chinkhoswe* ceremony. For that, I shall pass a scaring sentence so that 'the public must also be protected from others who may be tempted to emulate their [horrendous] example'.

In this case, the magistrate played a central role in lawfare by overlooking the parameters provided in the law in his pursuit of the majority public opinions on homosexuality and LGBT+ rights.

4.2 *The State v Officer in charge of Karonga Police Station*

Only a year after *Republic v Soko*,[35] the Malawi Police Service (MPS) and Malawi Revenue Authority (MRA) intercepted advocacy materials (known as '*zitenje*' in Chichewa language) which were being imported from Tanzania by two non-governmental organisations (NGOs), the Centre for Human Rights and Rehabilitation (CHRR) and the Centre for the Development of People (CEDEP). The materials were detained on

31 Section 340 of the Criminal Procedure and Evidence Code Chapter 08:01 of the Laws of Malawi.

32 Section 339 of the Criminal Procedure and Evidence Code.

33 Section 337 of the Criminal Procedure and Evidence Code.

34 *Republic v Soko* at 23. 2

35 Miscellaneous Civil Cause 21 of 2011, Mzuzu High Court.

suspicion that they would be used to 'promote homosexuality' as the two organisations had produced them for awareness activities on access to HIV and AIDS services among men having sex with men (MSM).

CEDEP and CHRR successfully filed an application before the High Court of Malawi and asked for an interim order for the MRA and Police to release the materials. The strategy by the applicant's lawyer, the co-author of this chapter, focused on the need for advocacy in the promotion of HIV and AIDS prevention and treatment as well as freedom of opinion and expression guaranteed by the Bill of Rights. Success in the case can be attributed to the applicant's strategy to avoid bringing explicit questions about homosexuality or LGBT+ rights to the fore which ultimately pre-empted the opportunity for a judge to digress as seen in *Republic v Soko*.

Although the presiding judge's views on LGBT+ rights were not tested in the case, the court took extra efforts to ensure that the advocacy materials were released to CEDEP and CHRR by sending a court messenger to personally deliver the court order and wait for two hours until MRA and MPS released the materials. This successful lawfare suggests that opponents may consider non-explicit claims for LGBT+ rights especially if matters of public interest (such as HIV and AIDS prevention) are concerned.

The views of the judge on sexual(ity) rights and the importance of educating the public on issues of sexual orientation, gender identity and sexual diversity could not be ascertained. The safer lawfare in this case was to focus on HIV and AIDS prevention and treatment for the ultimate aim to expedite delivery of the advocacy materials to ultimately prevent further vulnerability to HIV infections among LGBT+ people.

4.3 *Msonda* case

Politicians are prominent in Malawi's LGBT+ lawfare particularly to mobilise the masses towards their political parties amidst diminishing support over failure to keep campaign promises. Following the historical coming out by LGBT+ activist Eric Sambisa on national television in January 2016, Ken Msonda, a senior member of the ruling Democratic Party (DP) who also served as spokesperson for former ruling Peoples' Party (PP) wrote on his Facebook page that homosexuals should be killed in Malawi:[36]

36 '"Homosexuals should be killed" - Malawi politician' *News24* 5 January 2016. https://www.news24.com/Africa/News/homosexuals-should-be-killed-malawi-politician-20160104-2 (accessed 30 November 2018).

> Government should come up clear on the DPP administration stand on the issue of gays and lesbians. Gays and lesbians are worse than dogs. Arresting them won't address this problem because sooner or later they are being released on bail. The best way to deal with this problem is to KILL them ... It is pathetic to see our media houses parading these dogs on TV and newspapers hiding behind human rights- human rights my foot! THE DEVIL HAS NO RIGHTS.[37]

As Msonda's hate speech amounted to a threat to the lives of homosexuals and the LGBT+ community in Malawi, amidst the emergence of mass killings of people with albinism and inaction by the MPS,[38] it prompted human rights NGOs to call for criminal prosecution.[39] CHRR and CEDEP filed a criminal case against Msonda[40] under section 83(a) of the Criminal Procedure and Evidence Code.[41] This section allows any person in Malawi to move the court to lay criminal charges against any accused person. Whilst the Court granted the application to prosecute Msonda, the Director of Public Prosecutions (DPP) took over the case and thereafter applied for the court to discontinue the case without giving any reasons.[42]Although section 99(2)(c) of the Constitution gives powers to the DPP to discontinue any criminal case before any court as long the case has not reached judgment stage, she was required to provide reasons to the Legal Affairs of National Assembly in accordance with section 99(2) of the Constitution.[43] CEDEP and CHRR sued the DPP in the High Court

37 M Nkawihe 'Kill gays in Malawi, demands Msonda: "Devil has no rights"' *Nyasa Times* 3 January 2016 https://www.nyasatimes.com/kill-gays-in-malawi-demands-msonda-devil-has-no-rights/ (accessed 24 June 2022).

38 'Albinos "hunted like animals" for body parts in Malawi' *News24* 3 March 2015 https://www.news24.com/Africa/News/Albinos-hunted-like-animals-for-body-parts-in-Malawi-20150303-4 (accessed 25 November 2018).

39 'PP's Msonda get more sticks: CEDEP, CCJP denounce "kill gays" hate speech' *Nyasa Times* 5 January 2016 https://www.nyasatimes.com/pps-msonda-get-more-sticks-cedep-ccjp-denounce-kill-gays-hate-speech/ (accessed 30 November 2018). T Chiumia 'Malawi Law Society slam Msonda's "kill the gays" remarks: Police asked to act on hate speech' *Nyasa Times* 4 January 2016 https://www.nyasatimes.com/malawi-law-society-slam-msondas-kill-the-gays-remarks-police-asked-to-act-on-hate-speech/ (accessed 30 November 2018).

40 *Republic v Ken Msonda* Criminal Case 16 of 2016 before the Senior Resident Magistrates Court in Blantyre Registry.

41 Chapter 8:01 of the Laws of Malawi.

42 M Nkawihe 'DPP snoops on Msonda's case, takes over the matter' *Nyasa Times* 4 July 2016 https://www.nyasatimes.com/dpp-snoops-on-msondas-case-takes-over-the-matter/ (accessed 30 November 2018). G Muheya 'Msonda's "kill gays" case discontinued: SG says Malawi not ready to change anti-gay-laws' *Nyasa Times* 21 January 2016 https://www.nyasatimes.com/msondas-kill-gays-case-discontinued-sg-says-malawi-not-ready-to-change-anti-gay-laws/ (accessed 30 November 2018).

43 Section 99(2)(c) of the Constitution of Malawi.

of Malawi, asking the court to review the decision to discontinue the case on the grounds that the DPP acted unreasonably, unfairly and unlawfully in discontinuing the case without giving reasons to the concerned parties.[44]

The High Court's review of *Msonda* focused on reviewing the decision of the DPP to discontinue a criminal case in the magistrates' court, without attempting to address the legitimacy of LGBT+ rights.[45] Justice Kapindu acknowledged in the first ruling that the applicants, Gift Trapence and Timothy Mtambo, directors of CEDEP and CHRR respectively, filed a criminal case to protect the rights of members of the lesbian, gay, bisexual, transsexual, and inter-sexed community in Malawi.[46] Msonda had also filed for the High Court to determine whether his remark 'kill the gays' was in line with his freedom of speech, freedom of opinion and religious belief as provided in the Constitution of Malawi. The Court also acknowledged that the DPP took over the criminal case with the ultimate aim of discontinuing it.[47] The notice to take over the criminal case and the discontinuance certificate were filed on the same day, clearly for the sole purpose of the DPP taking over the case was only to discontinue it. Justice Kapindu referred to the Chief Justice to empanel a Constitutional Court for a determination on whether the DPP's conduct violated the Constitution. The Chief Justice ruled that human rights issues such as the right to freedom of expression, freedom of religion, thought, conscience, belief, opinion, association and speech should not be part of the determinations by the Constitutional Court. Section 9(2) provides that the matters being certified by the Chief Justice should relate to proceedings before the High Court and all business arising therefrom if the proceedings relate to application and interpretation of the Constitution. By restricting the certification to the issue of the exercise of power by the DPP, this was a lost opportunity for the courts to determine the constitutional issues on LGBT+ rights. In this instance, the DPP and Chief Justice played the 'avoidance lawfare' card to block constitutional litigation on recognition of human rights for LGBT+ people.

44 *The State v Director of Public Prosecutions: Ex-Parte Gift Trapence and Timothy Mtambo* High Court Zomba Registry Miscellaneous Civil Cause 16 of 2016.

45 *Ex-parte Gift Trapence and Timothy Mtambo* (n 44).

46 Paragraph 3 of Justice Kapindi's judgment dated 25 April 2016 in *State v Director of Public Prosecutions Ex-Parte Gift Trapence and Timothy Mtambo,* High Court Zomba Registry Miscellaneous Civil Cause Number 16 of 2016. The case has a number of rulings on different subject matters.

47 Paragraph 8 of Justice Kapindi's judgment dated 25 April 2016 of the *State v Director of Public Prosecutions Ex-Parte Gift Trapence and Timothy Mtambo*, High Court Zomba Registry Miscellaneous Civil Cause Number 16 of 2016.

The Malawi judiciary has avoided determining the fate of LGBT+ rights in the context of a progressive Constitution and the Chief Justice's decision in *Msonda* is not the first one. In *Republic v Soko*, the lawyers referred the matter to the Chief Justice to empanel a Constitutional Court for a determination on whether the charges against Soko and Kachepa were constitutional and in line with human rights principles.[48] The Chief Justice ruled that there were no proceedings in the High Court and the review of the laws could not be made on the basis of criminal charges in the magistrates' court.

In *Republic v Mussa Chiwisi*,[49] *Republic v Matthew Bello*,[50] and *Republic v Amon Champyuni*[51] the High Court of Malawi on its own motion called for submissions from the University of Malawi, Malawi Law Society, Malawi Human Rights Commission, CSOs and the general public to determine whether same-sex laws were constitutional and in line with human rights principles. However, the case was subjected to a number of technical and procedural issues at the instance of the state and eventually files went missing at the Court. While the Court got submissions from the listed institutions, the future of the case could not be determined at the time of writing this article. Two judges who were involved in this matter have since retired without proper handovers. 'Avoidance lawfare' can therefore be defined as a strategy used by actors to avert substantive litigation that is likely to secure legal guarantees for LGBT+ rights.

4.4 The Moratorium case

The Malawi government through the Minister of Justice announced in November 2012 during a radio debate that it had declared a Moratorium on prosecuting individuals involved in same-sex relationships and all anti-gay laws were suspended.[52] The ruling party at that time, the People's Party, adopted this position to promote its international image as a progressive and pro-human rights party. However, no official document was issued by the Malawi government confirming the existence of the Moratorium. When the Democratic Progressive Party won elections in 2014, the new

48 'Lawyers for gay Malawi couple seek change to law' *Reuters* 11 January 2010 https://www.reuters.com/article/ozatp-malawi-gays-20100111-idAFJOE60A0F420100111 (accessed on 25th November, 2018).

49 Confirmation Case 22 of 2011, High Court of Malawi, Principal Registry.

50 Confirmation Case 422 of 2011, High Court of Malawi, Principal Registry.

51 Confirmation Case 662 of 2011, High Court of Malawi, Principal Registry.

52 'Malawi suspends anti-gay laws as MPs debate repeal' *The Guardian* 5 November 2012 https://www.theguardian.com/world/2012/nov/05/malawi-gay-laws-debate-repeal (accessed 10November 2018).

Minister of Justice confirmed the application of the Moratorium and that nobody would be arrested in Malawi based on same-sex laws.[53]

In *State v Minister of Justice and Constitutional Affairs: Ex-parte Kammasamba*[54] three applicants including two pastors filed a case with the High Court of Malawi challenging the Moratorium on the grounds that only Malawi Parliament can suspend implementation of the law. The Court granted the injunction, setting aside the Moratorium. The Attorney-General challenged the decision on the grounds that the pastors had no sufficient interest in the case. CEDEP and CHRR applied to join the case as friends of the court, *amicus curiae*, to raise issues in the interest of the LGBT+ community, resulting in the Court adding CEDEP and CHRR and removing the two pastors based on arguments from the Attorney-General. The Court ruled that the issue before it was entirely legal and had nothing to do with morality or religion.[55]

> The issue before this Court is to a large extent, whether the Executive Branch of Government was within its legal mandate when it suspended gays laws. The other questions, ancillary thereto are to do with the human rights of minority groups including gay people and whether gay laws violate the constitution of the Republic. This has nothing to do with religion or morality.

However, the Court added one more applicant, Christopher Kammasamba, who argued that he was arrested on theft allegations and was challenging the Moratorium on grounds of equality and non-discrimination. The Court referred the case to the Chief Justice to certify and empanel a Constitutional Court on the ground that the matter related to application and interpretation of the Constitution of Malawi.

The Attorney-General appealed to the Supreme Court the decision of the High Court to suspend the Moratorium but no hearing of the appeal had been made at the time of publishing this chapter. The judgment of the High Court setting aside the Moratorium and referring the case to the Chief Justice was made on 11 May 2016.

Malawi has been described as having mixed signals on LGBT+ rights, struggling between retaining anti-gay laws whilst showing unwillingness

53 'Malawi "suspends" anti-homosexual laws' *BBC News* 21 December 2015 https://www.bbc.com/news/world-africa-35151341 (accessed on 10th November, 2018).

54 Miscellaneous Civil Cause 17 of 2016, High Court of Malawi, Mzuzu Registry.

55 Paragraph 2.2.1 of the *State v Minister of Justice and Constitutional Affairs: Ex-parte Kammasamba*, Miscellaneous Civil Cause 17 of 2016, High Court of Malawi, Mzuzu Registry.

to enforce them.[56] The 'tug of war' is beneficial to the government in two ways. First, the existence of the laws places the government in good standing with the assumed anti-gay public opinion, thus minimising the risk of losing votes in future elections. Similarly, the law is a source of mobilising legitimacy of the leadership. On the contrary, the unwillingness to implement the law provides for a 'convenient explanation' before international human rights mechanisms when requested by other member states to repeal anti-gay laws.

The above cases illustrate how the courts have conveniently deployed the law to navigate away from hearing cases for LGBT+ rights. Judicial officers have disregarded the law to pronounce their alignment with anti-gay public opinion (*Republic v Soko*), deployed technicalities to avoid hearing constitutional matters (*Msonda*), or conveniently tolerated court inefficiency (the *Moratorium* case). The courts are therefore active agents in the LGBT+ lawfare by contributing towards sustaining negative perceptions on LGBT+ rights and obstacles towards the possibility of facilitating legal recognition of LGBT+ rights. However, formal recognition of human rights for LGBT+ people in Malawi in accordance with constitutional principles or precedents under international human rights law will be dependent on key actors embracing positive lawfare over negative lawfare.

5 Impact of COVID-19

COVID-19 has exposed inequalities, structural and entrenched discrimination and other gaps in human rights protection.[57] Countries like Malawi have inadequate frameworks to address structural inequalities and negative discrimination in the context of COVID-19. Malawi developed several policy documents on how to combat COVID-19 but no policy document made specific provision to address issues anticipated by LGBT+ persons. The Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020[58] were developed to combat disasters but did not anticipate health needs of LGBT+ persons during COVID-19. Section 3 of these Rules states that the objective of the Rules is to prevent, contain

56 'Gay arrests in Malawi: More mixed signals on gay rights' *Rights Africa* 19 December 2018 https://rightsafrica.com/2018/12/19/gay-arrests-in-malawi-more-mixed-signals-on-gay-rights/ (accessed 19 December 2018).

57 United Nations Office of High Commissioner on Human Rights 'OHCHR and COVID-19: About COVID-19 and human rights' https://www.ohchr.org/en/covid-19?gclid=CjwKCAjw9-KTBhBcEiwAr19ig4n3fgKOUTYUVB0nbXuZEXzfZtDIR6gn6lPNTbQQ7YVoBM37WavyTxoCuZ8QAvD_BwE (accessed 4 May 2022).

58 Published in Government Gazette 4A on 9 April 2020, assented to on 8 April 2020 and commenced on 9 April 2020.

and manage the incidence of COVID-19 but section 3(2) provides that the enforcement of the Rules is under the Disaster Preparedness and Relief Act. The Rules provided for compulsory testing, detention, isolation and quarantine of individuals through use of force. Failure to comply with the rules would subject citizens to criminal sanctions including fines and imprisonment.[59]

At the time of publishing this chapter there was no assessment of the impact of current COVID-19 mechanisms on LGBT+ people. However, the absence of explicit mechanisms seen previously in HIV and AIDS policies or strategies suggest that LGBT+ persons are likely to be at increased vulnerability to stigma, discrimination or lack of services during lockdown or hospitalisation in isolation wards. CSOs and other stakeholders working on the rights of LGBT+ persons had challenges to reach out to the communities to provide essential health services.[60] Interrupted health services may include access to anti-retroviral therapies, psychosocial services and hormonal therapy. Elsewhere in Africa, LGBT+ persons have reported increased violence as a result of being at home and not accessing support services during lockdown.[61] So far the public discourses on COVID-19 have not extended to review the impact on LGBT+ persons. When the Rules were eventually challenged in a Malawi court, the focus was on political considerations and economic implications of lockdown and not consideration of its impact on the protection of human rights.[62]

6 Conclusion

This chapter has discussed cases in the courts of Malawi to demonstrate that judicial officers are also deploying strategies to contest LGBT+ rights. Importantly, strategies deployed by some judicial officers include deliberately ignoring the law or formal rules to advance populist homophobic views, using technicalities to discontinue or refuse constitutional proceedings, or tolerating judicial inefficiencies to perpetuate delays. The courts have

59 Section 6(4) of Malawi Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020.

60 Email discussion with the Programme Manager of CEDEP on the status of LGBT+ activities in the context of COVID-19.

61 OA Oginni, K Okanlawon & A Ogunbajo 'A commentary on COVID-19 and the LGBT community in Nigeria: Risks and resilience' (2021) 8 *Psychology of Sexual Orientation and Gender Diversity* 261 https://psycnet.apa.org/record/2021-28764-001 (accessed 26 June 2022).

62 SB Kaunga 'How have Malawi's courts affected the country's epidemic response?' London School of Economics (2020) https://blogs.lse.ac.uk/africaatlse/2020/11/13/how-have-malawis-courts-law-affected-epidemic-response/ (accessed 4 May 2022).

therefore been active players in shaping the judicial, social and political contestations which have been dominated by rejection of homosexuality and related human rights, counteracted by a minority voice that is gradually gaining ground. The courts have therefore played a significant role in sustaining the dominant voices and obstructing the legal recognition and protection of LGBT+ rights in Malawi. The status quo has benefited ruling governments to retain popular support through continued existence of anti-gay laws whilst claiming not to implement the laws when queried at international human rights mechanisms. Success in the advancement of LGBT+ rights will therefore depend on the extent to which the key actors will deploy positive lawfare over its negative counterpart.

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7 Against 'the order of nature': Towards the growth of queer lawfare in Nigeria

*Ayodele Sogunro**

1 Introduction

If we think of queer lawfare as 'legalised contestations over the rights of lesbian, gay, bisexual, and transgender (LGBT+) people on the African continent through court cases, constitutional amendments, legal changes, and "rights talk", then Nigerian jurisprudence remains very rudimentary. Certainly, the Nigerian legal system has never shied away from producing diverse laws criminalising or prohibiting non-heteronormative sexual conduct and gender identity. Yet, in comparison to the plethora of legislation, queer lawfare is very minimal and it is only recent that activists have started to use the rights, the law, and courts as part of their strategy towards preventing LGBT+ discrimination and advancing inclusion in Nigeria.

Historically, Nigeria's legal system derives its regulation of sexual orientation and gender identity and expression from received English law.[1] Accordingly, Nigeria's legal legacy is based on a colonial legacy that conceives non-heteronormative sexuality and identity as 'perversion', often depicted in the language: 'against the order of nature'.[2] More recently, this has come to be domesticated under 'home-grown' laws such as the Same Sex Marriage (Prohibition) Act, 2013 (SSMPA). As will be discussed in this chapter, the SSMPA is the outcome of legislative lobby by a powerful Christian elite in Nigeria, mostly in response to popular agitation for and ultimate legalisation of same-sex marriage in the United

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1 This consists of the common law of England, principles of equity, and English 'statutes of general application' enacted before 1900. AEW Park *The sources of Nigeria law* (1963); AO Obilade *The Nigerian legal system* (1979).

2 See, for example, Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004 (Criminal Code) sec 214.

States and the United Kingdom, rather than in response to any pro or anti-queer agitations at home. This lobby has purported to be the safeguard for religious and cultural values and, as the provisions of the SSMPA indicate, their goals are to seek out and punish actual or perceived homosexual orientation. In the same period, a similarly powerful Muslim elite in Nigeria's northern states had introduced Sharia criminal and 'morality' laws – including prescribing capital punishment for same-sex acts between men – to reinforce Islamic hegemony and consolidate their political power.

In essence, the criminalising laws in Nigeria were an outcome of calculated political strategies by the political elite, rather than popular agitation, and so precluded public debate on these laws. From the earliest colonial laws to the most recent laws, criminalising legislation on sexuality is often slipped into the statute books without the knowledge, involvement, or awareness of much of the public. At most, the public were only engaged through brief media coverage. As a political strategy, criminalising legislation also serves as a religious gift that reduces the need for political accountability on more topical issues, such as security and the economy. As such, even from the perspective of anti-queer activism, political strategy – rather than contestation over rights – has dominated the field. Within such a highly politicised environment where law and the meaning of rights takes second place to political power, the legal terrain is, arguably, full of uncertainties.

However, this does not mean there are no developments in queer lawfare. Despite the rudimentary legal situation, there is still an opportunity to increase the use of lawfare through strategic litigation and legal advocacy. Since 2016, a few activists and organisations in Nigeria have started to turn towards the use of lawfare to contest issues of sexual orientation and gender identity.

In this chapter, I discuss the broader political dynamics in Nigeria, both from a historical and legal perspective, and the extent to which these dynamics have influenced the use of lawfare in Nigeria and how queer activists have started navigating existing limitations to create, at least, an elementary queer lawfare process.

The rest of this chapter is divided into five sections. In the next section (section 2), I set the stage by reviewing the existing legal situation in Nigeria with an overview of the principal criminalising laws and their historical contexts. In section 3, I provide an in-depth picture of Nigeria's political developments over time in relation to queer lawfare, before proceeding to discuss the context of queer activism and its opposition in section 4. In section 5, I contemplate the various emergent themes from the preceding

sections and in section 6, I discuss the effect of political dynamics on queer lawfare, before concluding the chapter.

2 The legal situation in Nigeria

Nigeria currently criminalises same-sex relations under a medley of federal and state laws either inherited from colonial times or enacted after Nigeria's independence in 1960 by domestic legislatures.[3] The most pertinent federal laws are the Criminal Code Act (enacted in 1916); the Penal Code (Northern States) Federal Provisions Act (enacted in 1960); the Armed Forces Act (enacted in 1993); and the Same Sex Marriage (Prohibition) Act (SSMPA) (enacted in 2014). At the state level, some of the better-known laws are the Sharia Penal Code Law (adopted in twelve predominantly Muslim states in the North); the Same Sex Marriage (Prohibition) Law of Lagos State; the Prostitution and Immoral Acts (Prohibition) Law of Kano State; and the Prostitution, Lesbianism, Homosexuality, Operation of Brothels and Other Sexual Immoralities (Prohibition) Law of Borno State.

These laws offer a variety of prohibitions with a focus on same-sex relationships, especially relationships between men. For instance, the federal Criminal Code Act – the oldest of the laws – provides that a person who is found guilty of having 'carnal knowledge of any person against the order of nature; or … permits a male person to have carnal knowledge of him or her against the order of nature' is liable to 14 years' imprisonment.[4] The Criminal Code also penalises 'any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him'.[5]

The SSMPA – the most recent and the most severe attempt at criminalisation of sexual orientation, gender identity and related issues – contains, inter alia, the following provisions:

(1) A person who enters into a same sex marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years' imprisonment.
(2) A person who registers, operates or participates in gay clubs, societies and organization, or directly or indirectly makes public show of same

3 A Sogunro & D Fatunla *Bad laws: Compendium of laws discriminating against persons based on sexual orientation and gender identity expression in Nigeria* (2017).

4 Section 214 of the Criminal Code.

5 Section 217 of the Criminal Code.

sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years' imprisonment.

(3) A person or group of persons who administers, witnesses, abets or aids the solemnization of a same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years' imprisonment.

The state laws, even though they have less territorial application, are equally if not more hostile to the rights of LGBT+ persons. For example, the Prostitution, Lesbianism, Homosexuality, Operation of Brothels and Other Sexual Immoralities (Prohibition) Law of Borno State, enacted in 2000, has the following provisions:

3. Any person who engages in prostitution, lesbianism, homosexual acts or pimping in the State commits an offence.
7. Any person who engages in sexual intercourse with another person of the same gender shall upon conviction be punished with death.
10. Any person who screens, conceals, harbours or accommodates a prostitute, lesbian or homosexual person commits an offence and shall on conviction be liable to imprisonment for a term of one year or twenty-five thousand naira (N25,000.00) fine or to both such fine and imprisonment.

These federal and state laws, nevertheless, exist within the purported context of a liberal human rights framework, guaranteed under a Constitutional Bill of Rights, which came into force in 1999. This 1999 Constitution provides for, among other rights, the rights to privacy, assembly and association, expression, and freedom of conscience.[6] Nigeria has also ratified the major international human rights laws including the African Charter on Human and Peoples' Rights (African Charter),[7] which has also been domesticated as Nigerian law, the International Covenant on Civil and Political Rights,[8] and the International Covenant on Economic, Social and Cultural Rights.[9]

Clearly, there is a conflict between the constitutional rights and the invasive nature of the homophobic laws. Still, there has been no high-level

6 Constitution of the Federal Republic of Nigeria, 1999 (Nigerian Constitution) secs 37-40.

7 OAU African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

8 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999, p 171.

9 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993, p 3.

judicial interpretation of what the criminalising laws mean in relation to the constitutional rights and the overall objectives of the Nigerian society. Many of the cases reported in the media and non-governmental organisations (NGO) reports often involve trial level decisions solely based on the wording of the criminalising laws, with no mention or interrogation of the constitutional validity of these laws. Only in one notorious case: *Magaji v Nigerian Army*[10] – discussed later in this chapter – did the Supreme Court have an opportunity to engage the issues from a constitutional perspective but this was not brought before the court.

In the last five years, at least three legal challenges have been mounted against the SSMPA but none of these have advanced through the judicial system sufficiently to generate critical jurisprudence for queer lawfare.

3 Developments over time from a legal perspective

3.1 The colonial legacy

The earliest legal provisions on sexual minorities for all of what is now known as Nigeria is traceable to the consolidated Criminal Code enacted by the British colonial government in 1916. The Criminal Code had been adapted from Australia's Queensland Criminal Code (as a form of codified English criminal law) and introduced to Nigeria via the colony of Lagos.[11] As noted in the previous section, the Criminal Code penalises same-sex relationships, using terms such as 'against the order of nature'.[12] Other provisions in the law[13] along the same lines were principally directed at discriminating against certain types of sexual acts as well as targeting male same-sex relationships. This was not unusual for Victorian era morality, particularly the discrimination in legal consequences flowing from male-and-male sex acts and male-and-female sex acts.[14] Between 1958 and 1959, 'sodomy' provisions were enacted by the regional government of the predominantly Muslim Northern Nigerian region under a Penal Code[15]

10 *Major Bello Magaji v The Nigerian Army* (2008) 8 Nigerian Weekly Law Reports (Pt1089) 338.

11 HF Morris 'How Nigeria got its criminal code' (1970) 14 *Journal of African Law* 137.

12 Section 214 of the Criminal Code.

13 Sections 215 & 217 of the Criminal Code.

14 There is an argument to be made that colonial law's concern with, and attribution of legal consequences to, sexual acts between men stems from a sexist ideal that places a higher social value – and consequent legal expectations – on males. However, considering the legislature's reluctance to pass a Gender Equality Bill, advocacy on gender equality in Nigeria has not necessarily fared better than that on sexual orientation and gender identity.

15 Morris (n 11) 153; Penal Code (Northern States) Federal Provisions Act Cap P3 Laws

derived from the colonial Indian Penal Code, although the Criminal Code continued to operate in the Southern region. After independence (and to date), the states that succeeded these two regions continue to use variations of the two Codes as the basis of their criminal laws.

Although these criminal law provisions reflected prevalent British morality rather than the moralities of Nigeria's pre-colonial states and societies,[16] the independent Nigeria state did not make any attempt to abolish these laws. This was ironic, considering that at the same time Nigeria was striving towards its independence from colonial rule, the British government was receiving the 1957 'Wolfenden Report' by the Committee on Homosexual Offences and Prostitution.[17] The recommendations of the 'Wolfenden Report' ultimately led to the decriminalisation of homosexual acts in England and Wales in 1967.[18] However, what the independent Nigerian government did do was adopt a Republican Constitution in 1963 that set out fundamental rights protection clauses, including freedom from discrimination based on 'sex',[19] although it had no specific provisions on LGBT+ related issues.

3.2 Military rule

Although there were no legal protections for LGBT+ persons in the country in the 1960s, there was recognition of a homosexual subculture, contrary to arguments that homosexuality has only recently been imported into Nigeria. For example, in January 1966 when the first military coup in Nigeria was executed, the coup leader, Major Nzeogwu stated in his coup announcement speech:[20]

> You are hereby warned that looting, arson, homosexuality, rape, embezzlement, bribery or corruption, obstruction of the revolution, sabotage,

of the Federation of Nigeria 2004 (Penal Code) secs 284 & 405(2)(e).

16 Morris (n 11).

17 British Parliament 'Report of the Committee on Homosexual Offences and Prostitution' (1957) https://www.bl.uk/collection-items/wolfenden-report-conclusion (accessed 14 May 2022).

18 Sexual Offences Act 60 of 1967, sec 1.

19 Constitution of the Federation of Nigeria, 1963, sec 28.

20 'Radio broadcast by Major Chukwuma Kaduna Nzeogwu – announcing Nigeria's first military coup on Radio Nigeria, Kaduna on January 15, 1966' *Vanguard* 30 September 2010 http://www.vanguardngr.com/2010/09/radio-broadcast-by-major-chukwuma-kaduna-nzeogwu-%E2%80%93-announcing-nigeria%E2%80%99s-first-military-coup-on-radio-nigeria-kaduna-on-january-15-1966/ (accessed 15 February 2022).

> subversion, false alarms and assistance to foreign invaders, are all offences punishable by death sentence.

The coup was unsuccessful, but the civilian government was replaced by surviving top members of the armed forces. Fortunately for LGBT+ persons in Nigeria at the time, there was no more mention of the death sentence enactment for 'homosexuality'.

In 1979, Nigeria returned to civilian rule under a presidential style constitutional democracy. At face value, the push for democratic rule seems to suggest popular disapproval of authoritarian policies and a leaning towards human rights and, therefore, more tolerance towards sexual diversity and orientation. Thus, the 1979 Constitution, compared to the 1963 iteration, spelled out more elaborate fundamental rights and social policy objectives, including the previously recognised freedom from discrimination based on 'sex'.[21] But the possibility of an opportunity to test the discriminatory provisions of the Criminal Code and Penal Code against the newly established constitutional rights was terminated when Nigeria came under military rule again in 1984. The new government, led by Muhammadu Buhari, claimed to focus on eradicating 'indiscipline' from the country but it was replaced in a countercoup in just over a year. During this period, a wave of American-style Pentecostal evangelism surfaced in the country. Economic recession motivated more people to turn to religious institutions to fill the gaps in governance, and religious organisations increased in number and relevance.[22]

Nevertheless, the existence of a homosexual subculture did not go unremarked. For example, in some similarity to Nzeogwu's 1966 speech, the leader of an attempted coup in 1990 stated in his speech:[23]

> I, Major Gideon Orkar, wish to happily inform you of the successful ousting of the dictatorial, corrupt, drug baronish, evil man, deceitful, homosexually-

21 Sections 15(2), 17(3) & 39(1) of the Constitution of the Federal Republic of Nigeria, 1979.

22 BCD Diara & NG Onah 'The phenomenal growth of Pentecostalism in the contemporary Nigerian society: A challenge to mainline churches' (2014) 5 *Mediterranean Journal of Social Sciences* 395 at 398 http://www.mcser.org/journal/index.php/mjss/article/view/2432 (accessed 15 February 2022).

23 'April 1990 coup d'état speech' https://dawodu.com/orkar.htm (accessed 15 February 2022).

centred, prodigalistic, un-patriotic administration of General Ibrahim Badamosi Babangida.

This coup was also unsuccessful, and the sponsors were arrested and executed. The 1990s in Nigeria demonstrated what Jjuuko describes as 'the third wave of homophobia'.[24] A process to return to civil rule in 1993 was frustrated by the military government. General Sani Abacha assumed power and subsequently imprisoned the president-elect, Moshood Abiola. The political tensions reflected on the Nigerian economy, which deteriorated and further worsened public educational, health, and other social services. Evangelical Christianity became more prevalent, accompanied by faith healing and rising public confidence in religious authority and their often-homophobic statements.[25]

It is noteworthy that the same-sex discriminatory provisions of the Criminal Code would later find another home under the Armed Forces Decree of 1993.[26] Section 81(l)(a) of that Decree prescribes a term of imprisonment of up to 7 years for anyone who 'has carnal knowledge of a person against the order of nature'. The decree is still in force. In 1997, Major Bello Magaji of the Nigerian Army was arraigned before a General Court Martial on a charge of sodomy contrary to the Armed Forces Decree. The accused was found guilty by the General Court Martial and sentenced to 7 years in prison. The accused appealed to the Court of Appeal and then to the Supreme Court. The Supreme Court gave its judgment in 2008, reported in *Magaji v Nigerian Army.*[27]

Meanwhile, between 1998 and 1999, a democratic transition in Nigeria was triggered, following the sudden deaths of both General Abacha and Moshood Abiola in 1998. Civilian rule was restored in May 1999 under a Constitution similar to the truncated 1979 version. Amongst other rights embedded in the currently governing Constitution of the Federal Republic of Nigeria 1999 (Nigerian Constitution) are the rights

24 A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 264.

25 MS Umar 'The politics of ethno-religious balancing and the struggle for power in Nigeria' in JG Cooke & R Downie (eds) *Religious authority and the state in Africa: A report of the CSIS Africa program* (2015) 75-79.

26 Armed Forces Act Cap A20 Laws of the Federation of Nigeria, 2004, sec 81. Although enacted as a military decree, transitional provisions under the Constitution of the Federal Republic of Nigeria, 1999 (Nigerian Constitution) automatically converted federal decrees into Acts as though they had been enacted by the National Assembly.

27 N 10. The appeal was dismissed and the court affirmed the sentence of the Court Martial.

to privacy, expression and freedom from discrimination on the basis of 'sex'.[28] The provisional military government hurried the drafting of the Nigerian Constitution through to meet the one-year transition deadline they had set and there were no public debates on its provisions.[29]

3.3 Civilian rule since 1999

It is hard to say that the democratic transition in 1999 was more tolerant of human rights. Almost immediately, in late 1999, politicians in the Northern states began to promise to enact and implement Sharia law as their state laws.[30] These promises were made despite the constitutional prohibition against the adoption of a state religion.[31] There was a brief period of national public debate on the constitutionality of adopting Sharia law but the northern politicians won the day and Sharia law was first domesticated in the Penal Code of Zamfara State. Under this law, sodomy was enacted as a capital offence, but that particular provision did not receive public attention. Instead, the public debates were focused on provisions criminalising adultery and its consequence of capital punishment.[32] Ultimately, 12 of the 36 Nigerian states adopted similar Sharia law provisions. In these states, 'sodomy' is punishable by stoning to death, while lesbianism is punishable with 50 lashes and up to six months' imprisonment.[33]

The merger of political interests and religious interests in Nigeria on issues of sexual orientation is further demonstrated by the series of events that followed the consecration of Gene Robinson – an openly gay priest – as a bishop of the Episcopal Church in the United States of America (USA). The consecration prompted the Anglican Church in Nigeria to declare itself in 'impaired communion' with the Episcopal Church in

28 Sections 15(2), 17(3) & 42(1) of the Nigerian Constitution.

29 E Teniola 'The 1999 corrigenda' *PremiumTimesng.com* 7 November 2013 https://www.premiumtimesng.com/opinion/149240-1999-corrigenda-eric-teniola.html (accessed 15 February 2022).

30 HRW '"Political Shari'a"? Human Rights and Islamic Law in Northern Nigeria' (21 September 2004) https://www.hrw.org/report/2004/09/21/political-sharia/human-rights-and-islamic-law-northern-nigeria (accessed 5 July 2022).

31 Section 10 of the Nigerian Constitution.

32 'Convicted adulterer is the first man in Nigeria sentenced to death by stoning' *The Irish Times* 28 June 2002 https://www.irishtimes.com/news/convicted-adulterer-is-the-first-man-in-nigeria-sentenced-to-death-by-stoning-1.1062171 (accessed 15 February 2022).

33 Chapter VIII (*Hudud* and *Hudud*-related offences) of the Sharia penal codes in the relevant Northern Nigerian states, secs 129, 130, 133 and 134.

the United States in 2003.[34] Political rhetoric in Nigeria supported the position of the Anglican Church in Nigeria and, in the year that followed, President Olusegun Obasanjo described homosexuality as 'unbiblical, unnatural and definitely unAfrican'.[35] Obasanjo's attitude reflected either public unawareness of the history of sexual minorities in Nigeria (and Africa) or a deliberate attempt to restyle Victorian England mores as 'African' values. Unsurprisingly, many African leaders have used this same argument of 'not African' to push policies that discriminate against sexual minorities.[36] Arguably, it is easier to promote oppressive policies in the guise of safeguarding African independence from foreign influence.

More encouragingly, the attempt to impose a false narrative on sexual minorities in Nigeria prompted the rise of activism by sexual minorities in Nigeria as well as elsewhere in Africa.[37] In October 2004, a gay-rights activist, Bisi Alimi, made his sexual orientation known publicly (perhaps the first Nigerian to do this) on a popular live TV breakfast show, 'New Dawn with Funmi Iyanda'. This attempt to show the public evidence of an 'African' gay man was not received well by the authorities: the show's live-television format was cancelled soon after.[38] Nevertheless, the issue of sexual minorities had become part of public debate. In January 2006, the Same Gender (Marriage) Prohibition Bill was proposed in the federal legislature.[39] The Bill intended to prohibit same-sex marriages, homosexual identity and any advocacy regarding same-sex relationships in Nigeria and punish these with up to five years' imprisonment. The Bill was unsuccessful. It would later be amended and tabled again in 2008, and again in 2011 before receiving widespread media coverage to, arguably mixed public opinion and, eventually, legislative approval.

34 J Nunley 'Anglican provinces declare "impaired" or "broken" relationship with ECUSA' *Anglicannews.org* 9 December 2003 http://www.anglicannews.org/news/2003/12/anglican-provinces-declare-impaired-or-broken-relationship-with-ecusa.aspx (accessed 15 February 2022).

35 'Obasanjo backs bishops over gays' *BBC News* 27 October 2004 http://news.bbc.co.uk/2/hi/africa/3955145.stm (accessed 15 February 2022).

36 ST Ebobrah 'Africanising human rights in the 21st century: Gay rights, African values and the dilemma of the African legislator' (2012) 1 *International Human Rights Law Review* 110 at 113.

37 Jjuuko (n 24 above) 265.

38 H Ahmed 'Funmi Iyanda gave me opportunity to disclose I'm gay – Bisi Alimi' *Qed.ng* 6 October 2016 https://www.qed.ng/funmi-iyanda-gave-opportunity-disclose-im-gay-bisi-alimi/ (accessed 15 February 2022).

39 HRW 'Nigeria: Obasanjo must withdraw bill to criminalize gay rights' (23 March 2006) https://www.hrw.org/news/2006/03/23/nigeria-obasanjo-must-withdraw-bill-criminalize-gay-rights (accessed 15 February 2022).

Although that Bill was unsuccessful at the federal legislature, a related bill found approval in the Lagos legislature. In 2007, Lagos State enacted the Same Sex Marriage (Prohibition) Law. The law prohibited and criminalised same-sex marriage with up to 10 years' imprisonment, although it did not specifically criminalise sexual orientation or non-marital same-sex relationships. It is significant that this law was introduced in the most cosmopolitan and arguably the most socially liberal state in Nigeria. The lesson here is that liberal social values will not necessarily outweigh a combination of conservative political and religious forces.[40] Yet, Lagos State is a typical example of Nigeria's tensions between its colonial-religious heritage and its aim for constitutional democracy.[41] For example, Lagos State enacted the Criminal Law of Lagos State 2011, which repealed the Criminal Code and removed the colonial provisions on sodomy and 'offences against the order of nature'. Instead, these were replaced by a prohibition against 'indecent' acts and practices.[42]

At the federal level, political expediency reignited the debate on sexual minorities. Between 2012 and 2014, the Goodluck Jonathan administration was under attack due to growing concerns on public corruption and the Boko Haram terrorism in the country's North East. Perhaps as a populist measure in view of pending general elections in 2015, the dormant Same Sex Marriage (Prohibition) Bill was revisited by the legislature and eventually passed. Although originally sponsored by the opposition Action Congress of Nigeria (ACN), the ruling party – People's Democratic Party – adopted the Bill and passed it into law. In January 2014, President Jonathan signed the Bill into law spiking public debates on LGBT+ issues with public opinion being widely in support of the law.[43]

40 At this time, Lagos state was under the control of the (then) opposition party (Action Congress of Nigeria (ACN), later merged with other opposition parties into the currently ruling All Progressives Congress (APC)).

41 A Sogunro 'One more nation bound in freedom' (2014) 114 *Transition: An International Review* 47 at 54-57.

42 Criminal Law of Lagos State 2011, secs 134 & 136. The broad usage of the word 'indecent' still opens these provisions to abuse, especially since the advent of the SSMPA.

43 'Anti-gay law: Lawyers urge FG not to succumb to foreign pressure' *Vanguard* 16 January 2014 https://www.vanguardngr.com/2014/01/anti-gay-law-lawyers-urge-fg-succumb-foreign-pressure/ (accessed 15 February 2022).

3.4 The Same Sex Marriage (Prohibition) Act and its aftermath

Various authors and reports have discussed the provisions of Nigeria's SSMPA.[44] Comments on the SSMPA have ranged from 'draconian' to 'inconsistent with Nigeria's international legal obligations'.[45] The SSMPA prohibits same-sex cohabitation, same-sex marriage, public or private displays of any same-sex relationship, and advocacy or support for same-sex relationships.[46] These are punishable by prison sentences of between 10 and 14 years. Since the enactment of the SSMPA, there has been a recorded increase in arbitrary arrests of actual or suspected gay men in Nigeria including several cases of mass arrests.[47] None of these arrests have sparked significant religious or political disapproval. Meanwhile, public education in Nigeria on sexual minorities continues to be noticeably poor.[48] Media reports feature gay and lesbians being publicly shamed, assaulted or even killed with little or no outcry. It was without much public disbelief that the vice-president of the Nigeria Football Federation made a statement that 'lesbianism is killing women's soccer'.[49]

Prior to leaving office, the Jonathan administration enacted the Violence Against Persons (Prohibition) Act, 2015. This law prohibits discrimination and violence against all Nigerians and, amongst others, makes it a criminal offence to cause or attempt to cause 'physical, sexual, psychological, verbal, emotional or economic harm'. However, the legislation applies only to the federal capital, Abuja. It is curious that Nigeria's National Assembly enacted the SSMPA, a discriminatory

44 See VO Ayeni 'Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same Sex Marriage (Prohibition) Act' in Namwase & Jjuuko (n 24) 203; Human Rights Watch '"Tell me where I can be safe" The impact of Nigeria's Same Sex Marriage (Prohibition) Act' (2016) https://www.hrw.org/sites/default/files/report_pdf/nigeria1016_web.pdf (accessed 15 February 2022); PEN America Center 'Silenced voices, threatened lives: The impact of Nigeria's anti-LGBT law on freedom of expression' (2015) 16 https://pen.org/sites/default/files/nigeriareport_FINAL_highres.pdf (accessed 15 February 2022); Sogunro (n 41).

45 'Nigeria anti-gay laws: Fears over new legislation' *BBC News* 14 January 2014 http://news.bbc.co.uk/2/hi/africa/3955145.stm (accessed 15 February 2022).

46 Secs 4 & 5 of the SSMPA. This book chapter could well fall within the very broad prohibitions of the law against supporting 'the … operation and sustenance of gay clubs, societies, organizations, processions or meetings'.

47 Human Rights Watch (n 44).

48 PEN America Center (n 44) 16.

49 K Guilbert 'Women's soccer "lesbianism" row reflects homophobia in Nigeria: activists' *Reuters* 15 June 2016 https://www.reuters.com/article/us-soccer-nigeria-lgbt-idUSKCN0Z124M (accessed 15 February 2022).

law, for the entire country but restrained itself from legislating a non-discriminatory law for the same area of territory, for no apparent reason but possibly due to an unwillingness to confront more conservative states. In 2015, the Jonathan administration lost the general election and the APC (original sponsors of the SSMPA) became the ruling party. During a state visit to the United States, then new President Muhammadu Buhari of the APC reiterated his party's position when he informed President Obama: 'Sodomy is against the law of the country and abhorrent to our culture'[50] thus ending any notion that the new administration would take a more liberal position on LGBT+ rights.

However, while President Buhari was reiterating the politically expedient position, the former President Jonathan, at a speech in London, dissociated himself from the SSMPA, stating that he merely signed it into law in line with the will of the people. He, however, hinted at a possibility of the law being later reformed:

> In the light of deepening debates for all Nigerians and other citizens of the world to be treated equally and without discrimination, and with the clear knowledge that the issue of sexual orientation is still evolving, the nation may, at the appropriate time, revisit the law.[51]

A few weeks later, after the Orlando shooting in the USA, President Jonathan – seemingly to backtrack from his administration's hardline position on LGBT+ rights – posted his condolences via Facebook and Twitter, an action that was met with some public condemnation in Nigeria.[52]

Between 2016 and 2017, discussions on LGBT+ issues faded from national debate. Economic issues had become more prominent due to unstable foreign exchange rates, increased inflation, and a shrinking economy. It also seems that the enactment of the SSMPA has given closure to the Nigerian public on this issue. Nevertheless, violations of the rights of LGBT+ persons continue daily, mostly unreported in the news.

50 N Ibeh 'Buhari "pointblank" on gay rights, says "No" to US – Presidency' *Premium Times* 22 July 2015 http://www.premiumtimesng.com/news/top-news/187104-buhari-pointblank-on-gay-rights-says-no-to-u-s-presidency.html (accessed 15 February 2022).

51 M Sotubo 'Read full text of ex-president's speech at Bloomberg Studios' *Pulse.ng* 6 June 2016 http://pulse.ng/local/goodluck-jonathan-read-full-text-of-ex-president-s-speech-at-bloomberg-studios-id5118396.html (accessed 15 February 2022).

52 E Chidimma 'Nigerians blast ex-president Jonathan for supporting homosexuals' *Buzz Nigeria* 14 June 2016 https://web.archive.org/web/20170216111802/https://buzznigeria.com/nigerians-blast-ex-president-jonathan/ (accessed 15 February 2022).

In 2015, according to a report released by The Initiative for Equal Rights, there were 172 documented cases of violations against 282 persons[53] and in 2016 there were 152 documented violations against 232 persons.[54] In July 2017, the government of Lagos State arrested and publicly arraigned 42 men alleged to have been engaging in homosexual conduct.[55]

In 2019, public debate on queer issues resurfaced when the Director-General (DG) of Nigeria's National Council for Arts and Culture started publicly criticising Bobrisky,[56] a Nigerian internet celebrity transvestite, or possibly transwoman.[57] These criticisms resulted in a police raid of Bobrisky's birthday party in Lagos, with up to 100 police officers deployed to arrest her.[58] Public opinion was opposed to this wasteful use of security resources and, eventually, the police quietly backed down. Meanwhile, Bobrisky continues to enjoy internet fame.

However, there are several LGBT+ focused NGOs across different regions of the country, with some trying to coordinate strategic litigation on the anti-gay law and engage society through the media. Many of these NGOs and a few civil society advocates work under health and women's rights and are promoting sexuality-related issues in the media and through trainings. The most recurrent themes are the protection of sexual minorities from acts of violence and degrading treatment, and the repeal or amendment of anti-gay laws.

53 The Initiative for Equal Rights '2015 Report on human rights violations based on real or perceived sexual orientation and gender identity in Nigeria' http://www.theinitiativeforequalrights.org/resources1/2015-Report-on-Human-Rights-Violations-Based-on-Real-or-Percieved-Sexual-Orientation-and-Gender-Identity-in-Nigeria-.pdf (accessed 15 February 2022).

54 The Initiative for Equal Rights '2016 Report on human rights violations based on real or perceived sexual orientation and gender identity in Nigeria' https://drive.google.com/file/d/0B3ZPtCiUOS85VGpIcGpwNnlWVnc/view (accessed 15 February 2022).

55 'Lagos state govt arraigns 42 homosexuals' *Ynaija.com* 3 August 2017 https://ynaija.com/lagos-state-govt-arraigns-42-homosexuals/ (accessed 15 February 2022).

56 L Opoola 'Bobrisky is not a cultural ambassador, Runsewe warns youths' *Daily Trust* 14 June 2019 https://www.dailytrust.com.ng/bobrisky-is-not-a-cultural-ambassador-runsewe-warns-youths.html (accessed 24 February 2022).

57 In an Instagram post, Bobrisky stated her preference for the feminine pronouns. See A Odunayo 'Don't call me bro, I am a baby girl – Bobrisky' *Legit* 8 May 2019 https://www.legit.ng/1237437-dont-call-bro-i-a-baby-girl-bobrisky.html (accessed 24 February 2022).

58 S Kenechi 'Lagos CP deploys 100 operatives to venues of Bobrisky's birthday' *The Cable* 31 August 2019 https://lifestyle.thecable.ng/lagos-cp-orders-tight-security-ahead-of-bobriskys-birthday/ (accessed 24 February 2022).

Relatedly, in the context of the COVID-19 pandemic, organisations have also had increased roles in rallying around to protect their communities from disproportionate effects of the pandemic in the wake of government crackdown and abuse of lockdown emergency powers.[59] The pandemic triggered anxiety and fear within the LGBT+ community in Nigeria, particularly for those who worked low-income jobs and relied on NGOs for sexual and mental healthcare and other types of support.[60] Lockdown restrictions meant reduced opportunity for income and also difficulty in accessing support services. For younger members and more vulnerable people within the community, there were worries around being confined to homophobic environments with a potential for being outed and its attendant physical and psychological dangers. For organisations, the pandemic created more pressure on their resources from the community without corresponding increase in funding from donors. Meanwhile, persecution by state and non-state actors did not diminish with the pandemic. In one undocumented incident narrated to this author by Akudo Oguaghamba – Executive Director of Women's Health and Equal Rights Initiative (WHER), an Abuja based organisation – in 2020 a WhatsApp group created during lockdown restrictions was infiltrated by military officers who then used their access to identify three members of the group and attempted to extort their families until WHER intervened. In another incident, the lockdown in 2020 resulted in the forced outing of a lesbian soldier by her male colleagues and a subsequent tracing, arrest and torture of over 80 real or perceived lesbian, bisexual and queer women, all of whom were soldiers, in a military zone in Abuja. The women were detained in military custody without charges or trial until WHER alerted the Nigerian Human Rights Commission to intervene and secure the release of the women. Beyond these specific interventions, the next section considers some of the wider work that has been done around legal and social change.

4 Overview of queer activism in Nigeria

4.1 The main actors and the antagonists

The discussion in the previous section shows how, despite the plethora of criminalising laws in Nigeria, there was only very minimal public debate for or against these laws in Nigeria. The earliest laws were a colonial

59 'Nigerian security forces killed 18 people during lockdowns: rights panel' *Reuters* (16 April 2020) https://www.reuters.com/article/us-health-coronavirus-nigeria-security-idUSKCN21Y272 (accessed 5 January 2022).

60 Author's interview with Akudo Oguaghamba, Executive Director of Women's Health and Equal Rights Initiative on 11 May 2022.

imposition, enacted with little or no recourse to the wishes of the local population.[61] The home-grown laws have followed a similar pattern: enacted by legislatures serving political or religious agendas rather than reflecting any popular agitation.

However, this is not to imply that the laws do not enjoy popular support. Findings from a series of biennial polls measuring public attitudes to the criminalising laws and LGBT persons have shown that up to 75 per cent of Nigerians continue to support the criminalisation of same-sex relationships.[62] These polls have also consistently found that relatively few Nigerians are knowledgeable on or aware of the content of the laws – or even know a queer person personally. As such, there is a high disconnect between public understanding of homophobic laws and public attitudes towards same-sex relationships. Interestingly, the polls also show that as time passes and more public debates emerge, public attitude is softening.

Meanwhile, the SSMPA does not only criminalise same-sex relationships, it also criminalises 'the registration of gay clubs, societies and organisations' as well as their 'sustenance, processions and meetings' with a 10-year term of imprisonment. The criminalisation also extends to anyone who 'supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria'. In essence, these provisions attempt to anticipate and prevent queer activism by criminalising different elements of organised advocacy. This means that, under the law, organisations and individuals in Nigeria cannot claim to be queer activists without running the risk of prosecution under the SSMPA. It is not surprising, therefore, that a great number of organisations working on queer rights are registered as sexual and reproductive health organisations.[63]

61 A Gupta 'This alien legacy: The origins of "sodomy" laws in British colonialism' Human Rights Watch (2008) 4-8.

62 Polls commissioned by The Initiative for Equal Rights from 2013 to 2019 indicate popular but reducing support for the anti-gay laws: NOI Polls 'About 9 in 10 Nigerians support the proposed Anti-Same-Sex Marriage Bill' (2013) https://theinitiativeforequalrights.org/wp-content/uploads/2019/04/2013-Social-Perception-Survey-NOI.pdf (accessed 15 February 2022); NOI Polls 'Gay rights: Perception of Nigerians on LGB rights' (2015) https://theinitiativeforequalrights.org/wp-content/uploads/2019/04/Perception-Survey-2015.pdf (accessed 15 February 2022); NOI Polls 'Social perception survey on lesbian, gay and bisexual rights' (2017) https://theinitiativeforequalrights.org/wp-content/uploads/2017/05/Social-Perception-Survey-On-LGB-Rights-Report-in-Nigeria3.pdf (accessed 15 February 2022); NOI Polls 'Social perception survey on lesbian, gay, bisexual and transgender person rights in Nigeria' (2019) https://theinitiativeforequalrights.org/wp-content/uploads/2019/08/2019-Social-Perception-Survey.pdf (accessed 15 February 2022).

63 A Sogunro 'Citizenship in the shadows: Insights on queer advocacy in Nigeria' (2018) 45 *College Literature* 632.

A probable consequence of this is that organised queer activism in Nigeria has blossomed around the provision of social and health services to sexual and gender minorities[64] ensuring that initial policy-level lawfare was led by social workers rather than by legal practitioners. This activism focused less on human rights issues and instead emphasised the public health effects of the criminalising laws as an issue of concern not just for sexual and gender minorities, but for the government and society in general. With HIV/AIDS and public health as a focus, activists could strengthen their status in society. This was useful both to ensure societal receptiveness and to provide access to government officials. Organisations that focused on the goal of healthcare could contribute to the policies of public health institutions, such as the Ministries of Health and the National Agency for the Control of AIDS, who in turn relied on the work of the organisations to access or report on the use of foreign aid.[65] In some instances, the programme manuals, brochures and other documents used by activists bore the national coat of arms to indicate their partnership with the Nigerian government.[66] In essence, the professional arms of government would work quietly with activists on public health issues while the political arms of government denounced LGBT+ rights. It was often only in instances of arbitrary arrests would the activists call on lawyers to assist in police bail, criminal trial defence, and the general provision of legal aid to the queer community.

Only very recently did local queer organisations begin to probe into rights contestation spaces, for example, by documenting violations and reporting these to the National Human Rights Commission or law enforcement authorities. However, considering that the Nigerian legal environment continues to be hostile, much of the rights contestation work is being done at the regional level, before the African Commission on Human Peoples' Rights (ACHPR), where organisations can present statements on the situation of LGBT+ people in Nigeria and obtain a sympathetic hearing and possible intervention.[67] This kind of regional advocacy contributed to the concluding observations of the ACHPR

64 D Allman et al 'Challenges for the sexual health and social acceptance of men who have sex with men in Nigeria' (2007) 9 *Culture, Health, & Sexuality* 153; T McKay & N Angotti 'Ready rhetorics: Political homophobia and activist discourses in Malawi, Nigeria, and Uganda' (2016) 39 *Qualitative Sociology* 397.

65 Author interviews with various activists.

66 The author has seen several examples of these documents.

67 The author has attended several sessions of the African Commission on Human and Peoples' Rights (African Commission) involving such statements.

on Nigeria's state report urging the Nigerian government to repeal the SSMPA.[68]

The growth of organised queer activism in Nigeria has also led to some backlash, and the emergence of organised resistance. Unexpectedly, this backlash has not arisen from the political or religious hegemony in Nigeria, but from the global anti-queer movement. It seems that while the local political and religious interests in Nigeria have shifted their focus away from queer-related issues, global anti-queer interests are keen on pulling them back towards homophobia. In Nigeria, the most visible face of this backlash is the entity known as Citizen Go.

Citizen Go has been described as 'an anti-feminist, anti-queer organization with links to various US-based anti-choice organisations as well as the European far right'.[69] In 2017, Citizen Go hosted a petition to the ACHPR, and the presidents of Nigeria and Kenya expressing dissatisfaction with the ACHPR's 'embrace of LGBT Doctrine'.[70] The petition argued that terms such as 'sexual orientations' and 'gender identity', 'gender expression', 'intersex traits' and 'homophobia', used by the ACHPR have no 'universally-agreed-upon legal or scientific definition' and are not recognised by the United Nations (UN) or 'in any ratified international treaty'. The petition implies, incorrectly, the argument that international law can be found only in treaties, and exists independently of international bodies such as the ACHPR, when in fact, the decisions of bodies such as the ACHPR constitute a part of international law.[71] In the last couple of years, Citizen Go has increased its focus in Nigeria, using the language of rights and law to promote hate and diminish queer spaces. For instance, in May 2019, Citizen Go successfully launched a petition to close down a Marie Stopes clinic in Nigeria[72] and has since organised

68 African Commission 'Concluding observations and recommendations on the 5th periodic report of the Federal Republic of Nigeria on the implementation of the African Charter on Human and Peoples' Rights (2011-2014)' (2015) para 81.

69 OT Adegbeye 'Nigeria: Not left out of the global rollback of sexual and reproductive rights' *awid* 23 July 2019 https://www.awid.org/news-and-analysis/nigeria-not-left-out-global-rollback-sexual-and-reproductive-rights (accessed 15 February 2022).

70 'Say NO to African Commission on Human and Peoples' Rights embrace of LGBT Doctrine' Petition started by Citizen Go on 19 June 2017 https://www.citizengo.org/en/fm/71504-say-no-african-commission-human-and-peoples-rights-embrace-lgbt-doctrine (accessed 15 February 2022).

71 F Viljoen *International human rights law in Africa* (2012) 301-305.

72 'Stop Marie Stopes abortion activities in Nigeria' Petition started by Citizen Go on 5 February 2019 https://www.citizengo.org/en-af/lf/170400-stop-marie-stopes-abortion-activities-nigeria (accessed 15 February 2022).

conferences spreading its agenda.[73] While the Marie Stopes petition brought the issue of women's rights and abortion to the forefront of public debate (at least, on social media),[74] most of Citizen Go's activities on queer issues continue to be faceless and have not yet resulted in a visible forum for rights contestation. Still, the petition to the ACHPR gives an indication of what this conversation may look like.

4.2 Queer activism – The judicial attitude

The only existing judicial decision in Nigeria that gives a hint of jurisprudential thinking on queer issues is the case of *Magaji v Nigerian Army.*[75] Although the case itself has little to do with sexual orientation or gender identity, the reasoning of the Supreme Court decision in that case touched on these aspects from a legal standpoint. Briefly, the facts of the case before the Supreme Court were that, in 1997, Major Bello Magaji was arraigned before the Nigerian Army General Court Martial on a charge of sodomy contrary to the Armed Forces Decree, 1993. The particulars of the offence he was charged for were that, in 1996, the accused had carnal knowledge of four men 'against the order of nature' over a period of time. The accused pleaded not guilty to the charge. From the evidence provided in court, it appeared to be, in fact, a case of rape and sexual assault: the accused had used his military status to coerce young and poor civilian men, including a minor, into sexual acts.

The accused was found guilty by the General Court Martial and sentenced to 7 years in prison. The accused appealed to the Nigerian Court of Appeal unsuccessfully and then to the Supreme Court. The Supreme Court did not give judgment until 2008. When they gave their judgment, the reasoning of the judges in this case came straight out of the colonial playbook, with legal issues being interpreted through the lens of religious morality. Rather than focus on elements of rape and sexual assault presented by the case, the Court seemed to have been more horrified by the same-sex elements, insisting on categorising the offence as sodomy rather than an assault.

73 'NGOs, Catholic women partner to tackle the LGBT threat to African family values' *Sahara Reporters* 12 February 2019 http://saharareporters.com/2019/02/12/ngos-catholic-women-partner-tackle-lgbt-threat-african-family-values (accessed 15 February 2022).

74 'And these efforts to demonize and block access to these services are being funded in Nigeria by a spanish organisation called CitizenGO. CitizenGo is a partner to extremist SPLC designated hate group World Congress of Families. #EndWaronNigerianWomen' Tweet posted by @buky on 22 May 2019 https://twitter.com/buky/status/1131131727643107328?s=20 (accessed 5 July 2022).

75 N 10.

The opening statement by Justice Niki Tobi, is a direct indicator into the judicial attitude towards homosexuality: 'This appeal involves the beastly, barbaric and bizarre offence of sodomy; a more common place name is homosexual or homosexuality'.[76] Justice Tobi would then go on to give a comprehensive interpretation of the colonial terms 'order of nature' and how it relates to sexuality:

> The order of nature is carnal knowledge with the female sex. Carnal knowledge with the male sex is against the order of nature and here, nature should mean God and not just the generic universe that exists independently of mankind or people. It is possible I am wrong in my superlative extension of the expression. As that will not spoil the merits of the judgment, I leave it at that. Where there is a hole or an opening, there will be the possibility of penetration; penetration being the ability to make a way or way into or through. While the common usage of the word means putting of the male organ into the female sex organ when having sex, it has a more notorious meaning and that is the meaning in section 81. The natural function of anus is the hole through which solid food waste leaves the bowels and not a penis penetration. That is against the order of nature, and again, that is what section 81 legislates against … What the appellant decided to do was to dare nature in his craze for immoral amorphous satisfaction. By his conduct, the appellant re-ordered God's creation. Has he got the power to do that? No. No human being, whether in the military or not, has the power to re-order God's creation. After all, we are not talking of fighting a war. By his conduct, the appellant has brought shame to himself.

This legal framing of sexuality around Abrahamic religious concepts is problematic. Constitutionally, Nigeria is a secular state and legal terms should not be interpreted through religious ideals. However, this decision is the current position of Nigerian law on the subject and, until the Supreme Court overrules itself, lower courts are bound to follow this position.

The difficulty in reconciling constitutional rights with this religious morality may explain why litigation brought by queer activists before the courts in recent years has yielded little fruit. In all these cases, the courts have focused more on procedural aspects of the challenge and avoided entering the substantive arguments. For instance, in the early case *of Teriah Joseph Ebah v Nigeria*[77] filed in 2014, the High Court of Lagos State dismissed the suit, with the very tenuous explanation that:

76 *Magaji* case (n 10).

77 Suit No FHC/ABJ/CS/197/2014.

> The applicant has no locus standi to bring this action on behalf of 'Gay Community in Nigeria' in any case there is nobody or organisation in Nigerian called lesbian, gay, bisexual and transgender (LGBT) community. Even the Applicant himself did not describe himself as a gay.[78]

In 2018, the strategic litigation case of *Pamela Adie v Corporate Affairs Commission*,[79] tested judicial attitudes towards the freedom of association and registration of queer organisations. In the suit, the plaintiff established that the Nigerian agency responsible for corporate registrations, the Corporate Affairs Commission (CAC), had refused to register the name 'Lesbian Equality and Empowerment Initiatives', applied for by the plaintiff. Consequently, the case was brought before the Federal High Court to establish the extent to which the rights to freedom of association and freedom of expression under the Nigerian Constitution and the domesticated African Charter were violated by the refusal to register.

In its decision, the Court agreed that 'the applicant has the right to form or belong to any association of her choice as provided by Section 40 of the 1999', to the extent that this right is limited by section 45 of the Nigerian Constitution. Section 45 of the Nigerian Constitution limits rights through 'any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health'. However, the Court did not give a reasoned decision on what qualifies as a limitation that is 'reasonably justifiable in a democratic society' and neither did it explain what thresholds would qualify as 'in the interest of defence, public safety, public order, public morality or public health'. Instead, the court simply decided that since there was a law – the SSMPA – which imposed a limitation on those rights, then the existence of the law itself was sufficient reason to deny the exercise of the rights. As such, the High Court avoided the responsibility of conducting a substantive judicial review of the SSMPA and accepted that the law was binding on the plaintiff simply by its existence. The case has currently gone on appeal.

A different approach to litigation, focusing on broad constitutional rights rather than discrimination on the basis of sexual orientation, was undertaken successfully in the 2014 case of *Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board*.[80] In this case, Ifeanyi, then the Executive Director of International Centre for Advocacy

78 As above.

79 Suit No FHC/ABJ/CS/827/2018. The author has been involved in this case at the appellate stage as an advisor to the counsel and litigant.

80 Suit No FHC/ABJ/CS/799/2014.

on the Rights to Health (ICARH), an organisation that focuses on the health of LGBT+ persons, was arrested at his office in Abuja by 15 police officers, armed with guns, allegedly on the orders of the Commissioner of Police. Throughout he was not informed of the reasons for his arrest. Meanwhile, the police searched and wrecked the office – without a warrant – and removed office equipment and advocacy materials. After the police officers unsuccessfully tried to extort him for money, he was then assaulted. He was released later on the same day and, within a few weeks, he initiated constitutional-rights litigation against the police. In 2016, the Court gave a judgment in favour of Ifeanyi and ordered the police to pay N1 000 000 in damages (approximately US$3 400 at the time) and to issue him a public apology. While this type of litigation can guarantee success in court, its strategic impact has been limited as it cannot be said to be a victory for the community but merely a victory for the litigant.

5 Some pertinent issues for queer lawfare in Nigeria

5.1 Repressive colonial laws versus modern constitutional rights

Queer lawfare in Nigeria will have to engage the continuing tension between the co-existence of repressive colonial laws on issues of sexuality and more progressive provisions of the Nigerian Constitution that recognise freedom of expression, the right to privacy, freedom from discrimination and freedom of association.[81] On the one hand, the Nigerian state often attempts to portray itself as a constitutional democracy with deep concerns for the protection of human rights – as evidenced by its record of ratifying core human rights treaties both globally and regionally. On the other hand, much of the legal system is based on colonial and military heritages that are autocratic in principle and incompatible with the human rights culture. Queer lawfare in Nigeria will require the resolution of this conflict. This requires the development of a judicial culture that interprets constitutional provisions progressively and not militaristically. The South African transitional jurisprudence and its utilisation of dignity

81 Sogunro (n 41) 54.

and equality to re-orient the legal system from apartheid-era principles is a noteworthy example of such a resolution.[82]

5.2 Northern versus southern criminal law templates

Despite the overarching jurisdiction of the SSMPA, Nigeria does not have a monolithic legal regime on queer issues. A developing queer lawfare environment will have to consider these geographical variations and the diversity of legal systems. For instance, most of Northern Nigeria has adopted the Sharia law provisions that stipulate punishments ranging from whipping to the death penalty depending on the gender and marital status of the parties involved. As such, Northern Nigeria utilises a criminal legal system that is derived from religious doctrine and thus more likely to generate resistance to court-ordered reform. In this case, lawfare will have to focus more on public engagement. Most of the southern Nigerian states continue to follow the colonial male sexuality focused colonial provisions stipulating punishment of three to fourteen years of imprisonment for different types of 'offences against morality'. Defining queer lawfare in Nigeria requires different approaches to these legal settings.

5.3 Federal versus state jurisdictions

Criminal law in Nigeria is often regulated by state (provincial) legislatures and prosecuted in state high courts except in issues where federal law has exclusive or concurrent jurisdiction. Until the enactment of the SSMPA, state law regulated issues around sexuality. Thus, Lagos State could repeal the 'offences against morality' provisions of the colonial criminal code. It is interesting that although the SSMPA purports to regulate marriage, which (with the exception of customary and religious marriage) is within exclusive federal law-making powers,[83] its substantive provisions touch on and criminalise sexual identity, some types of advocacy, as well as religious marriage all of which should ordinarily be under state law law-making jurisdiction. Nevertheless, the distinction between federal and state law-making jurisdictions suggests the possibility of an incremental approach to queer lawfare. A state-by-state (or regional) advocacy may be more effective than an attempt to reform the entire national legal system in one dash. Also, a progressive state government may undertake to challenge the

82 *S v Makwanyane* 1995 (3) SA 391 (CC).

83 Item 61, Schedule 2, Part 1 of the Nigerian Constitution.

constitutional authority of the federal government to make criminal laws governing conduct on non-federal issues.

5.4 Navigating politics, religion and culture

The debate on sexual orientation in the Nigerian political context has always been initiated and concluded by politicians and religious leaders whereas issues of the economy, public corruption and security are often the content of citizen protests and debates. Sexual orientation rarely forms content of public concern until political or religious influence triggers it as a distraction from more problematic areas. Public engagement on queer lawfare must engage this wider context by framing queer issues around wider social issues such as health education, healthcare for persons living with sexually transmitted infections, rape victims, and the provision of contraceptives. Lawfare can also navigate cultural arguments through an engagement with customary law issues. First, there is the understanding that Nigeria is a multi-ethnic society and no customary practice has precedence. Second, the question of what cultural practices have survived the 'repugnancy test' of colonialism is open to conversation.[84] For instance, as recently as 2017, a Nigerian court upheld a 1976 Supreme Court decision that ruled that an Igbo customary woman-to-woman marriage practice was 'repugnant'.[85] Engaging customary laws by highlighting these problematic aspects of judicial filtering can serve as a valid counter-argument against the notion that laws tolerant towards homosexuality are not African.

6 The effect of socio-political dynamics on queer lawfare

The current state of law in Nigeria means that gender identities continue to be regarded as 'universally' either male or female, while sexual orientation

84 Under colonial legacy laws of evidence in Nigeria, customary laws are not considered 'law' but 'facts' to be proven by evidence. For a proven customary law to be applied by the court, it had to be compatible with the 'Repugnancy Test', that is, it must not be: (i) repugnant to 'natural justice, equity and good conscience', (ii) contrary to public policy; and (iii) incompatible directly or indirectly with any existing law in force. The standards were colonial norms and many traditional practices have been struck down in legal decisions that relied on the Repugnancy Test.

85 *Eugene Meribe v Joshua C Egwu* (1976) LCN/2358 (SC), where the court had observed that: 'In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be the union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a 'woman to woman' marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant'.

is deemed as 'universally' heterosexual. There are no other recognised statuses. And, as noted previously, this legal position is derived from 19th century English legal perspectives that became domesticated within the Nigerian legal system. Any gender identity or sexual orientation outside this purview is, therefore, not just likely to be criminal but also imaginary and thereby 'un-legal'.

Yet, despite the non-legal status of lesbian, gays, transgendered, questioning, or intersex persons, the Nigerian legal system has crudely – even if by prohibiting it – recognised the existence of a 'gay' sexuality within the confines of the SSMPA. For example, section 4(1) of that law states that: 'The registration of gay clubs, societies and organizations, their sustenance, processions and meetings is prohibited'. Similar 'gay club' phrasing is used in other provisions of the law without any attempt to legally define what constitutes a 'gay club' or what being 'gay' presupposes (beyond, probably, the pedestrian understanding that it refers to men who have sex with men). But, of course, this is a simplistic usage of the word, reflecting popular imagination of 'gay bars' rather than implying any concise terminology, and so it can hardly be used as a solid argument in support of a *prima facie* legal acknowledgement of diverse sexual orientations in Nigeria. Still, from a 'half-full' perspective, the fact that Nigerian law has utilised the word 'gay' – as opposed to the colonial description of 'carnal knowledge against the order of nature' – is itself a type of legal development on sexual orientation.

While the ultimate nature and legal implications of a legal reference to 'gay' remains unknown, we can still contrast its usage in the SSMPA with the absence of other aspects of sexual orientation and gender identity. For example, there is no direct legal mention of lesbians, transgendered persons, questioning or intersex persons – not even in passing. Instead, these other expressions of sexuality and gender are swept into the broad range of 'same sex amorous relationship' irrespective of the practical reality of that description. In this way, both non-heteronormative gender identity (whether publicly or privately expressed) and non-heteronormative sexual orientation (whether actual or perceived) are legally lumped into the same categorisations and criminalised.

Ideally, all these legal quandaries would make for an interesting queer lawfare environment. However, the use of the courts and the contestation of rights has been diminished by the near surreptitious nature of the legislation process. As the series of polls since 2013[86] have shown, a majority of Nigerians are not aware of – or even interested in – the issues

86 NOI Polls (n 62) above.

generating these debates, and even where they support the law, they are not aware of the contents, relying simply on their religious notions of sexuality and popular political rhetoric. Queer lawfare in Nigeria may not make significant progress until public consciousness on the importance of safeguarding rights is increased, through a deliberate push by queer activists to raise public awareness on the importance of a broader human rights system. In recognition of this challenge, some queer activists and organisations have started to mainstream their work by intersecting with and engaging other issues including art and literature, women's rights and transparent and open government.

7 Conclusion

This chapter paints a broad picture of the political and legal history of the criminalisation of same-sex relationships in Nigeria and the impact this has had on queer activism and queer lawfare. While it is clear that Nigeria continues to suffer from a dearth of legal engagement, it is equally clear that queer activists have not simply given up and, instead, are beginning to go against the unkind nature of the legal environment, finding ways to engage lawfare directly through strategic litigation and the court system and indirectly through a public contestation of the human rights space. Nevertheless, the situation remains uncertain, and the next few years may be more indicative of the direction in which things will move.

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PART III:

Lawfare in the context of religious and cultural nationalism

8

LGBT LAWFARE IN RESPONSE TO HETEROSEXUAL NATIONALISM AND THE RETENTION OF THE ANTI-SODOMY LAWS IN ZAMBIA

*Landilani Banda**

1 Introduction

According to an Afrobarometer survey, Zambia ranks as the eighth most homophobic country on the African continent, recording only 7 per cent tolerance levels of sexual and gender minorities, with the most tolerant, Cape Verde, scoring 74 per cent and the least, Senegal recording 3 per cent.[1] This may come as a surprise, considering that Zambia hardly makes the news for homophobia compared to equally low-ranking countries on the continent. However, attention was drawn to Zambia when in 2019, the American Ambassador condemned the sentencing of a homosexual couple to 15 years in prison.[2] This attracted international attention when the Zambian government requested his recall, with the President stating that 'Zambia would do without USAID if America ties homosexuality to aid'.[3] The statement expressing government policy on sexual and gender

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1 B Dulani, G Sambo & KY Dionne 'Good neighbours? Africans express high levels of tolerance for many, but not for all' Afrobarometer Dispatch 74 (1 March 2016) 12 https://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno74_tolerance_in_africa_eng1.pdf (accessed 21 February 2021). While the survey presents data collected in 2016, it is still reflective of the general attitudes that are held about sexual and gender minorities in Africa.

2 'US press statement on the severe LGBTI sentencing in Zambia' issued on 29 November 2019. The statement can be found at 'Jailing of Kapiri gay couple to 15 years horrifies US envoy' *Lusakatimes* 29 November 2019 https://www.lusakatimes.com/2019/11/29/jailing-of-kapiri-gay-couple-to-15-years-horrifies-us-envoy/ (accessed 30 January 2020).

3 See 'US recalls ambassador to Zambia after gay rights row' *BBC* 24 December 2019 https://www.bbc.com/news/world-africa-50901537; and 'US ambassador recalled after dispute with Zambian government over gay rights and corruption' *CNN* 25 December 2019 https://edition.cnn.com/2019/12/25/politics/daniel-foote-zambia-ambassador/index.html (both accessed on 21 February 2021).

minorities was supported and applauded by religious and traditional leaders as well as the Zambian public at large.[4] To the sexual and gender minority rights' community and their allies, it was a reminder that LGBT lawfare would not be easy in Zambia.[5]

Zambia criminalises consensual same-sex relations through the Penal Code, and occasionally sexual and gender minorities get arrested for engaging in consensual same-sex conduct. Despite this, there have not been any cases brought to court to directly challenge the criminalisation of consensual same-sex conduct or for the enforcement of LGBT rights. As such the nature of lawfare over LGBT rights in Zambia is limited to the state opposing the recognition of LGBT persons, and LGBT groups organising and pushing back. This chapter discusses the LGBT lawfare in response to heterosexual nationalism in Zambia. It starts by discussing the nature of heterosexual nationalism in Zambia, then highlights the impact of heterosexual nationalism and the anti-sodomy laws on the rights of sexual and gender minorities. The Chapter further discusses the LGBT response to the heterosexual nationalism, and the anti-sodomy laws. It concludes with recommendations on how the sexual and gender minorities movement can effectively engage in LGBT lawfare in Zambia.

2 Legal framework: Zambia's anti-sodomy laws

Zambia is among the 30 African states that criminalise consensual same-sex sexual conduct between adults.[6] It does so through the Penal Code, Chapter 87 of the Laws of Zambia, and in particular sections 155, 156 and 158. These provisions fall under the heading 'offenses against morality' and the sub-heading, 'unnatural offences'. The provisions were adopted at independence in 1964 from the British colonial government and have remained the same except for an amendment in 2005.[7] This amendment

4 S Mansoor 'Zambia says US Ambassador's position "no longer tenable" after he criticised the gay rights record' *Time Magazine* 29 December 2019 https://time.com/5755538/us-ambassador-zambia-recalled/ (accessed 11 June 2022).

5 In this Chapter, sexual and gender minority rights are LGBT rights are used interchangeably.

6 See Human Dignity Trust 'Map of countries that criminalise LGBT people' (2022) https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/ (accessed 11 May 2022). At the time of this book chapter the latest country to decriminalise its anti-sodomy laws in Africa was Botswana which did so in December, 2021.

7 Parliament of Zambia *Hansard*, 9 September 2005. The amendment in 2005 was not a direct act of LGBT lawfare against sexual and gender minorities. Rather it was motivated by the moral panic at the time in relation to the protection of children from sexual abuse. As such, the Zambian Legislature increased the punishment for sexual offences in relation to children, to life imprisonment across the board. As such, section 155(c)(i) was introduced, making 'carnal knowledge against the order of nature

increased the punishment from a *maximum* of 14 years, to a *maximum* of life imprisonment and *minimum* of 15 years. The amendments did not attract any international attention. As it stands section 155 states that any person who has carnal knowledge against the order of nature or permits a male person to have carnal knowledge of him or her is liable upon conviction to imprisonment for not less than 25 years and may be liable to imprisonment for life. Section 156 states that any person who attempts to commit any of the offences specified in section 155 commits a felony and is liable, upon conviction of not less than seven years but not exceeding 14 years. Section 158 criminalises gross indecency 'whether in public or private between persons of the same sex or *any other person* (male or female)[8] and carries a penalty of 25 years in prison'. The provisions were drafted based on the Queensland Criminal Code, first introduced to Africa in Northern Nigeria, then to Colonial East Africa and later to Malawi and finally Zambia.[9]

These provisions, constituting the anti-sodomy laws of Zambia, are often misunderstood and misinterpreted/mischaracterised to mean that they criminalise homosexual identity rather than the conduct described in the relevant provisions. Therefore, they are exclusively applied against homosexual persons and other sexual and gender minorities in Zambia, even where acts of sodomy or gross indecency have not occurred. However, from a strict criminal law point of view, sexual orientation and gender identity are not elements of the offences. The provision itself is self-evident in that '*any* person who has carnal knowledge with another person or permits a *male* person to have carnal knowledge of *him* or *her*' – signifying that the conduct can either be *heterosexual* or *homosexual*. Two aspects stand out regarding the identity of the actors in the offence. First, the generality of the provision in stating that 'any person' implies that heterosexual, homosexual, gender non-conforming and all other categories or identities are included. Second, 'permitting a male person to have carnal knowledge of *him* or *her* against the order of nature' signifies both homosexual and heterosexual sodomy. In essence, the provision is

with a child' liable to punishable for a minimum of 25 years and maximum of life imprisonment. The same penalty applied to rape and defilement of children.

8 Emphasis added.

9 'Criminal laws on homosexuality in African nations' (2020) *Global Legal Research Center* https://www.loc.govsearch/?fa=partof:law+library+of+congress&q=homosexuality+in+Africa (accessed 21 February 2022). For a detailed discussion of how the anti-sodomy laws came to Africa and eventually to Zambia, which was the last country to have a Penal Code in Commonwealth Africa, see HF Morris 'A history of the adoption of codes of criminal law and procedure in colonial Africa 1876-1935' (1974) 18 *Journal of African Law* 6; and R O'Regan 'Sir Samuel Griffith's Code Criminal Code' (1991) 7 *Australian Bar Review* 141.

indiscriminate regarding sexual orientation or gender identity, and by its exact drafting, rules out the exclusive applicability of the provisions to sexual and gender minorities.[10]

These provisions are justified and retained on the grounds of religion, morality, and culture. In Zambia they are particularly justified and retained on the basis that the Constitution 'acknowledges the supremacy of God Almighty and declares the Republic of Zambia as a Christian Nation while upholding a person's right to freedom of conscience, belief or religion'.[11] While the legal effect of the declaration is debatable, in no other issue has the declaration been referred to the more than in the political mobilisation and lawfare against sexual and gender minority rights with the view of retaining the anti-sodomy laws in Zambia.[12] In effect, the justification for, and the retention of the anti-sodomy laws represents a form of heterosexual government rationality (governmentality)[13] that contests the diversity of sexual citizenship, while respecting other diverse forms of citizenship such as religious and political citizenship.[14]

Considering the above, I argue that Zambia has created a form of 'heterosexual nationalism' that informs their retention of anti-sodomy laws

10 Notably no heterosexual couples have been arrested under the anti-sodomy laws. This lends to the conclusion that the laws are understood to apply exclusively to sexual and gender minorities in Zambia. See S Pierre 'Exploring discourses and actions of othering homosexual citizens by officers of the Zambia Police service in Lusaka, Zambia' Master's dissertation, Van-Hall Larenstain University of Applied Science, 2013.

11 Preamble of the Constitution of Zambia, para 1. In 1991, following a constitutional review process, Zambia was declared a Christian nation through a clause in the Preamble. Subsequent constitutional amendments in 1996 and 2016 retained the declaration with the majority of the population supporting the retention of the declaration. For a detailed discussion of the declaration see AM Cheyeka 'Zambia, a "Christian nation" in the post Movement for Multiparty Democracy (MMD) era, 2011-2016' (2016) 6 *International Journal of Humanities and Social Sciences* 167.

12 A Van Klinken 'Homosexuality, politics and Pentecostal nationalism in Zambia' (2014) 20 *Studies in World Christianity* 259.

13 M Foucault 'Governmentality' in C Gordon et al (eds) *The Foucault effect: Studies in governmentality* (1991) 88; and C Gordon 'Government rationality: An introduction' in C Gordon et al (eds) *The Foucault effect: Studies in governmentality* (1991) 1-3. Gordon notes that concept of governmentality can be understood from different perspectives. This chapter uses the concept in the context of how government rationalises its decisions and what informs this rationality. Foucault himself states that 'governmentality is a zone of research not fully formed and hence the concept itself is not a full product' but can be referred to in different contexts that relate to political power.

14 M Waites 'United Kingdom: Confronting criminal histories and theorising decriminalisation as citizenship and governmentality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the commonwealth: From history and law to development activism and transnational dialogue* (2013) 145, 174.

despite the harm that these laws cause on sexual and gender minorities. For this purpose, I define heterosexual nationalism as a governmentality that rejects the diversity of sexual citizenship using the principles of nationalism and state sovereignty to affirm a constructed heteronormative culture and identity which is protected by the retention of anti-sodomy laws.[15] Heterosexual nationalism therefore contests the recognition of sexual and gender minorities as a vulnerable class of citizens but instead labels them as social, cultural, and religious deviants. In this regard, heterosexual nationalism is the ground on which lawfare is waged against sexual and gender minorities in Zambia.

3 Heterosexual nationalism and the justification for retaining the anti-sodomy laws in Zambia

3.1 The nature of heterosexual nationalism

Primarily this chapter contends that heterosexual nationalism in Africa generally and Zambia in particular, has a number of characteristics; it perceives Western liberal democracies as an enemy that advocates the rights of sexual and gender minorities; it is sustained by the state but driven by both state and non-state actors such as the media, religious and traditional leaders; it rationalises the retention of anti-sodomy laws as a deterrence to homosexuality; it feeds the mischaracterisation of the anti-sodomy laws; it rationalises the negative impact of these laws on sexual and gender minorities as a justified consequence of their sexual deviance; it stands on the principles of state sovereignty whenever calls for decriminalisation are raised and ignores international human rights obligations with regard to sexual and gender minorities (human rights exceptionalism). Heterosexual nationalism also views sexual and gender minorities as a threat to Zambia's nation-statehood and thus excludes them from the construction of 'nation' and 'nationality' thereby denying them their citizenship rights. In Zambia, as in other heterosexual nationalist countries heterosexuality is therefore seen as the decent and normal sexual citizenship that fulfils this ideal. In this regard, Van Klinken rightly observes that in Zambia

> [a] discourse of national belonging is anchored on a script of family values. Following this script church organisations [in agreement with the state] not only reinforce a normative, exclusively heterosexual definition of the nation, but also explicitly support the state's criminalisation of same-sex practices. Appealing to the [B]ible and the divine order of creation, as well as to an invented traditional Zambian or African culture, they 'baptise' a post-colonial

15 A country that affirms heterosexual nationalism is referred to as a '*heterosexual nation*' for purposes of this book Chapter.

> Zambian nationalist ideology in which heterosexuality is normalised while homosexuality is suppressed and construed as a threat to the nation's moral order.[16]

An example of the extent and emotive nature of the discourse and expressivity of heterosexual nationalism and its complementary relationship with the mischaracterisation of the anti-sodomy laws in Zambia can best be illustrated by looking at the Zambian political leadership's reaction to Ban Ki-moon's statement during his visit to the country in 2012, in his capacity as United Nations Secretary General (UNSG). Ki-moon urged the Zambian government to 'improve its human rights protection by taking advantage of the current constitution making process to prohibit discrimination on the basis of race, gender, age, *sexual orientation*, *gender identity* and disability'.[17] In response to this statement, the political leadership (reflecting and in unity with the general public) expressed considerable discontent, charging that Ki-moon was misguided because he wished 'to promote homosexuality in Zambia', something which was understood as un-Zambian. Spearheading this displeasure, the political and religious leadership more broadly retorted that 'homosexuality is illegal under the penal code' and that these anti-sodomy laws are necessary to preserve Zambia's sovereign declaration as a Christian nation as well as its cultural and moral values.[18] In the same vein, opposition political leaders responded by stating that the UN and the government had conspired to legalise homosexuality in Zambia and that they would not support its decriminalisation in Parliament.[19]

The net outcome of the visit by the UNSG was that the words 'vulnerable and marginalised groups' were deleted from the discrimination clause of the draft Constitution, which was in the drafting process at the time. Demanding this outcome, the Church mother bodies made a joint statement, which read as follows:[20]

16 Van Klinken (n 12) 256.

17 Speech of the former UNSG Ban Ki-moon, delivered to the Parliament of Zambia on 24 February 2012 UNSG 'Secretary-General's remarks to the National Assembly of the Republic of Zambia [as delivered]'(24 February 2012) https://www.un.org/sg/en/content/statement/secretary-general-remarks-national-assembly-republic-zambia (accessed 6 September 2019) (emphasis added).

18 'Zambia: Ban Ki Moon calls for respect of homosexuals and lesbians' *Lusaka Times* 25 February 2012 https://www.lusakatimes.com/2012/02/25/ban-kimoon-calls-respect-homosexuals-lesbians (accessed 6 September 2019).

19 As above.

20 Joint press statement of the church mother bodies issued on 4 September 2014 (emphasis added).

> As a matter of public concern, it is in this light that some churches have submitted to the Technical Committee of the constitution making process to spell out categorically who the *minority* and *marginalised* groups implied in Article 60 of the first draft constitution really are ... This is so because we do not want to end up with a situation where advocates for homosexuality and related rights sooner or later resort to use or misuse of Article 60 to champion their rights.

The unfolding of events is telling of the religious nature of heterosexual nationalism in Zambia. Also featuring prominently in the discourse of heterosexual nationalism is the assertion of state sovereignty and human rights exceptionalism. The collective discontent with the UNSG's statement to respect the rights of sexual and gender minorities and the subsequent amendment of the draft constitution was seen as Zambia standing up to international bullying in the name of human rights and asserting its sovereignty. In 2019 these themes were fully expressed when the President requested the American Ambassador to Zambia to leave the country following his statement on the conviction and sentencing of two gay men under the anti-sodomy laws.[21] In what has been termed as uncharacteristic and strong from a diplomat, the American Ambassador issued a press statement expressing his disappointment with the sentences adding that corrupt Zambian politicians never receive such hash sentences.[22] In reaction, the President requested for the American Ambassador to be recalled, and during a television interview stated:[23]

> The Ambassador has insulted our collective wisdom as Zambians. I think a retraction or apology can do but I don't know how far this issue will go because already the US is tying this issue to Aid. If that is how you are going to bring your Aid then I am afraid the West can leave us alone in our poverty, and we shall continue scrounging and struggling on our own and get ourselves going. No amount of money will change Zambia's views on homosexuality.

The two incidents outstandingly bring out the narrative of heterosexual nationalism in Zambia. Hoad has commented on such instances stating that homophobic strands in African nationalism represent a displaced resistance to perceived and real encroachments on neo-colonial national

21 *Lusakatimes* (n 2).

22 'US press statement on the severe LGBTI sentencing in Zambia' issued on 29 November 2019 (n 2).

23 The Presidents interview and statements can be accessed on 'Zambia's president says "no to homosexuality"' *Sky News* 2 December 2019 https://www.youtube.com/watch?v=DyNQGrwt7Ig&app=desktop (accessed 30 November 2020).

sovereignty by economic and cultural globalisation.[24] Heterosexual nationalism manifests in three forms in Zambia: religious (Christian), cultural and moral.

3.2 Religious/Christian heterosexual nationalism

Religious heterosexual nationalism identifies itself with a particular religion and contests sexual diversity based on the teachings of that religion on human sexuality. In Zambia, religious nationalism is based on the political and constitutional declaration that 'the Republic is a Christian nation'.[25] The declaration was first made by then President Fredrick Chiluba in 1991.[26] Chiluba, himself a Pentecostal Christian, was supported by Pentecostal leaders who had gained prominence by criticising the socialist style of the previous government under the United National Independence Party (UNIP) which they termed as 'evil'.[27] Cheyeka observes that after the speech, 'no other politician would dare go back on this declaration as political mobilisation was centered around Pentecostal affiliation'.[28] To this end, sexual and gender minorities have been made a symbol of evil following the story of Sodom and Gomorrah, and thus their persecution and the retention of the anti-sodomy laws is interpreted as living up to the theo-political aspiration of Zambia. To affirm this aspiration, the declaration was later enshrined in the first line

24 N Hoad *African intimacies: Race, homosexuality and globalization* (2007) xii. While the encroachment on African states sovereignty is – in many instances a perception – it is also real in others and this sends African leaders on the defence. The victims are usually sexual and gender minorities who suffer the backlash of this neocolonial sovereignty battle between Africa and the West. M Epprecht *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* (2013) has cautioned that while Western commentary on the rights of sexual and gender minorities is important, it can lead to unprecedented back class for sexual minorities in Africa as they become the victims of political defiance of the state. In this regard he suggests that mobilisation against homophobia would be more progressive if predominantly done by local civil society organisations and human rights activists.

25 CJ Kaunda 'From fools for Christ to fools for politicians: A critique of Zambian Pentecostal Theo-political imagination' (2017) 41 *International Bulletin of Mission Research* 296 https://journals.sagepub.com/doi/pdf/10.1177/2396939317730694 (accessed 1 December 2020), see also I Phiri 'President Fredrick Chiluba of Zambia: The Christian nation and democracy' (2003) 33 *Journal of Religion in Africa* 401.

26 As above. The speech and the events were captured in a propaganda documentary sponsored by local and international evangelicals. See 'Miracle in Zambia: Prayers of the First President – A TeamZambia Films Production' https://m.youtube.com/watch?v=gIZDvJF5-D8 (accessed 2 December 2020).

27 Kaunda (n 25) 1-3.

28 AM Cheyeka 'Zambia, a "Christian nation" in the post Movement for Multiparty Democracy (MMD) era, 2011-2016' (2016) 6 *International Journal of Humanities and Social Sciences* 167.

of the Preamble of the Constitution. The Preamble does not have legal force but its contents express the spirit of the Constitution and as such the basis on which the Constitution, laws (such as the anti-sodomy laws as seen below) and policies are interpreted in Zambia.[29] As such Christian retentionists of the anti-sodomy laws in Zambia base their argument on the supremacy of the Constitution by stating that in a democracy, the constitutionally expressed will of the people should be reflected in the law.[30] This rhetoric of Christian nationalism is predominantly driven by Pentecostal Christian churches who perhaps have the most influence in the discourse on sexuality in Zambia. As observed by Van Klinken

> [i]n Zambia this is even more apparent because it is the only country on the continent where Pentecostal Christianity has shaped a popular, constitutionally embedded sense of national identity … the constitutional and political configuration of Zambia as a Christian nation clearly shapes and defines the debates and politics concerning homosexuality and LGBTI rights. [31]

The influence of Pentecostalism on legal and political discourses in Zambia reveals a strong relationship between church and state. Notably while in other countries religious based heterosexual nationalism is influenced or even driven by Western far-right Christian movements,[32] in Zambia such influence is present and the discourse is driven by local Pentecostal churches.[33]

3.3 Cultural heterosexual nationalism

Like Christian heterosexual nationalism, cultural heterosexual nationalism is also a strong basis for the retention of anti-sodomy laws in Zambia. Cultural heterosexual nationalism is broadly grounded on the narrative that Africa is organically heterosexual; that pre-colonial African societies did not have diverse forms of human sexuality and therefore that 'homosexuality is unAfrican'.[34] In this regard cultural nationalists argue

29 A Chanda *Constitutional law in Zambia: Cases and materials* (2011) 11-17. See also art 388, Constitution of Zambia, Act 2 of 2016.

30 Kaunda (n 25) 13.

31 A Van Klinken 'Gay rights, the devil and the end times: Public religion and the enchantment of the homosexuality debate in Zambia' (2013) 23 *Religion* 519.

32 See K Kaoma 'The paradox and tension or moral claims: Evangelical Christianity, the politicisation and globalisation of sexual politics in sub-Saharan Africa (2014) 2 *Critical Research on Religion* 227.

33 Van Klinken (n 12) 254.

34 S Murray & W Roscoe (eds) *Boy wives and female husbands: Studies in African homosexualities* (2001) 9.

that 'homosexuality is exported from the West into Africa to disrupt African cultural values'.[35] An extended arm of cultural heterosexual nationalism is that African civil society organisations that use rights talk to further the rights of sexual and gender minorities in Africa are sponsored by the West.[36] In essence cultural heterosexual nationalism in Africa generally, as an offspring of African cultural nationalism, is a contestation of what is perceived as western value systems and a rejection of what is deemed as 'unAfrican' and 'bad for' Africa.[37]

Cultural heterosexual nationalism takes two basic forms in Zambia and perhaps in other heterosexual nationalist states in Africa. These are political and religious. Religious based cultural heterosexual nationalism is driven by religious and traditional leaders who link African religious morality and value systems to Christian moral ethics on sexuality. Van Klinken observes that both

> in popular discourse and in the rhetoric of political and religious leaders, Christianity and Zambian culture are strangely deployed as almost interchangeable canons for arguing against homosexuality, which is considered un-christian, un-Zambian and un-African.[38]

The interchangeable use of religion and culture in highly Pentecostalised countries like Zambia is strange and surprising because 'Pentecostalism generally presents the rhetoric of breaking with the past and is not interested in authentic Africaness' which it associates with witchcraft.[39]

Political-based cultural nationalism is driven by political leaders who view non-heteronormative sexualities as impositions from Western governments. To a large extent, political based cultural heterosexual nationalism rejects the minority rights thesis using cultural relativism and human rights exceptionalism as opposed to the universality of human rights. In this context culture is 'used' as a legitimate basis to politicise sexuality with expected favourable outcomes. Gloppen and Rakner define politicisation as the process by which a social phenomenon (in this case sexuality) becomes the basis of mobilisation by societal and political actors, who turn it into an issue of major political significance, as a subject

35 As above.

36 M Epprecht *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* (2013) 11.

37 Epprecht (n 36). See also M Epprecht *Heterosexual Africa? The history of an age of exploration the age of AIDS* (2008).

38 Van Klinken (n 12) 24.

39 As above.

of heated public arguments, mobilisation and conflict.[40] The critical nature of politically charged cultural heterosexual nationalism was best illustrated in the events that led to the American Ambassador's recalling from Zambia, discussed above.

3.4 Moral heterosexual nationalism

Moral heterosexual nationalism holds that homosexuality is immoral and sponsors heterosexuality as the decent, respectable and natural form of sexual citizenship. It is premised on deviance theory arguing that homosexuality is a choice and represents a deviation from what are perceived as organic heteronormative societies like Zambia.[41] To ensure a decent society, moral heterosexual nationalism therefore, postulates that one of the functions of law is to enforce morals, for example through the ant-sodomy laws.[42] Thus, most anti-sodomy laws are termed laws against 'morality and the order of nature'. This view, founded in natural law theory, contests the postulation that the realm of law is to prevent public harm and not to delve in the private lives of citizens, such as consensual same-sex relations.[43] In essence moral nationalism holds that sexual citizenship, public or private falls under the purview of the law.

Continuing the above legacy, morality was added as a constitutional value and basis for interpretation in the 2016 constitutional amendment. Article 8 was introduced in the 2016 amendment to make certain that Zambia does not lose its history of upholding morality as the basis for law, policy and governance. Moral arguments to sustain the anti-sodomy laws are thus partly made based on article 8 of the Constitution, which states that morality and ethics should guide the interpretation of the law. In this regard it can be argued that Zambia took a natural law point of view by relating law with morality. With respect to sexual and gender minorities, Delvin's view is taken that the law should be a tool to combat the immorality of homosexuality.[44] Opposed to this view is the positive school of thought which argues in favour of the separation thesis – that

40 S Gloppen & L Rakner 'LGBT rights in Africa' in C Ashford & A Maine (eds) *Research handbook on gender, sexuality and law* (2020) 198.

41 Van Klinken 'Sexual citizenship in postcolonial Zambia: From Zambian humanism to christian nationalism' in B Bompani & C Valois (eds) *Christian citizens and the moral regeneration of African state* (2017) 136-137; A van Klinken 'Religion, sexualities and politics' in J Chammah et al (eds) *Competing for Caesar: Religion and politics in postcolonial Zambia* (2020) 85.

42 P Delvin *The enforcement of morals* (1965) 15.

43 L Fuller *The morality of the law* (1964) 33-38.

44 Delvin (n 42) 151.

law and morality should be separated.[45] While the meaning of article 8 in terms of what constitutes morality has not yet been a subject of litigation in the judicature of Zambia, its use has been mianly in lawfare against sexual and gender minority rights by political and religious leaders.

4 The impact of heterosexual nationalism and the mischaracterisation and misapplication of the anti-sodomy laws in Zambia

The anti-sodomy laws of Zambia more than being a product of colonialism, represent coloniality, in that they are mainly a sustained commodity of heterosexual nationalism. Once retained at independence the laws took a life of their own in the post democratisation era but retaining aspects of the colonial governmentality on which they were first conceived. As stated in the introductory note, these laws, retained, nurtured, and mobilised through heterosexual nationalism, are mischaracterised, and misapplied as anti-homosexual orientation and identity laws. The mischaracterisation and misapplication have adverse effects on the rights of sexual and gender minorities in breach of Zambia's human rights legal obligations.[46] This consequent breach, seen through the eyes of heterosexual nationalism, is often perceived as legitimate or ignored as insignificant, because the victims (sexual and gender minorities) are labelled as deviants and constituting a criminal population.

As stated earlier, pure criminal law analysis of the provisions reveals that it is not an ingredient of the offence to prove that a person is a homosexual, for that person to be convicted. In the same light, it is not a defence for a person to argue that they are not homosexual to be acquitted. However, the provisions are misunderstood to be anti-homosexuality laws and therefore applied exclusively against sexual and gender minorities in Zambia.[47] Homosexuality, itself is misunderstood to mean anal sex and all sexual and gender minorities, including intersex persons are categorised as homosexual.[48] The net result is that society and the drivers of heterosexual nationalism have converted sodomy into a term synonymous to homosexuality. To this 'end, a homosexual is seen as synonymous to a sodomite and a sodomite synonymous to homosexual'.[49] In essence sexual

45 HLE Hart *Liberty and morality* (1963) 11.

46 For a full discussion see Panos Institute of Southern Africa *Towards non-discrimination on the basis of sexual orientation and gender identity in Zambia* (2013) 3-11.

47 Pierre (n 10) 31-33.

48 As above.

49 CR Leslie 'Creating criminals: The injuries inflicted by "unenforced" sodomy laws' (2000) 35 *Harvard Civil Rights-Civil Liberties Law Review* 103 at 110.

and gender minorities in Zambia, suffer the label of deviant criminals without actually committing any crime, or having any criminal record. Leslie puts this point as follows:[50]

> Sodomy laws do not merely express societal disapproval, they go much further by creating a criminal class. The contours of criminal class are not defined by conduct, but by sexual orientation regardless of whether one's desires are ever manifested in conduct. Sodomy laws do not merely define the fluid boundaries of a social class, rather they achieve indirectly what the states cannot do directly; criminalise homosexuality.

In the landmark decision of *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the South African Constitutional Court explained this as follows:[51]

> It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of the regulatory control, conduct that deviates from some publicly established norm is usually only punished when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because its deviant. It is repressed for its perceived symbolism rather than because of its proven harm … Thus, it is not the act of sodomy that is denounced, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony.

The mischaracterisation has macro and micro effects. The macro effect is that it has created a legal and social environment where discrimination, marginalisation and violent homophobic attacks are seen as legitimate and therefore perpetrated against sexual and gender minorities in Zambia.[52] In this sense sexual and gender minorities are not seen as holders of human rights but rather as social deviants who deserve the attacks and other forms of human rights violations that are perpetuated on them.

Based on their mischaracterisation as laws against homosexual orientation, the anti-sodomy laws are misapplied to give effect to heteronormativity against sexual and gender minorities. Seen as legitimate, the misapplication of anti-sodomy laws in Zambia is at two levels: societal (public) and institutional. Nurtured by heterosexual nationalism, at

50 As above.

51 (1998) ZACC 15.

52 Panos Institute (n 46) 11-17.

societal (public) level, the anti-sodomy laws are among the few laws where society or the public deems it justifiable to take matters into their own hands regarding their enforcement.[53] In this regard 'mob-justice' energised by heterosexual nationalism is usually carried out against sexual and gender minorities under the guise of citizens' responsibility to maintain public morality and the declaration of Zambia as a Christian nation.[54] These violations occur with the full awareness of the state who turn a blind eye to them. It is worth probing the social psychology behind the mob misapplication of law in the context of sexual and gender minorities. Rich explains that heterosexual socialisation breeds subconscious hatred for sexual and gender minorities, translating to violence in 'conducive' environments such as heterosexual nationalism.[55]

At an institutional level, the anti-sodomy provisions are misapplied by both state and non-state actors. Among state actors are the police, healthcare institutions and the media, both public and private. A report by the Transbantu Association of Zambia (TBZ) supported by the United States Agency for International Development (USAID) documented disturbing violations of human rights against sexual and gender minorities by Zambian police (ZP) officials in the form of rape, assault, extortion, unlawful detention and torture.[56] For instance 32 per cent of the 'female' transgender participants that were interviewed in the TBZ survey, alleged that they were raped and assaulted by police.[57] A similar statistic was recorded in a USAID/Family Health International (FHI360) 'Open Doors Project Report'.[58] The report indicates that sexual and gender minorities are abused by both the police and the public but that these cases of abuse are never officially recorded as sexual minorities fear further victimisation.[59] In most instances sexual minorities are 'outed' by arrest and this leads to a whole range of suffering which includes media harassment, loss of family support, loss of employment and generally a

53 R Rich *The sociology of criminal law: Evaluation of the deviance of the Anglo-American society* (1979) 7.

54 Transbantu Association of Zambia (TBZ) *Findings of Human Rights Violations Report 2013-2015* (2016) 15, quoting a victim of violence and abuse in Zambia, National Scientific research Centre & Panos Institute Southern Africa 'Combating HIV among men having sex with men in Zambia' (2016) 22.

55 Rich (n 53) 27.

56 TBZ (n 54) 3-13.

57 TBZ (n 54) 46.

58 USAID/FHI360 'Understanding the legal barriers to accessing HIV/AIDS services by key populations: Key findings from expert panel meetings' (2019) 11-12 https://www.fhi360.org/resource/understanding-legal-barriers-accessing-hivaids-services-key-populations-findings-expert (accessed 20 December 2021).

59 As above.

normal way of life. The depth of the problem is highlighted in a study on wellbeing of sexual and gender minorities in Zambia which captures the experience of violence as follows:[60]

> The levels of physical violence among sexual and gender minority people in our Zambian study are not only higher than the levels of violence among the general Zambian population, they are also higher than the levels of violence among sexual and gender minority populations elsewhere in the world. For example, in Virginia, USA, 27% of transgender people participating in a community-based survey said they had experienced physical violence in their lifetime. In our Zambian study it was 64% of gender minority participants. In a study among transgender women who have a history of sex work, also done in the US, 51% of participants said they experienced physical violence in their lifetime. In our Zambian study, 68% of transgender women had experienced physical violence.

Non-state actors misapply the anti-sodomy laws in much the same way as state actors. For instance, between September and November 2017 one of the leading private newspapers run a series of reports against sexual minorities and called for enforcement of the law through homophobia.[61] The report series led to the closure of the 'Key populations' clinic which was run privately by FHI-360 but did not lead to any arrests.[62]

5 LGBT lawfare in response to heterosexual nationalism and the impact of the anti-sodomy laws

5.1 The genesis

LGBT lawfare in response to heterosexual nationalism and the impact of the anti-sodomy laws started in the early 1990s following the end of one-party rule. Arguably, LGBT rights talk and pushback against the anti-sodomy law was one of the immediate consequences of the

60 A Muller & K Daskilewicz 'Are we doing alright? Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in Zambia' (2019) 44.

61 'Homosexuality business shocker' *The Daily Nation* 9 November 2017; 'Homosexuality is not Zambian' *The Daily Nation* 8 January 2018. All these stories were published as the main front page stories. In 2016 during the Constitution making process the paper had carried a series of stories inciting members of the public to rise against 'inclusion of gay rights in the constitution'. The United States Government through their embassy in Zambia reacted to this stating that the paper had misrepresented facts http://www.lusakatimes.com (accessed 26 December 2020).

62 'Secret gay indaba' *The Daily Nation* 7 November 2017.

democratisation phase in post-colonial Zambia. After the return to multi party politics in 1990, the MMD, as the main opposition political party stood on the ticket of democracy, the rule of law and the state's respect for human rights and freedoms which the citizens had lost during the one-party dictatorial rule of UNIP. Once in power the MMD adopted neo-liberal policies, which required a more open society and respect for human rights. However, the MMD government's declaration of Zambia as a Christian nation at the dawn of democracy is the main basis for anti-sexual and gender-minority rights mobilisation in Zambia and thus set the scene was for LGBT lawfare.

5.2 Organisational mobilisation

Sexual and gender minority rights mobilisation against the anti-sodomy laws became a public issue for the first time in Zambia in 1998, when Francis Chishambisha, a college student, publicly came out announcing that he was gay and also shared his lived experiences of constant human rights violations and helplessness.[63] He therefore announced that he and his friends intended to form an organisation called the Lesbian, Gay, Bisexual and Transgender Association (LEGATRA) to advocate for the rights of sexual and gender minorities.[64] The story was covered as a three-page article in *The Post*, a private-owned newspaper. The background to the article is that Chishambisha walked to the *Post* newspaper offices, told the reporters that he was gay and asked if they could interview him and cover his life story. According to Long & Cooper, the reporters leapt at this chance to report on homosexuality for the first time in Zambia and covered the story.[65] What followed was unprecedented public anger and backlash against sexual and gender minorities from all sections of society.

Despite the constitutional guarantees of freedom of association and the promise by the MMD government to respect human rights, LEGATRA was never registered despite several attempts. The state took a human rights exceptionalism stance with the Registrar of Societies stating that it was an 'illegal organisation because homosexuality is a criminal offence in Zambia' and adding that he could 'not register LEGATRA any more than he could a satanic organisation'.[66] As a department under the Ministry of Home Affairs, the Office of the Registrar of Societies (ORS) could, arguably, not have made a contrary decision because the Minister

63 'I'm 25, gay with 33 partners; And enjoying it' *The Post Newspaper* 14 July 1998.

64 As above.

65 S Long & G Cooper *More than a name: State-sponsored homophobia and its consequences in Southern Africa* (2003) 34.

66 Long & Cooper (n 65) 69.

of Home Affairs had earlier stated that the anti-sodomy laws of Zambia meant that 'anyone who tried to register an organisation promoting homosexuality would be arrested'.[67] This mischaracterisation of the anti-sodomy laws was repeated by the Zambia Police spokesperson and validated by the Minister of Justice who issued that 'registration of such an association [supporting sexual and gender minority rights] is in itself a crime'.[68] Uncharacteristic for the National Human Rights Institution (NHRI) the Zambia Human Rights Commission (ZHRC) took a human rights exceptionalism and relativism position, stating the following:[69]

> [T]his is not one of our priority concerns. We are concerned with pressing issues, including poverty and prisons. Human rights have to be balanced … the rights of children have to be balanced against the rights of gays. It is appropriate to consider levels of development of countries. For us the timing is wrong.

Permeating through and influencing the discourse was religious and cultural nationalism. For example, two days after the article was published, a prominent clergy, Archbishop John Mambo, issued a press statement saying that 'homosexuality cannot be an issue of human rights because it is against the teaching of the [B]ible'.[70] Several religious leaders weighed in and gave similar statements urging the government to maintain Zambia as a Christian nation and enforce its laws against 'homosexuality'. Cultural nationalism was expressed through the government's Spokesperson who when asked to give the official government position on the registration stated that 'homosexuality is un-African and an abomination to society which would cause social decay' and as such 'government would not tolerate gay rights'.[71] Arguably LEGATRA registration set the tone for LGBT lawfare and future discourses on sexual diversity in Zambia. In many respects it also marked the start of heterosexual nationalism as the basis for mobilisation against sexual and gender minority rights in Zambia. The main actors, political, religious and traditional leaders have remained the leading voices. The sexual and gender minority rights movement did not employ litigation as a strategy to challenge the decision in court. If one considers the incremental approach and the factors that aid successful strategic litigation, the time was perhaps not right.[72] Instead, they were

67 'Zambia issues warning on gay associations' *The Herald* 5 September 1998.

68 As above.

69 Press statement of The Zambia Human Rights Commission on the registration of gay rights organisation (1998).

70 'Mambo attacks Zulu for defending homosexuals' *The Post* 16 July 1998.

71 'Gay grouping thrown out' *Zambia Daily Mail* 3 September 1998.

72 For a full discussion on the effective use of strategic litigation in LGBT lawfare see

driven underground and compared to other movements in the region such as Botswana, the movement in Zambia has since not shown significant ability to mobilise and engage in effective lawfare following the failure of LEGATRA.

The failure of LEGATRA's registration was however not the end of the sexual and gender minority rights movement in Zambia. Human rights organisations like Friends of Rainka (FoR), Trans-Bantu Zambia (TBZ) and Lotus Identity Zambia (LIZ) have a focus on sexual and gender minority rights. They have not taken on cases in court or engaged in public advocacy but their existence is in itself part of LGBT lawfare.

5.3 Strategic litigation

Strategic litigation, as a tool in lawfare, has not yet been employed by the sexual and gender minority rights movement in Zambia. The closest use of the judicial arena for lawfare was in an appeal against the conviction of a trans woman in *Hatch-Brill v The People*.[73] On the material night, Hatch, a transwoman got into a taxi going home from a night club. On the way home, the cab driver forced himself on her, overpowered her, and raped her. After this incident the taxi driver took Hatch to the police reporting that 'he had sex with a man who pretended to be a woman and only realised this after the fact'.[74] At the police Hatch was stripped naked and when it was found that her gender marker was 'male' she was arrested, charged and detained under the anti-sodomy laws. The basis of the charge was that as a transwoman, she was the one who must have initiated the anal sex and that the taxi driver would not have reasonably initiated or solicited anal sex. Hatch's statement that she was raped was thrown out. Convicted to 15 years in prison Hatch appealed making it the first case ever to go to a higher court with respect to anti-sodomy laws. Notably, during the criminal prosecution at the magistrate's court, Hatch was not represented by a lawyer as she could not afford one, a factor that the court should have considered. It was during the appeal that the legal team, funded by the Southern Africa Litigation Centre (SALC) came on board,[75] and raised several human rights issues, including the unfairness

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

73 (2017) CAZ/09/03/2016.

74 As above.

75 The team was constituted through the intervention of the Southern African Litigation Centre, an international NGO focusing on strategic litigation that became aware of the case through TBZ, a local organisation focusing on sexual and reproductive health rights. It was telling of the fact that local organisations have no capacity to mobilise resources to mount a defence.

of the anti-sodomy laws, the violation of Hatch's rights as a trans person such as mandatory HIV testing which is illegal in Zambia.[76] The team relied on several local and international human rights law jurisprudence.[77] However, the court dismissed the arguments stating that 'this is a criminal law case where the accused person pretended to be a woman' adding that 'arguments that he is a transgender and that the anti-sodomy laws are unconstitutional or violate his rights are hollow and we shall not even spend time entertaining them'.[78] The Courts' refusal to entertain the human rights arguments, arguably highlights their lack of knowledge on sexual and gender minorities which can be attributed to their training and socialisation in a heteronormative society.

The case reveals that the anti-sodomy laws will always be disproportionality applied against sexual and gender minorities. Arguably a level of fairness would have been achieved if both the accused and the complainant were charged since each of them had a different version of events of the material night. However, due to the mischaracterisation of the anti-sodomy laws as laws against queer identity and expression, the gender identity and expression of the accused was the criminalising factor which led to the exclusive application of the law on her, thereby endorsing the view that it was the person and not the action that was the target of the law.

Ideally the lessons learnt from the case should have been used to create strategies for proactive litigation in LGBT lawfare. However, rather than energise the sexual and gender minority rights movement to engage in proactive lawfare, it – like the LEGATRA saga two decades before – only drove the movement further underground. At a post litigation meeting, it was suggested that the movement should use litigation incrementally as a tool in the lawfare. But due to the fear of imprisonment and public harassment, litigation was seen as unsafe and dangerous to the welfare of sexual and gender minorities.[79] This is in sharp contrast to other countries

76 Mandatory HIV testing was declared illegal in Zambia in *Kingaipe & Chookole v The Attorney General* (2010) HL/86.

77 The defence argued that the arrest and treatment of Hatch amounted to discrimination based on gender identity and relied on jurisprudence from different justifications such as *Thuto Rammage & 20 Others v Attorney General* (2014) CA 128, *Toonen v Australia* (1992) CCPR/C/50/488 and *Lawrence v Taxes* (2003) US 558. The defence team used the principle of human dignity relying on the Universal Declaration of human rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Yogyakarta Principles. The Court however, rejected arguments on the protection from discrimination based on gender identity.

78 As above.

79 As part of the legal team that represented Hatch on appeal, I took part in several

with similar hostile environments like Botswana where despite initial court disappointments, the movement took the positive aspect of the lost cases to build on future cases until eventually the anti-sodomy laws in that country were decriminalised. A notable fact is that in Botswana, during the hearing of cases, the movement showed solidarity outside the court grounds with their banners calling for equal protection before the law. In Zambia, the movement was silent, invisible and steered away from the case.

The reaction to the *Hatch-Brill* case and several other cases[80] where sexual and gender minorities have been convicted under the anti-sodomy laws demonstrates that Zambia is many steps behind countries like Botswana in using strategic litigation in LGBT lawfare. While it can be understood that the legal, political and social environment is hostile and presents several barriers for strategic litigation, it can also be argued – learning from other states within the region – that it is such hostile environments that make strategic litigation a potent tool. While the sexual and gender minority rights movement has not used litigation to protect their rights, the state has effectively used it not only to prosecute them but also for political reasons to mobilise public support and gain political advantage. Even in such events, the local sexual and gender minority rights movement does not show solidarity or the ability to mobilise resources to mount a legal defence. Defence lawyers are often externally funded which reinforces the heterosexual nationalism narrative that sexual and gender minority rights are a foreign agenda which must be contested. However, it is noted that strategic litigation in a hostile environment as Zambia should be approached with caution by ensuring that all the elements are in place.[81]

meetings where the team highlighted the importance of proactive strategic litigation and its long-term nature before results can be gained. However, the concern was that witnesses would out themselves during litigation and this would cause a backlash with more arrests and convictions since anti-sodomy laws are seen as laws against identity and not conduct. As such, safety was seen as the primary strategy and concern which affected any prospects for litigation.

80 Most of the cases where sexual and gender minorities have been prosecuted under the anti-sodomy laws were conducted in the Magistrates' Courts and hence are not reported. For example, *The People v Mwale* and *The People v Mubiana* are just but examples of such cases. The sexual and gender minority rights movement though aware of these cases has not taken strategic advantage of them by using them to challenge their constitutionality as did the movement in Botswana with similar cases such as *Letsweletse v Attorney General* (2019) MAHGB 16, which finally decriminalised same-sex sexual conduct in Botswana.

81 For a full discussion on the elements that make LGBT strategic litigation in Africa successful, see A Jjuuko *Strategic litigation and the struggle for lesbian, gay, and bisexual equality in Africa* (2020).

The nature of LGBT lawfare in Zambia is also exemplified in *The People v Kasonkomona*.[82] Kasonkomona a sexual and reproductive health rights activist, appeared on a live television programme where he was advocating for, among others, the state to respect the rights of sexual and gender minorities in Zambia. His aim was to create awareness and help shift the negative narrative in Zambia. During the programme he highlighted the impact of the anti-sodomy laws in Zambia, the fact that they violate Zambia's human rights obligations and therefore called for their repeal. He was immediately arrested after the programme by police who were waiting for him outside the studio. Initially he was charged under section 155 (sex against the order of nature) but it was soon realised that the charge would not stand and so it was amended to 'soliciting in the public for immoral purposes'.[83] The rationale for the charge was that

> by asking for non-discrimination of sexual and gender minorities and calling for decriminalisation of the anti-sodomy laws, Kasonkomona was promoting homosexuality which is illegal and immoral in Zambia as a Christian nation.[84]

During trial, the state called six witnesses among them the Director of the Evangelical Fellowship of Zambia (EFZ) who was the main witness. He testified on the sinfulness and immorality of homosexuality as his testimony was meant to establish that the statement of the accused amounted to soliciting for immoral purposes.[85] This approach highlights the fact that the case was constructed in terms of religious and moral nationalism as justification for the anti-sodomy laws in Zambia. However, the testimony was discredited on an evidential point of law because it turned out that the witness had not even watched the programme himself. His testimony was in fact based on the

> collective view that he and his colleagues in the church leadership held, that Zambia being a Christian nation, the statement made by the accused amounted to a criminal offence which the state ought to prosecute.[86]

The testimony not only illustrates how the state [through agency of the police] understands the anti-sodomy provisions but also how they are used/enforced in conjunction with other laws to unfairly prosecute sexual

82 *The People v Paul Kasonkomona* (2014) HPA/54.

83 Section 178 of the Penal Code of Zambia.

84 Zambia Police Indictment form of Paul Kasonkomona, 8 April 2013.

85 See *The Kasonkomona case* (n 82).

86 As above.

and gender minorities or activists. Notably in their submissions the state argued:[87]

> The respondent [the accused] was not merely discussing homosexuality but was actually advocating for the rights of people practicing homosexuality to be protected. And it is illegal to practice homosexuality … It is further submitted that in light of the provision under which the respondent was charged, it would be discerned that the test for the offence of soliciting for immoral purposes in relation to homosexuality is not actual harm but potential harm to public morality. Thus, any attempt to promote or to funding or in any way supporting homosexuality and related practices is an offence.

From the submission it is also clear that the prosecution's (state's) understanding of 'homosexuality as a practice' and not as a diverse form of human sexual orientation informed or rather misinformed their argument. The defence put up a strong argument, submitting that Kasonkomona not only had his freedom of expression guaranteed in the Constitution when he made the statement but also that calling for non-discrimination and decriminalisation did not amount to soliciting for immoral purposes. The Magistrates' Court agreed with this submission by the defence and after protracted hearings, Kasonkomona was acquitted.

The *Kasonkomona* case brings out an important point factor to consider regarding the potential in direct litigation challenging the anti-sodomy laws. This is because the litigants who are members of the anti-sodomy laws, or witnesses would one themselves up to arrest and prosecution.

5.4 Rights talk

With the hostility of the political and social environment, as well as the non-registration of sexual and gender minority rights organisations, some general human rights civil society organisations have employed 'rights talk' to counter heterosexual nationalism and the anti-sodomy laws. For example, as early as 1998 following the refusal to register LEGATRA, the Zambia Independent Monitoring Team (ZIMT), a local human rights organisation that focused on elections, issued a statement that: 'Gay people just like lesbians, are normal people and are entitled to fundamental human rights and should not be discriminated against'.[88] The ZIMT leader Alfred Zulu and other employees were mocked and received death threats of arrest political and traditional leaders.[89] ZIMT which sought to carry

87 States submissions in the *Kasonkomona* case (n 82).

88 'Zulu defends homosexuals' *The Post* 15 July 1998.

89 'Zambia: Arrest ZIMT Officials' *The Times of Zambia* 22 October 1998 https://allafrica.

LEGATRA under it wings became the subject of a funding inquiry by the Zambian government.[90] As Long & Cooper note, 'eventually – and perhaps most dangerously – the controversy became one of how civil society in Zambia was funded'.[91] This led to a near diplomatic incident when the Norwegian Ambassador to Zambia was summoned and questioned by the Minister of Foreign Affairs regarding Norway's funding of ZIMT. For unexplained reasons, a year later in 2000, ZIMT was deregistered by the executive and ceased to exist.[92]

Rights talk was the strategy used by Dette Resources Zambia (DRZ), a local human rights organisation whose main focus was Land rights. DRZ, publicly spoke out in support of sexual and gender minorities using explicitly Christian rationale considering the strength of religious heterosexual nationalism in Zambia.[93] However marginal, their voice represented a rare counter narrative towards sexual and gender minority rights in Zambia. DRZ had first conducted a survey to understand the lived experiences of sexual and gender minorities in Zambia with the aim of using the information for advocacy.[94] The announcement of the survey attracted attacks from the usual actors; political and religious leaders, with the Ministry of Home Affairs launching a criminal investigation on their source of funding. Despite these attacks DRZ issued several statements calling for the respect and protection of the rights of sexual and gender minorities in Zambia. Basing its understanding of human rights on biblical doctrine of Imago Dei and then applying it to sexual and gender minority rights, DRZ sought to root its defence of human rights for sexual and gender minorities in a religious language and theological narrative that most Zambians would understand.[95] However, despite DRZ's good intentions, its rights talk and advocacy, as was the case with the statements of Ban Ki-moon discussed above, was diluted in the huge volume of attacks from political, religious, traditional leaders as well as

com/stories/199810220043.html; and 'Gays out' *The Mail & Guardian* 11 September 1998 https://mg.co.za/article/1998-09-11-zambian-gays-out/ (both accessed on 9 May 2022). The situation with ZMIT also highlights the danger in engaging in litigation at this point.

90 As above.

91 Long & Cooper (n 65) 46.

92 As above.

93 Van Klinken 'Christianity, human rights and LGBTI advocacy: The case of Detta Resources Foundation Zambia' in Van Klinken & E Chitando (eds) *Public religion and the politics of homosexuality in Africa* (2016) 229.

94 'Zambian LGBT Organisation facing government prob' *The London Evening Post* 29 July 2013.

95 As above.

members of the general public who took to social media condemning the organisation.[96]

As seen, rights talk in support of sexual and gender minority rights by originations in Zambia is consistently gaslighted by the executive into inquiries about funding and motivation. In this regard Long & Cooper note that 'the discourse on sexual minority rights in Zambia eventually and perhaps most dangerously becomes about how and who funds civil society organisations that support homosexuality'.[97] Van Klinken corroborates and notes that the government's consistent reference to organisations 'falling for donor funding to support gay rights' and labelling them as agents of western neo-colonial imperialism has isolated and weakened the local sexual and gender minority rights movement in Zambia.[98] Long after DRZ's statements the executive remained under pressure from religious, traditional and opposition political party leaders, to deal with such organisations and their agenda strongly. Yielding to this pressure, and in a somewhat political gesturing move, with elections around the corner the then government urged members of the public to 'report homosexuals to the police' stressing that:

> [A]s Zambians, we have declared that we are a christian nation and there is no way we can allow this un-Zambian culture. I want to urge all Zambians to rise and denounce this vice and report all homosexuals to the Police. Why should someone or some institutions want to import this homosexuality and try to influence others to practice it? We can't allow it; I'm calling on all citizens to stand firm and reject it.[99]

Rights talk has also been employed by individual activists. Most prominently the background facts to the *Kasonkomana* case discussed above is an example of rights talk by an individual. Kasonkomona, a sexual and reproductive health rights activist, appeared on a live television

96 See comments on 'Ban Ki-Moon calls for respect of homosexuals and lesbians' *The Lusaka Times* 25 February 2012 https://www.lusakatimes.com/2012/02/25/ban-kimoon-calls-respect-homosexuals-lesbians/ (accessed 1 August 2022).

97 Long & Cooper (n 65) 46.

98 Van Klinken (n 93) 229.

99 'Kabimba urge Zambians reject and denounce people and institutions championing homosexuality' *Lusaka Times* 22 April 2013 https://www.lusakatimes.com/2013/04/22/kabimba-urge-zambians-reject-and-denounce-people-and-institutions-championing-homosexuality/ (accessed 7 July 2020) (emphasis added).

programme where he was advocating for, among others, the state to respect the rights of sexual and gender minorities in Zambia.

5.5 Shifting the narrative: Strategies for engaging in effective LGBT lawfare in Zambia

5.5.1 Media training

The media is an active participant in LGBT lawfare in Zambia and is as responsible for the flag of heterosexual nationalism as the other actors. Aware of the power of the media to shift the narrative in lawfare, Lotus Identity, a local organisation focusing on health rights of sexual and gender minorities, working in collaboration with the National HIV/AIDS Council (NAC) embarked on nationwide trainings of media personnel.[100] To avoid controversy the trainings were framed in a public health context with major content focusing on the impact of the anti-sodomy laws on the right to health for 'key populations' [including sexual and gender minorities] and the role of the media in shifting the negative narrative regarding sexual diversity in Zambia. To capture the media's construction of sexual and gender minorities, a word association exercise was conducted where 150 journalists across the provinces were asked to associate different words which included 'sex-worker', 'homosexuality' and 'gay person.' One hundred and thirty-eight (138) participants out of 140 associated homosexuality and gay persons with negative and de-humanising words. The words recorded were 'sinner', 'demon possessed', 'mentally disturbed', 'abnormal', 'animal', 'uncultured', 'criminal', 'evil' and 'lover of man'.[101] Typically, sexual and gender minorities are viewed through one of the lenses of heterosexual nationalism where they are either medicalised, de-humanised, de-spiritualised, stereotyped or in some way given the label of deviance. While the impact of the trainings has yet to be evaluated, the first but sadly only story covered by one of the trained participants showed the potential of positive change. What makes the story even more significant is the fact that it was covered by a public newspaper under the headline 'Key populations have suffered propositional stigmatisation'.[102] While the headline used the public health

100 The trainings were conducted between 2017-2020. With Elections in 2021, it was strategised that the training be suspended to avoid brining attention to sexual and gender minority rights as in previous elections the subject became the cite of political mobilisation against sexual and gender minorities in Zambia. Further, NAC being a public institution could not be allowed to embark on the programme to avoid the state being 'misunderstood to support homosexuality in Zambia' one officer stated.

101 NAC Internal Report on Media Training (2021).

102 *Times of Zambia*, 6 November 2020.

frame of sexual and gender minorities, its content took a more human rights approach stating for instance that:

> Sexual and gender minorities in Zambia have been subjected to some of the worst human rights violations in Zambia. Lack of information, poor enforcement of the law and distorted reporting by the media is part of the reason for these human rights violations.[103]

This piece shows that the potential to change the narrative is there. However, change can only occur over time with consistent engagement with the media as one of the actors in Zambian LGBT lawfare.

5.5.2 Using the public health approach as a master narrative

While NAC is not directly engaged in LGBT lawfare in Zambia, as an ally it has taken agency of the public health approach on sexual and gender minority rights in Zambia, much like other like institutions in the region. Guided by Sustainable Development Goal (SDG) number 15[104] to ensure universal health coverage and to 'leave no one behind' NAC, as a public funded institution under the Ministry of Health, lobbied for and adopted the National HIV/AIDS Strategic Framework (NASF), which is the only official government policy that speaks to the promotion and protection of sexual and gender minorities as 'key populations' in the National response to HIV.[105] In this regard, NAC works with local and international sexual and gender minority rights organisations. The media trainings discussed above would not have been possible without the agency of NAC and would have received backlash if NAC was not a public institution working in the context of the sustainable development goals. Further, the executive and other branches of government are careful not to criticise this approach as that would create the narrative that Zambia is opposed to the SDGs. Programming under the NASF, as with general health programming in Zambia, is largely dependent on donor funding.[106] While this may impact

103 As above.

104 See UN sustainable Development Goals 'Goal 3: Ensure healthy lives and promote well-being for all at all ages' https://www.un.org/sustainabledevelopment/health/ (accessed 13 April 2022).

105 See NAC 'National AIDS strategic framework 2017-2021' https://www.nac.org.zm/?q=content/national-aids-strategic-framework-nasf-2017-2021 (accessed 17 February 2022).

106 There are two sides to international donor funding in relation to sexual and gender minority rights. One side is that such funding can be used to advance sexual and gender minority rights. In support of this view, EM Lubaale 'Beyond the rhetoric of international human rights standards in the struggle to decriminalise homosexual conduct in Uganda' (2021) 30 *Afrika Fokus* 254, argues that international donor agencies should tie aid to particular policies and programmes that further tolerance for sexual

the overall efficacy of the policy, its long-term impact on LGBT lawfare has potential to be positive. The laxity of government notwithstanding, the HIV and the public health framing of sexual and gender minority rights represents the best opportunity in Zambia. Incrementally, the discourse, programming and activism can have a more 'standalone' but not divorced voice from the HIV and public health master frame. One way that local civil society and its supporting partners can gain traction using the HIV and public health master frame is through the NASF. As government official policy the NASF recognises as follows:

> HIV however, continues to contribute the highest mortality rates, burdening households and straining national health systems. With this understanding, the Revised Zambia National AIDS Strategic Framework (RNASF) 2020-2023 exemplifies the governments to deliver better health for all with a focus on socially inclusive interventions to prevent and manage HIV and AIDS … *It emphasises an equitable HIV response that ensures no one is left behind*. This is a priority for Zambia to achieve her goals. It targets *key and priority populations* while ensuring that all Zambians are reached and stigma and discrimination are reduced for improved health outcomes.[107]

While government budgeting arguably makes the above policy statement sound rhetorical and gesturing, local civil society and supporting partners can take advantage of this 'commitment' to create thematic programmes for sexual and gender minorities around it. The public health approach has also been adopted by other organisations such as FHI 360 on the 'Open doors' project which focuses on the health rights of sexual and gender minorities among other key populations. In one of its reports under the

and gender minorities. In this way, Lubaale argues, donor funding will have a positive impact on the overall protection of sexual and gender minorities. The other side argues that tying aid to the promotion of sexual and gender minority rights will have a backlash as it will only reinforce the narrative that western countries have an agenda to promote homosexuality in African. In this regard M Epprecht *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* (2013) 12, cautions against aid conditionalities in Africa as it has only reinforced nationalism. In the Zambia context, I argue that while the sexual and gender minority rights movement and indeed organisations like NAC will be unable to effectively engage in LGBT lawfare with external funding, such funding should be given in a manner that does not tie aid to the promotion of sexual and gender minority rights. This view is informed by the backlash the organisations like ZIMT and DRZ faced. Further, in 2020, the President of Zambia – when asking for the recall of the American ambassador – expressly stated that 'if our friends want to tie aid to homosexuality then they stay with their aid, and we shall find other ways of funding our programme's. Our collective wisdom and sovereignty cannot be sacrificed so that we receive donor money' see n 3 & 23.

107 NAC (n 105) (emphasis added).

project, FHI 360 highlights the lived experiences of sexual and gender minorities.[108]

Taking lessons from the lawfare in Botswana, the movement in Zambia can also effectively use the public health framing of sexual and gender minority rights as its 'master frame'. In order for any minority group to be successful in its struggle for recognition, emancipation and equality, its activists should argue their cause from general and less controversial human rights discourses within the context of that society. De Vos describes this as the 'master narrative' or 'master frame' arguing that in countries were progress has been made, 'sexual and gender minority rights organisations framed their activism within the broader human rights discourse and struggle'.[109] In Botswana for example, the master frame/narrative was the public health model in the context of the national response to HIV. As such the lawfare and particularly the litigation strategy highlighted the lived experiences of sexual and gender minorities in the context of how the anti-sodomy laws prevented them from accessing general, but most specifically, HIV related healthcare services. This made a huge difference when in *Letswelestse Mosthidiemang v Attorney General*, the case through which the anti-sodomy laws were decriminalised, the court acknowledged the following:[110]

> A number of studies and research papers, all authorised by the Botswana Government, confirmed the negative effect of the impugned criminal sections had on gay men in Botswana as an HIV/AIDS vulnerable, and that they were often reluctant to, owing to the stigma, and fear of prosecution, to come forward for testing and treatment, or as complainants when they suffered blackmail or assault owing to their orientation. This had an adverse effect on their mental well-being owing to the stress of constant fear of discovery or arrest if they engaged in what for them was normal sexual conduct as an expression of their love for their partners. This sometimes led to depression, suicidal behaviour, alcoholism, or substance abuse, and at a level far higher than of heterosexuals.

In this light the public health approach and the evidence-based reports developed by NAC, FHI-360 and other organisation present a potent tool for future use towards effective LGBT lawfare in Zambia. What presently lacks is a strong sexual and gender minority rights movement.

108 TBZ (n 54) 46-47.

109 P de Vos 'On the legal construction of gay and lesbian identity and South Africa's transitional constitution' (1996) 12 *South Africa Journal on Human Rights* 274.

110 (2019) MAHGB-00591-16.

5.6 Strengthening the capacity of local sexual and gender minority organisations to engage in lawfare

After LEGATRA and subsequent events some of which have been discussed above, the sexual and gender minority rights movement has avoided visibility and confrontation with the drivers of heterosexual nationalism. In this sense, it is debatable whether the movement is actively engaged in lawfare. It can be argued that the movement, although not at the same active level as others in South Africa, is not where it is post the LEGATRA registration failure. The movement has managed to build from within, which can be taken as responses to heterosexual nationalism.

Administratively, organisations that focus on sexual and gender minority rights have registered as general human rights promotion organisations. This has helped to avoid the state's strict scrutiny of their activities. This strategy has worked in hostile environments like Zambia and has avoided the need for litigation as a strategy to 'force' the state to allow registration. As such organisations have been able to operate as general human rights institutions. Currier and Cruz note that this strategy is effective in hostile environments but however, caution that while this approach is tactically effective in the African context, 'it has produced situations where activists endlessly defer initiating LGBT rights campaigns and activities'.[111] They argue that 'some organisations took years to decide to open decriminalisation campaigns and in the end those plans died with the organisations'.[112]

A significant and notable step has been capacity building. Organisations like Friends of Rainka, Lotus Identity and TBZ have managed to conduct paralegal trainings of their members with a specific focus on sexual and gender minority rights. The trained paralegals are always on standby to respond to situations where sexual or gender minorities are arrested by the police or face any challenges that may bring public attention and risk their safety. The trainings have occurred over time and are ongoing. While this step deserves commendation, they are designed for safety and are reactive to rather than taking a proactive step in lawfare. Notwithstanding, an initiative to mobilise some trained lawyers is currently on going. Perhaps this can evolve into a strategy to start taking steps towards visible and proactive lawfare. TBZ has also gone a step further by documenting some

111 A Currier & J Cruz 'Civil society and sexual struggles in Africa' in E Obadare (ed) *Handbook of civil society in Africa* (2014) 10.

112 As above.

human rights violations which hopefully and potentially could be used for more effective/proactive lawfare.[113]

Another praiseworthy step is the collaboration between organisations that have focused on sexual and gender minority rights with others such as NAC and FHI-360. This has enabled the voice and lived experiences of LGBT persons to inform the programming of these organisations although limited to the public health context. However, as argued above, this can be used as a steppingstone towards more effective lawfare.

6 Conclusion

LGBT lawfare in Zambia is fought on the grounds of heterosexual nationalism with the state using the anti-sodomy laws as its most potent weapon. It has weakened the sexual and gender minority rights movement making it unable to respond effectively or visibly. Lessons learnt from other jurisdictions in Africa point to the fact that a strong civil society movement is crucial to any lawfare. As such if LGBT lawfare in Zambia is to yield positive results, the sexual and gender minority rights movement has to strengthen and be visible in its efforts. Several factors and conditions need to be met to reach this height.[114] This chapter has shown that the movement is currently not engaged in effective proactive lawfare, and has taken an invisible and safety approach in the face of heterosexual nationalism. However, the chapter has also shown that the movement is not where it used to be since it first showed visibility in 1998. As earlier stated, the movement fortunately has a lot of lessons to learn from countries within the region such as Botswana, South Africa and Mozambique which have greater success in decriminalisation of their anti-sodomy laws. Other countries that have not decriminalised like Uganda and Kenya also provide pertinent examples as their movements are relatively stronger, advanced, and more visible with incremental success scored. An emerging concern for Zambia is the diminishing foreign funding in the wake of the COVID-19 pandemic will further weaken activism. It is however certain that the situation in Zambia will not change by chance.

113 TBZ (n 53).

114 See F Viljoen 'Botswana court ruling is a ray of hope for LGBT people across Africa' *The Conversation* 12 June 2019 https://theconversation.com/botswana-court-ruling-is-a-ray-of-hope-for-lgbt-people-across-africa-118713 (accessed 4 December 2021).

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9 LGBTIQ+ LAWFARE IN RESPONSE TO THE POLITICISATION OF HOMOSEXUALITY IN GHANA

Ernest Yaw Ako & Amanda Odoi***

1 Introduction

The question as to whether homosexuality should be accepted or tolerated in Ghana is highly politicised and deployed as a lawfare tactic.[1] It is a subject that can make or mar a political career if a politician supports or denounces it. The announcement of an impending LGBTIQ+ conference in Accra, the capital city of Ghana, in August 2006[2] sparked a national debate on the 'threat' homosexuality posed to culture and morals in Ghanaian society,[3] and marked the beginning of the politicisation of

* Barrister & Solicitor of the Supreme Court of Ghana & Lecturer in Law, University of Cape Coast, Ghana. Portions of the analysis and arguments used in this chapter are drawn from chapter 3 of the first author's doctoral thesis completed at the Centre for Human Rights, University of Pretoria. EY Ako 'Towards the decriminalisation of consensual same-sex conduct in Ghana : a decolonisation and transformative constitutionalism approach' LLD Thesis, https://repository.up.ac.za/handle/2263/82603 (accessed 25 September 2022).

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1 The authors define lawfare to mean the approach of looking at the issues of LGBTIQ+ with a political lens or from political gains rather than from the angle of the rights of the members of the community.

2 D Mcelhill 'Ghanaians ban gay conference' *PinkNews* 1 September 2006 https://www.pinknews.co.uk/2006/09/01/ghanaians-ban-gay-conference/ (accessed 9 May 2022); see also Refugee Review Tribunal Australia 'RRT Research Response: Ghana' GHA33179 (9 April 2008) https://www.justice.gov/sites/default/files/eoir/legacy/2014/09/25/homosexuals-2006%20gay%20and%20lesbian%20conference.pdf (accessed 9 May 2022); K Sakyi-Addo 'Ghana bans gay and lesbian conference' *Mail&Guardian* 2 September 2006 https://mg.co.za/article/2006-09-02-ghana-bans-gay-and-lesbian-conference/ (accessed 9 May 2022); 'Proposed gay conference still sketchy' *GhanaWeb* 1 September 2006 https://www.ghanaweb.com/GhanaHomePage/rumor/Proposed-gay-conference-still-sketchy-109876 (accessed 9 May 2022); A Odoi 'Homophobic violence in Ghana: When and where it counts' (2021) *Sexuality Research and Social Policy* 2.

3 K Essien & S Aderinto 'Cutting the head of the roaring monster: Homosexuality and repression in Africa' (2009) 30 *African Study Monograph* 121.

homosexuality in Ghana. Moral entrepreneurs[4] capitalised upon this imaginary threat to a so-called Ghanaian culture and started encouraging politicians to draft a law to curb the activities of LGBTIQ+ persons. Since this period, politicians have threatened to enact laws with stiffer punishments to curtail the 'upsurge' of the LGBTIQ+ community and their activities. Diverse tactics ranging from arrests, lawfare, discrimination, expulsion from school and the use of violence against members of the LGBTIQ+ community have been employed.[5]

The use of the criminal law, the coercive forces of the state and the delegitimising of the LGBTIQ+ community became more prominent in 2020 and 2021 when more stringent methods were introduced to clamp down on the LGBTIQ+ community.[6] The LGBTIQ+ community and LGBTIQ+ led civil society organisations, which were usually quiet became more visible through advocacy related activities and the grand opening of an LGBT office in the capital of Ghana. The increased visibility angered state officials who were prompted by moral entrepreneurs to act swiftly to save Ghana from moral and cultural decadence.

Even when COVID-19 struck, the state did not withhold its wrath against the LGBTIQ+ community. At the height of the COVID-19 pandemic, for example, when minority rights were challenged globally,[7] and people needed safe spaces to seek refuge, a newly established resource centre for the LGBTIQ+ community in Ghana, where members could

4 WJ Tettey 'Homosexuality, moral panic, and politicised homophobia in Ghana: Interrogating discourses of moral entrepreneurship in Ghana media' (2016) 9 *Communication, Culture and Critique* 86 at 88-89. Moral entrepreneurs or moral panics are individuals or groups who 'seek to organise behaviours and attitudes to conform to particular regimes of moral regulation'. The desire of moral entrepreneurs to regulate the moral and sexual lives of homosexuals leads to a portrayal of homosexuality and homosexuals as 'threats to society and its values, thereby generating significant alarm among the public'. In Ghana, moral entrepreneurs or panics include Parliamentarians, religious leaders, traditional authorities, civil society groups, and the media.

5 Odoi (n 2).

6 See 'US Department of State 2021 Country reports on human rights practices: Ghana' https://www.state.gov/wp-content/uploads/2022/03/313615_GHANA-2021-HUMAN-RIGHTS-REPORT.pdf (accessed 12 May 2022), 7, 25-26. See also '"LGBTIQ+ office in Ghana" cause strong division among citizens' *BBC News* 23 February 2021 https://www.bbc.com/pidgin/tori-56146389 (accessed 17 April 2022); see also PI Williams '"LGBTQI office in Ghana" see Police storm location for Accra, raid & close am down' *BBC News* 24 February 2021https://www.bbc.com/pidgin/tori-56183723 (accessed 17 April 2022).

7 CL Booker & C Meads 'Sexual orientation and the incidence of COVID-19: Evidence from understanding society in the UK Longitudinal Household Study' *Healthcare* (2021) 937; see also American Psychological Association 'How COVID-19 impacts sexual and gender minorities' (29 June 2020) https://www.apa.org/topics/covid-19/sexual-gender-minorities (accessed 10 May 2022).

go for support, was closed down by the police based on political and public agitations.[8] Politicians and the general public verbally attacked diplomats and supporters of the LGBTIQ+ community who attended the inauguration of the LGBTIQ+ office claiming that diplomatic support for the LGBTIQ+ community was a camouflage and imperialist tactic to force homosexuality on Ghanaians.[9]

Following the closure of the LGBTIQ+ resource centre, the threat to re-criminalise homosexuality by Parliament was resurrected.[10] A group of religious leaders and anti-LGBTIQ+ activists known as the 'Coalition for Proper Human Sexual Rights and Family Values' who have been pushing for this move since 2018, reinitiated attempts at lobbying parliamentarians to criminalise same-sex practices in March 2021.[11] What was different from the previous attempts was that this time round, these calls successfully won the support of eight members in Parliament to come up with a private member's sponsored bill geared toward criminalising LGBTIQ+ rights in Ghana.[12]

The court was also used as part of the attacks on the LGBTIQ+ community. On 20 May 2021, a group of activists (16 females and five males) were arrested for participating in a workshop in empowering the LGBTIQ+ community in Ho, a town in the Volta Region of Ghana.[13] Charged with unlawful assembly and engaging in homosexual activities, these young activists, who came to be known as the Ho 21, were detained

8 The Police closed down an LGBTIQ+ office inaugurated in February 2021. See *BBC News* articles (n 6) ; see also Odoi (n 2) 1.

9 K Emmanuel 'Shut down LGBTIQ+ office in Ghana – Pentecostal and Charismatic Council' *Pulse.com* 23 February 2021 https://www.pulse.com.gh/news/local/shut-down-LGBT+-office-in-ghana-pentecostal-and-charismatic-council/7fkbtf5?utm_campaign=pulseghana&utm_medium=social&utm_source=Twitter#Echobox=1614068891 (accessed 10 May 2021).

10 'Bill to criminalise homosexuality coming soon – Foh Amoaning' *GhanaWeb* 29 May 2018 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Bill-to-criminalise-homosexuality-coming-soon-Foh-Amoaning-655883 (accessed 30 September 2019).

11 As above.

12 Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021.

13 'Outcry after 21 people arrested in Ghana for "advocating LGBTIQ+ activities"' *The Guardian* 24 May 2021 https://www.theguardian.com/world/2021/may/24/outcry-people-arrested-ghana-advocating-LGBTIQ+-activities (accessed 17 April 2022); see also 'Ghana court frees 21 arrested for attending May LGBTIQ+ event' *The Guardian* 5 August 2021 https://www.theguardian.com/world/2021/aug/05/ghana-court-frees-21-arrested-for-attending-may-LGBTIQ+-event (accessed 17 April 2022).

and denied bail for three weeks.[14] The case was eventually struck out for lack of evidence and the activists were discharged in August 2021.[15]

In the same week that the Ho 21 activists were discharged by the Ho High Court, a group of eight Ghanaian moral entrepreneurial[16] parliamentarians, with support from the Speaker of Parliament, Mr Alban Bagbin, tabled a private member's bill named the 'Promotion of Proper Human Rights and Family Values Bill, 2021' (Anti-LGBTIQ+ Bill) before Parliament. The Bill seeks the criminalisation of LGBTIQ+ practices and related activities[17] and to enforce a moral code on how people should make love and to which partners. The Bill, aims to provide for proper human sexual rights and family values. The Bill also prohibits propaganda, advocacy for LGBTIQ+ and associated activities, protection and support for children and victims of LGBTIQ+ related activities.[18] If passed into law, the Anti-LGBTIQ+ Bill will expand the existing colonial-era provision in the Criminal Offences Act of Ghana that criminalises 'unnatural carnal knowledge',[19] signalling the culmination of years of politicisation and lawfare against homosexuality in Ghana, dating back to 2006.

However, after the introduction of the Bill in Parliament to re-criminalise consensual same-sex relationships, some pro LGBTIQ+ activists have opposed the Bill in Parliament and showed signs of possibly litigating in court, if it is enacted into law.[20] In this chapter, we examine the lawfare practices engaged in Ghana in response to the threats to the LGBTIQ+ community. We begin with an overview of the legal framework on LGBTIQ+ rights in Ghana, chronicle how political involvement in

14 'Ghana court frees 21 arrested for attending May LGBTIQ+ event' (n 14).

15 'Outcry after 21 people arrested in Ghana for 'advocating LGBTIQ+ activities' (n 13); 'Ghana court frees 21 arrested for attending May LGBTIQ+ event' (n 13).

16 Tettey (n 4). Moral entrepreneurs are individuals or groups who 'seek to organise behaviours and attitudes to conform to particular regimes of moral regulation'. The desire of moral entrepreneurs to regulate the moral and sexual lives of homosexuals leads to a portrayal of homosexuality and homosexuals as 'threats to society and its values', thereby generating significant alarm among the public. In Ghana, moral entrepreneurs or panics include Parliamentarians, religious leaders, traditional authorities, civil society groups, and the media.

17 'Ghana LGBTIQ+ Bill: Lawmakers propose a new bill which goes to criminalise LGBTIQ+ activism - See what to know about it' *BBC News* 23 July 2021 https://www.bbc.com/pidgin/tori-57939586 (accessed 17 April 2022).

18 As above.

19 Section 104(1)(b) of the Criminal Offences Act of Ghana 29 of 1960, as amended.

20 'Ghana Anti-LGBTIQ+ Bill: Why high-profile Ghanaian professors, lawyers dey fight against anti-gay bill' *BBC News* 6 October 2021 https://www.bbc.com/pidgin/tori-58813525 (accessed 17 April 2022).

the debate on homosexuality in Ghana presents some impediments to using the court by the LGBTIQ+ community and recommend avenues for conducting successful challenges against the politicisation of homosexuality in Ghana.

2 Overview of the legal and human rights frameworks concerning LGBTIQ+ rights in Ghana

There are no express constitutional provisions or legislation in Ghana that prohibit discrimination based on sexual orientation, or that specifically mention and protect LGBTIQ+ rights. It is arguable, however, that the Bill of Rights in the 1992 Constitution protects the rights of all persons including LGBTIQ+ persons, because the operative word used in the constitution is 'every person'.[21]

The Constitution prohibits discrimination 'on grounds of gender, race, colour, ethnic origin, religion, creed, or social or economic status'.[22] The Bill of Rights also enjoins the executive, legislature, judiciary and other entities including organs of government and private entities to respect and uphold the fundamental human rights of every person.[23] Even though the Constitution does not explicitly prohibit discrimination on the grounds of sexual orientation, there is no reason to foreclose the grounds of discrimination. While sex is not mentioned as a prohibitory ground of discrimination, gender and social status potentially widen the scope of this protection and the category of persons to include sexual and gender orientation.[24]

21 Constitution of Ghana, 1992. Chapter 5, from articles 12 to 33, contains a list of rights titled 'fundamental human rights and freedoms', which are entitlements guaranteed to 'every person'.

22 Article 17(2) of the Constitution of Ghana, 1992. Article 12(2) also makes it imperative that 'every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this chapter but subject to respect for the rights and freedoms of others and for the public interest'.

23 Article 12 (1) of the Constitution of Ghana, 1992.

24 RA Atuguba 'Homosexuality in Ghana: Morality, law, human rights' (2019) 12 *Journal of Politics and Law* 113 at 118. Atuguba argues that 'a bold and forward-looking interpretation of social status' is required to include LGBTIQ+ persons within the scope of art 17 of the Constitution which prohibits discrimination.

Apart from article 17 which prohibits discrimination and does not expressly mention sexual orientation, article 33 of the Constitution potentially embraces the rights of LGBTIQ+ rights.[25] It states:

> [T]he rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.[26]

In effect, article 33(5) means that the rights listed in Chapter 5 of the 1992 Constitution are not exhaustive. Other rights which exist in other democracies, and treaties ratified by Ghana may therefore form part of the Constitution of Ghana. If this interpretation is accepted, the prohibition of discrimination even on grounds of sexual orientation which is the cornerstone of bills of rights in many democracies around the world,[27] potentially forms part of the Constitution of Ghana. The Economist Intelligence Unit (EIU) has assessed and published a list of democracies for close to a decade and a half. Based on criteria such as electoral process and pluralism, political culture and civil liberties, the EIU differentiates full democracies from flawed and other types of democracies.[28] A recent democracy index of the EIU lists 22 out of 165 countries that qualify as 'full democracy'.[29] All 22 full democratic countries, except Mauritius, prohibit discrimination on the basis of sexual orientation and recognise that criminalisation of consensual same-sex sexual acts is an affront to the dignity of the human being.[30] Many others belonging to the category of flawed democracies also protect sexual minority rights and do not criminalise or have decriminalised consensual adult same-sex sexual relationships.[31]

25 Article 33(5) of the Constitution of Ghana, 1992.

26 As above.

27 See for instance sec 9(3) of the Constitution of the Republic of South Africa, 1996 which states: 'The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender … sexual orientation … and birth'.

28 'Democracy Index 2019: A year of democratic setbacks and popular protest' Report by the Economist Intelligence Unit (2020).

29 Democracy Index Report (n 28) 10.

30 These countries include Norway, New Zealand, Finland, Canada, Australia, Germany, Mauritius and Costa Rica.

31 Examples are South Korea, United States of America, Malta, Botswana, Lesotho, India, and South Africa.

Despite the constitutional provisions that potentially protect the rights of LGBTIQ+ persons, the Constitution Review Commission of Ghana (CRC) in 2011 argued that based on the African Charter on Human and Peoples' Rights (African Charter),[32] the Ghanaian Constitution does not embrace the rights of LGBTIQ+ persons.[33] However, as argued elsewhere,[34] the Constitution of Ghana and the African Charter protect the rights of LGBTIQ+ persons. [35]

Apart from the arguments by the CRC discounting the protection of LGBTIQ+ rights, the Criminal Offences Act of Ghana[36] and the new Bill before parliament,[37] present formidable challenges to the rights of LGBTIQ+ persons in Ghana. The Criminal Offences Act[38] criminalises sex between persons of the same sex, and arguably targets men and not women.[39]

Therefore, while constitutional rights protect the rights of every person in Ghana including LGBTIQ+ persons, existing laws criminalise 'unnatural carnal knowledge', which is used to target activities of LGBTIQ+ persons. Hostility and violence towards the LGBTIQ+ community has peaked with the introduction and consideration of 'The Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill' of 2021. The Bill is the outcome of almost two decades of politicisation of homosexuality.

32 OAU, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982),

33 Report of the Constitution Review Commission of Ghana 'From a political to a developmental constitution' (Constitutional Review Commission report) (2011) 656-657.

34 EY Ako 'Domesticating the African Charter on Human and Peoples' Rights in Ghana: Threat or promise to sexual minority rights?' (2020) 4 *African Human Rights Yearbook* 99. The author argues that the African Charter and the Ghanaian Constitution protects the rights of LGBTIQ+ persons.

35 Ako (n 34) 113-117; see also R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86 at 92-97.

36 Section 104(1)(b) of the Criminal Offences Act29 of 1960, criminalises the offence of 'unnatural carnal knowledge' which is used to target, arrest, and extort money from LGBTIQ+ persons in Ghana. See Human Rights Watch 'No choice but to deny who I am' (2018).

37 See 'Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021'.

38 Criminal Offences Act 29 1960.

39 Atuguba (n 24).

3 A chronicle of politicisation of homosexuality in Ghana

Since transitioning from military rule to the fourth republican democratic state in 1992, Ghana has had five presidents. The first of these five, the late President Rawlings, ruled from 1992 to 2000. Nonetheless, it was during the term of President John Agyekum Kufour, the second president (from January 2001 to December 2008) that the country saw the first significant nationwide and political discussion on homosexuality. It is fair to say that President Kufour did not 'invent' the debate on homosexuality that generated significant controversy in the country at the time. The debate which began in 2006 was triggered by an announcement by the president of the Gay and Lesbian Association of Ghana (GALAG) on radio, to the nation's shock that an international conference of gays and lesbians would be held in the nation's capital, Accra.[40] At the height of the debate, President Kufour was serving his last term as President.

The minister for information and national orientation at the time, Mr Kwamena Bartels, issued a press statement warning alleged homosexuals to abandon the gay conference, or they would be arrested.[41] The state apparatus headed by the President of Ghana and his ministers ensured that the alleged gay conference did not happen. Claiming homosexuality and lesbianism are against Ghanaian culture and strongly offend the values of Ghanaians, Mr Kwabena Bartels in a press statement warned that the government would arrest anyone who attended the gay conference or carried out any LGBTIQ+ related activity.[42] Since then, every President of Ghana has been asked by social and political actors to declare their stand on homosexuality, publicly.[43]

Professor Atta-Mills, who succeeded Mr Kufour as President in January 2009, also got involved in the debate. In response to comments made by the then British Prime Minister, Tony Blair, that aid could be cut to countries in Africa who do not recognise LGBTIQ+ rights, the President stated that Britain could keep their money because homosexuality was a moral and cultural issue that Ghanaians were not prepared to accept.[44]

40 Mcelhill (n 2); see also Essien & Aderinto (n 3).

41 Mcelhill (n 2). See also Essien & Aderinto (n 3) 127.

42 Mcelhill (n 2).

43 As above.

44 'Ghana refuses to grant gays' rights despite aid threat' *BBC News* 2 November 2011 https://www.bbc.com/news/world-africa-15558769 (accessed 10 September 2020).

President John Mahama, who succeeded Professor Mills from July 2012 to January 2017, was accused of supporting a gay agenda,[45] while his vice president, the late Amissah Arthur was accused of being gay during his nomination for the position.[46] President Mahama had to publicly denounce homosexuality as criminal, in response to pressure from religious leaders to declare his stand on the subject.[47] Similarly, the late vice president Amissah Arthur publicly stated that he was not a homosexual and like most Ghanaians, did not support the practice.[48] President Mahama, like most Ghanaian politicians, had to denounce homosexuality in order to gain the support of religious leaders, whose backing is critical to winning political power in Ghana.

The current President Nana Addo Dankwa Akuffo-Addo, however, is perceived by many, including persons within his political party to be sympathetic to the rights of LGBTIQ+ persons due to his responses in an interview granted to Al-Jazeera television network in October 2019. The President, in response to questions on the legalisation of LGBTIQ+ rights in Ghana, noted that when there is a groundswell of opinion, sufficient to galvanise action, homosexuality could be decriminalised in Ghana.[49] After this interview, political, religious and traditional leaders heavily criticised the President for being sympathetic to LGBTIQ+ rights, compelling him to retreat from his positive statements about LGBTIQ+ rights and assuring

45 'President Mahama and the powerful gay lobby' *GhanaWeb* 20 March 2016 https://www.ghanaweb.com/GhanaHomePage/features/President-Mahama-and-the-powerful-gay-lobby-424637 (accessed 10 September 2020); see also an opinion piece by Andrew Solomon titled 'In bed with the President of Ghana?' *New York Times* 9 February 2013, in which he denies the accusation that he supported the campaign and election of the then President of Ghana https://www.nytimes.com/2013/02/10/opinion/sunday/in-bed-with-the-president-of-ghana.html (accessed 10 September 2020).

46 'Vice President must not be ashamed of being gay' *Modern Ghana* 12 October 2012 https://www.modernghana.com/news/423685/vice-president-must-not-be-ashamed-of-being.html (accessed 10 September 2020); 'I am not gay; Amissah-Arthur defends integrity' *Justice Ghana* 7 August 2012 http://www.justiceghana.com/index.php/en/features/2-uncategorised/845-i-am-not-gay-amissah-arthur-defends-integrity (accessed 10 September 2020).

47 A Bonsu 'Homosexuality is criminal – President Mahama' *Graphic Online* 2 February 2013 https://www.graphic.com.gh/news/general-news/homosexuality-is-criminal-president-mahama.html (accessed 28 April 2021).

48 'I am not gay; Amissah-Arthur defends integrity' (n 46).

49 'Legalising homosexuality "not on the agenda" but "bound to happen" –- Akuffo Addo' *GhanaWeb* 26 November 2017 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Legalising-homosexuality-not-on-the-agenda-but-bound-to-happen-Akufo-Addo-604072 (accessed 25 October 2019); see also 'Ghana likely to legalise homosexuality – Akuffo-Addo' *GhanaWeb* 26 November 2017 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghana-likely-to-legalize-homosexuality-Akufo-Addo-604066 (accessed 25 October 2019).

Ghanaians that he will not decriminalise homosexuality.[50] Also, when the Ministry of Education introduced a Comprehensive Sexuality Education (CSE) Policy in 2019, which critics claimed was a ploy to teach children about homosexuality in public schools, the President openly declared that he will not support anything that offends Ghana's culture.[51]

His political opponents have challenged him with taunts that he supports homosexuality and is on course to legalise it.[52] Even the immediate past speaker of Parliament, Mike Ocquaye, while in office and a member of the President's party, condemned homosexuality. The former Speaker stated, in an apparent swipe at the President, that if any bill was brought to parliament to decriminalise homosexuality, he will fight against it and even resign his position in parliament.[53]

For those who have an intimate understanding of political party intricacies of Ghana's democracy, the speaker was indirectly telling the President that he will oppose decriminalisation of homosexuality even if the President is in favour of it. While Parliament and the Speaker's office is supposed to be independent of the executive, a keen follower of Ghana's politics since 1992 will know that the majority in parliament has always belonged to the ruling executive President and his party.[54] In addition to Parliamentary Bills which are initiated by the President and eventually passed into law, there are members of Parliament who are ministers of

50 'Homosexuality won't be legalised under Nana Addo – Presidency' *GhanaWeb 28 April 2018* https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Homosexuality-won-t-be-legalized-under-Nana-Addo-Presidency-647221 (accessed 25 October 2019).

51 D Kenu '"CSE no-no" President Akuffo Addo vows' 7 October 2019 https://www.graphic.com.gh/news/general-news/ghana-news-cse-no-no-president-akufo-addo-vows.html (accessed 7 October 2019).

52 '"Prof Do little" Mills boldly kicked against homosexuality, "Prof do plenty", can you? – Koku dares Akuffo-Addo' *GhanaWeb* 30 September 2019 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Prof-Do-Little-Mills-boldly-kicked-against-homosexuality-Prof-Do-Plenty-can-you-Koku-dares-Akufo-Addo-784985 (accessed 25 October 2019).

53 'I will resign if Akuffo-Addo legalises homosexuality – Speaker' *GhanaWeb* 14 May 2018 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/I-will-resign-if-Akufo-Addo-legalizes-homosexuality-Speaker-651656 (accessed 25 October 2019).

54 The December 2020 election in Ghana has changed this dynamic. Both the ruling New Patriotic Party (NPP) and the opposition National Democratic Congress both have 137 members of Parliament. An independent candidate, formerly of the NPP, has promised to work with the NPP in Parliament, giving the ruling party a slim majority of 138 to 137 members, available at https://www.parliament.gh/mps?az (accessed 28 April 2021). Parliament has also introduced a private members law that allows Members of Parliament to introduce Bills in Parliament. See 'Parliament adopts Private Members Bill' *The Chronicle 18 July 2020* https://thechronicle.com.gh/parliament-adopts-private-members-bill/ (accessed 28 April 2021).

state who are part of the President's cabinet.[55] Consequently, there are even intra-party disputes, in addition to the inter-party taunting, relating to a person's position on homosexuality, as depicted by the apparent tension between the President and the former Speaker of Parliament.

Apart from the inter and intra party debate on homosexuality in Ghana, there is also some tension between political leaders of Ghana and their foreign counterparts. Tweneboah appreciates this international political tension relating to homosexuality and captures it neatly.[56] In his view, the concept of sovereignty is a myth in contemporary times because a country like Ghana does not have exclusive control over its borders, citizens and laws. Ghana has ratified international treaties and there are treaty bodies that are required to monitor Ghana's compliance with the terms of the treaty and hold it accountable for human rights violations. Thus, Ghana uses religious and cultural values as a pretext to defend the country's sovereignty to withstand pressure from the west, concerning the rights of sexual minorities.[57]

Therefore, Ghana's former late President, Atta-Mills, 'would link Ghana's sovereignty with the sanctity society attaches to sexuality as an extra basis for his insistence on Ghana's position on the same-sex relationship'.[58] This is because political leaders are acutely aware that by the international human rights treaties they have ratified on behalf of their countries they cannot invoke law as a basis to deny sexual minority rights, but instead use culture and religion as a smokescreen. In the same vein, it is understandable why some people criticise the current President, Nana Akuffo-Addo. Past Presidents of Ghana succumbed to the political gymnastics of denouncing same-sex relationships when urged by moral entrepreneurs and political activists. In this regard, having resisted the pressure to denounce homosexuality, the current President deserves commendation because he has proved that he is delivering his electoral promises and does not need the politics of homosexuality to endear himself to the electorate.

Consequently, even though 'Ghanaians accused President Akuffo-Addo of missing the opportunity to unequivocally state his unwillingness

55 Article 78(1) of the Constitution of Ghana 1992 instructs the president to appoint a majority of ministers of state from parliament, who invariably are members of the president's political party and part of his cabinet that introduces bills that are subsequently passed by parliament into law.

56 S Tweneboah 'Religion, international human rights standards, and the politicisation of homosexuality in Ghana' (2018) 24 *The African Journal of Gender and Religion* 25.

57 Tweneboah (n 56) 42.

58 As above.

to initiate moves for the legalisation of homosexuality in Ghana', the President acted within the confines of the Constitution. He swore an oath to uphold the Constitution of Ghana that requires him to protect the rights of all persons and not to denounce the rights of a minority group.

The politicisation of homosexuality in Ghana has a unique twist. Ghana operates a silent code of 'remain invisible and not be harmed' policy toward homosexuals. As long as members of the LGBTIQ+ community remain silent and conduct their activities without public attention, people are happy to let them be. When the LGBTIQ+ community announced the convening of an LGBTIQ+ international conference in the capital of Ghana in 2006,[59] political leaders condemned the announcement and threatened to arrest participants and organisers if they go ahead with the conference. Since then, the focus has been on silencing members of the sexual minority community. The silent code was shattered, and the government and other institutions saw the movement as a threat to the heterosexual and political hegemony of the state. Sporadic statements such as the threat by LGBTIQ+ persons that if the state does not do enough to protect their rights, sexual minorities will not vote in national elections,[60] has also placed LGBTIQ+ rights in the political spotlight.

However, can a person or group of persons be blamed for asserting their rights to free expression, and association? Must a call on the state to protect their rights in the face of mounting violations be deemed an affront to state authority and a threat to heteronormativity? Students, teachers, market women, farmers, ordinary citizens, and many other groups have threatened the political establishment to provide one service or the other and called for the protection of one right or the other, yet politicians have responded and either provided the service or right or promised to do so. So why is it different if sexual minorities call for protection of their rights, or invite like-minded persons to a conference to discuss issues that affect their community? Tweneboah makes the following comment:

> [N]ot only is the subjugation of the human body and sexuality a tool for maintaining state power in the Foucauldian sense but through the politics of homosexuality, the state's normative legitimacy can and does become a stage for political manipulation.[61]

59 Essien & Aderinto (n 3) 121.

60 'Gays to boycott elections?' *GhanaWeb* 23 May 2008 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Gays-To-Boycott-Elections-144227 (accessed 29 October 2019).

61 Tweneboah (n 56) 40.

Homosexuality is politicised for the state to exercise control and subjugation of non-conforming sexualities. A phenomenon relating to the politicisation of homosexuality is the interdependence of politicians and the electorate on each other. In Ghana, politicians find it very convenient to use sexual minorities as a basis to launch their political popularity to seek political office or be retained in office. They usually employ the very arguments used by religious and traditional leaders to make their point. This is not surprising because politicians often seek the support of various traditional and religious leaders to win elections. They campaign in traditional areas of the country, and since the traditional leaders have some influence over the people whose votes they want to win, they say what the people and their leaders want to hear. Churches also offer their pulpits for politicians to make statements to woo electorates. Accordingly, some of the major churches give politicians the platform to market themselves and in return politicians kowtow to the whims of the churches. If the churches cry foul about homosexuality, the politicians are compelled to take the issue up and to be seen acting in the interests of the church.

Therefore, politicians have often responded to moral entrepreneurs who press the panic button at the very mention of the word 'homosexuality'. The usual statements they make are that homosexuality is a threat to the cultural values and morals of society and threatens its members.[62] As a follow up to this rhetoric, politicians and their allies have introduced bills in Parliament to further criminalise consensual same-sex conduct between adults and have even engaged in hate speech.[63]

An analysis of the statements of politicians in Ghana regarding the subject of homosexuality suggests that first, the politicisation of the victimless crime between two consenting adults in the privacy of their bedroom is a diversionary tactic away from the everyday issues of bread and butter, identity, freedoms, and human rights of the ordinary Ghanaian. The response of politicians to the so-called 'evils' of homosexuality is only a response to moral entrepreneurs in whose debt they are, for the promises they made on the pulpit of their churches and their mosques while pretending to be the most pious religious persons, but all in the name of seeking votes for political office.[64]

62 'President Mills: Homosexuality, lesbianism foreign to our culture' *Modern Ghana* 10 July 2011.

63 'Bill to criminalise homosexuality coming soon – Foh Amoaning' (n 10).

64 Tettey (n 4) 86.

After all, a significant majority of Ghanaians belong to the Christian and Islamic faith,[65] so playing along with them and articulating what appears to be what they want to hear is essential for maintaining political office and for an opportunity in future to campaign in the churches and mosques. Also, politicians often pander to the dictates of their base, their party and political elites who fancy that the majority of ordinary people are against homosexuality. Therefore, they have an opportunity to say what resonates with these supporters to win their trust and votes. Politicians who have made homosexuality a central issue for political campaigning have realised that the issue of homosexuality is one that easily secures consensus and popular support, and therefore a powerful tool to secure votes and popularity. It is also a good issue to divert attention from failure to deliver on 'bread and butter' campaign promises.

3.1 Moral entrepreneurs' contribution to politicisation of homosexuality

The response of political leaders to issues concerning LGBTIQ+ rights in Ghana has often been at the instance of moral entrepreneurs and social institutions who put pressure on the politicians to act. Matters relating to sexual minority rights are sensationalised in the media, and politicians following the bait and coupled with a seeming lack of understanding of the rights of LGBTIQ+ persons,[66] make negative comments about homosexuality. Apart from the response of politicians to sensationalised reports in the media and comments by moral entrepreneurs concerning LGBTIQ+ activities, politicians have also responded to statements made by leaders in other countries, particularly the global north, to denounce homosexuality and attempt to affirm the sovereignty of the state capable of managing its affairs including the subject of homosexuality[67]

Moral entrepreneurs comprise individuals who demand certain moral standards, often subjective of the state.[68] These persons are usually

65 Statistics Ghana '2010 population and housing census' https://statsghana.gov.gh/gssmain/fileUpload/pressrelease/2010_PHC_National_Analytical_Report.pdf (accessed 10th January 2022).

66 Rights of LGBTIQ+ persons do not mean a new set of rights but the claim that existing rights also cover LGBTIQ+ persons. Politicians in Ghana often overlook or are ignorant of this distinction.

67 'Ghana refuses to grant gays' rights despite aid threat' (n 44); see also AA Asiedu 'LGBTIQ+ is an abomination that won't be accepted in Ghana – Bagbin tells Australian High Commissioner' *My Joy Online* 2 April 2021 https://www.myjoyonline.com/LGBTIQ+I+-is-an-abomination-that-wont-be-accepted-in-ghana-bagbin-tells-australian-high-commissioner/ (accessed 14 April 2022).

68 Tettey (n 4).

religious, political and traditional leaders. Sometimes they are people who have some standing or popularity in the eyes of the public. When these moral entrepreneurs speak on media platforms, particularly the radio, they quickly get the attention of political officeholders or those seeking political office.[69]

It is generally the case in Ghana that when moral entrepreneurs make passionate arguments on the radio, calling on politicians, religious and traditional leaders to act to save the country against homosexuality, the debate is sustained for weeks[70] and politicians have been compelled to act to save their political careers. Politicisation of homosexuality had led to some traditional leaders warning people in their locality to desist from homosexual activity and in extreme cases, banished individuals perceived to be homosexuals from their traditional community.[71] However, the call to action, announced by moral entrepreneurs is usually targeted at politicians. These entrepreneurs know that politicians wield power to make laws to criminalise LGBTIQ+ activities and also use the state's coercive forces, which should be used for the collective good of the country, to harass and violate the rights of LGBTIQ+ persons.

Politicians have failed to protect the rights of LGBTIQ+ persons, leading to increased hate speech and assault against the latter.[72] Also, when

69 Essien & Aderinto (n 3).

70 'Ghana Anti-LGBTIQ+ Bill: Ghana church leaders intensify pressure on parliament to pass anti-gay bill' *BBC New* 11 October 2021 https://www.bbc.com/pidgin/tori-58867937 (accessed 9 May 2022). See also '"We won't tolerate LGBTIQ+" Ga Chiefs Warn' *Daily Guide Network* 24 October 2021 https://dailyguidenetwork.com/we-wont-tolerate-LGBTIQ+-ga-chiefs-warn/ (accessed 8 May 2022).

71 Tinchie 'Gay man caught by Nkoranza Chiefs: Asked to bring 24 sheep, Schnapps to pacify Gods' *Opera News* https://gh.opera.news/gh/en/society/6c9d827f36347d2d55a086313dd2094a (accessed 8 May 2022); see also Ccobbina 'The traditional rulers of Nkoranza has baptized a gay with the blood of a sheep' *Opera News* https://gh.opera.news/gh/en/religion/8fcef4da36230863d8df5e8e2dc9580c (accessed 8 May 2022); A Cromwell 'Alleged homosexual banished from Nkoranza community' *My Joy Online* 8 October 2021 https://www.myjoyonline.com/alleged-homosexual-banished-from-nkoranza-community/ (accessed 8 May 2022); '21-year-old suspected gay confesses after being threatened with an oath' *GhanaWeb* 8 October 2021 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/21-year-old-suspected-gay-confesses-after-being-threatened-with-an-oath-1375618 (accessed 8 May 2022); 'Nkoranza Traditional Council banishes suspected gay' *Daily Guide Network* 9 October 2021 https://dailyguidenetwork.com/nkoranza-traditional-council-banishes-suspected-gay/ (accessed 8 May 2022).

72 Human Rights Watch (n 36) 33-36. 'Pearl' an interviewee, narrates a chilling story of how she was assaulted by a government official and his police escort on suspicion of being lesbian. Youths of the town put a vehicle tyre around her neck and nearly burnt her alive, but for the intervention of her father who promised to make her leave the town where the incident occurred.

people have been declared unwanted and banished from a community by a traditional authority, contrary to their Constitutional rights, politicians have failed to protect them.[73] Therefore, not only do politicians attack and speak against LGBTIQ+ persons and their rights when goaded by moral entrepreneurs, but they also fail to act when the rights of LGBTIQ+ individuals are threatened or violated, as required by the 1992 Constitution of Ghana.[74] Politicians affirm moral entrepreneurs' views to maintain political relevance and popularity, and ultimately to maintain power.

When there is violence and violations of the rights of LGBTIQ+ persons, politicians ignore the subject and refuse to speak against such acts. For instance, when news emerged that a man had been severely assaulted by some residents of Nima, a suburb of Accra over allegations that he was homosexual, there was no urgency to pursue the case and bring the perpetrators to book.[75] Owing to the lackadaisical attitude of state agencies, the matter was thrown out of court for lack of interest to prosecute, even though the victim was always present in court and desirous of pursuing the matter to its logical conclusion.[76] Video footage shown on media outlets and social media revealed details of the assault, which was carried out in a manner to send a message that homosexuality was unacceptable and vigilante groups would do everything to stop the practice.[77] If political leaders issue threats that homosexuals would soon be lynched,[78] it emboldens citizens to assault and record such shameful acts against alleged homosexuals.

73 As above.

74 Constitution of Ghana, 1992, chap 5 contains provisions such as the protection of personal liberty (art 13); human dignity (art 15); protection of privacy and home (art 18); and general fundamental freedoms (art 21) which are often violated in relation to LGBTIQ+ persons.

75 Human Rights Watch (n 36) 44; see also Human Dignity Trust 'Ghana' https://www.humandignitytrust.org/country-profile/ghana/ (accessed 26 April 2021).

76 Human Rights Watch (n 36) 44-46. 'Nima youth assault gay man' *GhanaWeb* 17 August 2015 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Nima-youth-assault-gay-man-375655 (accessed 10 May 2022).

77 'Nima youth assault gay man' (n 76); 'Anti-LGBTIQ+ Bill Controversy: Man assaulted for engaging in a homosexuality act in Nkoranza' *JoyNews* 9 October 2021 https://www.youtube.com/watch?v=i1aKJzGXK4E (accessed 10 May 2022); see also 'Suspected gay man beaten badly by Nkoranza residents' *MyInfogh* 11 October 2021 https://myinfo.com.gh/2021/10/suspected-gay-man-beaten-badly-by-nkoranza-residents/ (accessed 10 May 2022).

78 'Homosexuals could soon be lynched in Ghana – MP warns' *Ghanamps* 17 June 2011 https://ghanamps.com/homosexuals-could-soon-be-lynched-in-ghana-mp-warns/ (accessed 30 June 2017).

It is even more intriguing to learn of instances where political leaders have instructed and supervised assault against LGBTIQ+ persons in Ghana.[79] For instance, a District Chief Executive who is the representative of the President of the Republic of Ghana in the district, summoned an alleged lesbian to his office, unilaterally cancelled a contract that the lady had won to provide services to the assembly, ordered his police escort and other persons to severely beat her up and banished her from the traditional community where she lived.[80] Politicians have also incited citizens to force alleged homosexuals out of their communities. A former minister of the Western Region of Ghana, Mr Paul Aidoo authorised people in that region to report on persons who are homosexuals, charging landlords and employers to evict and dismiss them from their houses and employment, respectively.[81] This resulted in demonstrations by the youth and religious organisations, both Christian and Muslim, against LGBTIQ+ persons in the region.[82] These are serious infringements of the Constitutional rights and liberty of a person, but the state, controlled by politicians have failed to act, and no sanctions have been meted out against perpetrators.

In some instances, moral entrepreneurs have sounded an alarm when media reports of the outcomes of health screenings have been made public. One such occasion, is the sensational publication by media outlets of the Ghana AIDS Commission's Report that homosexuals are a high-risk group. It alleged that homosexuals had undergone health screening and most of them had contracted HIV and other sexually transmitted diseases, which caused people to stigmatise LGBTIQ+ persons.[83] It was a major argument employed by the moral entrepreneurs and the eight parliamentarians to set up a hostile climate for LGBTIQ+ persons in Ghana.[84] With this information, LGBTIQ+ members were presented and viewed by the general population as people who were bent on decimating

79 Human Rights Watch (n 36).

80 As above.

81 'Paul Evans Aidoo's Ghana gay spy call "promotes hatred"' *BBC News* 22 July 2011 https://www.bbc.com/news/world-africa-14250170 (accessed 9 May 2022); See also 'Council Adopts Resolution Condemning Ghanaian Minister's Anti-LGBTIQ+ Comments' *City of West Hollywood* 17 August 2011 https://www.weho.org/Home/Components/News/News/894/ (accessed 9 May 2022).

82 As above.

83 'Most homosexuals in Ghana are bi-sexual – National AIDS/STI Control Programme Manager' *My Joy Online* 30 July 2021 https://www.myjoyonline.com/most-homosexuals-in-ghana-are-bi-sexual-national-aids-sti-control-programme-manager/ (accessed 8 May 2022).

84 As above.

society or creating a public health hazard for all Ghanaians because of their promiscuous sexual lifestyle. [85]

Interestingly, there is no space for a reasoned conversation because any attempt to speak for and on behalf of LGBTIQ+ persons is met with insults, assaults and threats of death. Sometimes the reputation of respected members of society is dented and they are accused of also being homosexuals; that is why they speak favourably about the subject.[86] Apart from a few bold human rights activists who speak for LGBTIQ+ persons on the grounds of principle, even human rights organisations are afraid or simply unable to do so, because they suffer hate speech from the general population and from moral entrepreneurs.

4 Lawfare and LGBTIQ+ activism: Responses by the LGBTIQ+ community to the politicisation of homosexuality in Ghana

Since the anti-LGBTIQ+ Bill's tabling in Parliament and the inception of public debates around its motives and necessity, two key factions of activism have developed from the discussions of the Bill. We categorise these activists along two key lines, activists for and activists against the Bill, and discuss how these two groups have engaged the Bill in this section.

While activism against the LGBTIQ+ community is not a new phenomenon, public support for LGBTIQ+ rights by a cross-section of society is rare. The number of activists coming out openly to object to the Bill, defend the LGBTIQ+ community and push back attempts at repressing the rights of LGBTIQ+ persons in Ghana now, is significant. Although the LGBTIQ+ community seems not to have responded resoundingly to the attacks on its members and the new Bill, the number of emerging allies who have challenged it and sparked national debate is worth noticing. These activists against the Bill have employed diverse spaces to challenge it. These include journal articles,[87] presentation of a memorandum to parliament blogs, and webinars, among others, to

85 As above. See also memorandum to 'Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021' 5.

86 See for instance the verbal attack on Dr Charles Wereko Brobbey, an elder statesman who challenged an anti-gay activist for pursuing hate against LGBTIQ+ persons: 'Let's help you if you're homosexual: Foh-Amoaning tells Wereko Brobbey' *Peacefmonline* 28 April 2018 https://www.peacefmonline.com/pages/local/social/201804/350885.php?storyid=100& (accessed 12 May 2022).

87 See for instance TE Coleman, EY Ako & JG Kyeremanteng 'A critique of Ghana's anti-LGBTIQ+ Bill of 2021' forthcoming in the *African Human Rights Law Journal* 2022.

discuss and express their displeasure with the Bill.[88] Criticism of the Bill by allies and persons of respectable social standing through various media platforms has created a sense of safety, empathy, and awareness of the depth of politicisation and denigration of LGBTIQ+ rights in Ghana.[89] In social media spaces, for example, LGBTIQ+ activists and allies have used pseudonyms and other forms of identities which offer protection, to raise awareness about the dangers that the Bill poses to the rights of Ghanaians and LGBTIQ+ persons. Succinctly put by Stewart:[90]

> In the context of this revisionist history and pervasive violence, LGBTIQ+ Ghanaian activists are creating virtual and physical safe spaces to affirm their identities and speak out about their experiences.

Prominent amongst these emerged activists have been a group of 18 academics, lawyers, and social justice advocates under the name 'a group of concerned citizens of Ghana'.[91] Founding their arguments on the issues of human rights,[92] they have through a memorandum, submitted to Parliament in response to the Bill highlighted its ills and why it should not be passed into law.[93] Other individuals and groups have also appeared before the parliamentary select committee and presented various memoranda to justify why the Bill needs to be withdrawn.[94] During the public hearing in Parliament of memoranda submitted in support of and against the Bill in November 2021,[95] LGBTIQ+ activists and allies raised

88 Odoi (n 2); Coleman, Ako & Kyeremanteng (n 87); AO Gyamerah & A Hutchful 'Ghana's proposed hate bill threatens safety, livelihood, and the health of LGBTIQ+ People' *Think Global Health* 6 January 2022 https://www.thinkglobalhealth.org/article/ghanas-proposed-hate-bill-threatens-safety-livelihood-and-health-LGBTIQ+I+-people (accessed 15 April 2022) ; see also 'Kill the bill Ghana: Socialists and LGBTIQ+ Liberation' *Socialist Solidarity Gh* 23 August 2021 https://www.youtube.com/watch?v=pbx_b1gUBgQ (accessed 17 April 2022).

89 'Archbishop of Canterbury criticises Ghana anti-LGBTIQ+ bill' *BBC News* 27 October 2021 https://www.bbc.com/news/world-africa-59062483 (accessed 16 April 2022).

90 'Ghana's proposed hate bill threatens safety, livelihood, and the health of LGBTIQ+ People' (n 88).

91 Memorandum submitted to select on constitutional, legal, and parliamentary affairs committee on the Promotion of proper human sexual rights and Ghanaian family values bill, 2021. On file with authors.

92 'Ghana Anti-LGBTIQ+ Bill: Why high-profile Ghanaian professors, lawyers dey fight against anti-gay bill' (n 20).

93 Memorandum (n 91).

94 'LGBTIQ+ Bill: Proposed bill will promote violence when passed – Group' *GhanaNews* 21 February 2022 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/LGBTIQ+-Bill-Proposed-bill-will-promote-violence-when-passed-Group-1473881 (accessed 17 April 2022).

95 Parliament of Ghana 'House Select Committee Begins Public Hearings on Anti-LGBTIQ+ Law' (12 November 2021) https://www.parliament.gh/news?CO=153

concerns about the danger the Bill poses to the safety of persons perceived to belong to the LGBTIQ+ community.[96] While the concerns raised by the pro LGBTIQ+ groups might be legitimate, moral entrepreneurs and their allies also submitted memoranda to Parliament, fiercely opposing these concerns.[97]

LGBTIQ+ activists have however not approached the courts to resist violations of their rights. The first reason is the hostile socio-political environment and attitudes towards the LGBTIQ+ community. The Ghanaian society believes that homosexuality is a western concept unknown to Ghanaian culture.[98] Yet, critical historical writings point to the existence of same-sex relationships in early Ghanaian communities before the arrival of colonial administrators.[99]

The second reason the LGBTIQ+ community may not have resorted to using the courts, flowing from the evidence in the debates, is a lack of conviction that the 1992 Constitution of Ghana protects the rights of every person, including LGBTIQ+ persons. The (non-)appreciation that the Constitution protects the rights of all persons is replicated in the Constitutional Review Commission Report of 2011, which claimed that constitutional rights do not extend to LGBTIQ+ persons and that the majority of Ghanaians think it should not be amended to protect such rights.[100] This belief is strengthened by the provision in the Criminal

(accessed 17 April 2022); See also 'LGBTIQ+ Bill: Rightful Ghana group meeting with committee to be held in-camera' *GhanaWeb* 17 March 2022 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/LGBTIQ+-Bill-Rightful-Ghana-group-meeting-with-committee-to-be-held-in-camera-1492844 (accessed 17 April 2022).

96 'LGBTIQ+ Bill: Proposed bill will promote violence when passed- Group' (n 94).

97 'House Select Committee Begins Public Hearings on Anti-LGBTIQ+ Law' (n 95).

98 L Ossé 'Ghanaians are united and hospitable but intolerant toward same-sex relationships' *Afrobarometer Dispatch* 461 (1 July 2021) 2, reports that about 93 per cent of Ghanaians are intolerant of people in same-sex relationships. See also Odoi (n 2) 2; Report of the Constitution Review Commission of Ghana 'From a political to a developmental constitution' (n 33) 657.

99 M Epprecht 'The 'unsaying' of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (1998) 24 *Journal of Southern African Studies* 631; N Ajen 'West African homoeroticism: West African men who have sex with men' in SO Murray & W Roscoe *Boy-wives and female husbands: Studies of African homosexualities* (1998); O Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 14 at 23-24. I Signorini 'Agonwole agyale: The marriage between two persons of the same sex among the Nzema of Southwestern Ghana' (1973) 43 *Journal de la Societe des Africanistes* 221.

100 Constitution Review Commission 'From a political to a developmental Constitution' (2011) 652-653 https://constitutionnet.org/sites/default/files/crc_research_report_final.pdf (accessed 14 July 2022).

Offences Act of Ghana that criminalises the offence of 'unnatural carnal knowledge'.[101] Therefore, many Ghanaians believe that because the Constitution does not expressly protect LGBTIQ+ rights and the criminal law also criminalises same-sex sexual relations, LGBTIQ+ rights are a new form of rights that should not be introduced into the Constitution.[102] This impression by most Ghanaians that the Constitution does not protect the rights of LGBTIQ+ persons is erroneous.

The case of *Toonen v Australia*,[103] shows that 'sex' could be interpreted as including sexual orientation,[104] thereby widening the scope of prohibition of discrimination on grounds of sex to include sexual orientation. The recent case of *Flamer-Caldera v Sri Lanka*[105] that found Sri Lanka in breach of article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is also instructive.[106] The CEDAW Committee held that 'criminalisation of same-sex sexual activity by women compounds discrimination against women in Sri Lanka'.[107] This decision underscores the fact that even in the absence of express words protecting LGBTIQ+ rights, existing corpus of human rights protects the rights of every person including LGBTIQ+ persons.

Some domestic courts have also followed in the footprints of global treaty monitoring body decisions and have also held that despite the lack of express provisions in their constitutions, LGBTIQ+ persons are also entitled to constitutional rights protections.[108] Therefore, Ghana will not be the first country to have its courts recognise the rights of LGBTIQ+ persons. The point being made here is that recognising that the Constitution protects the rights of LGBTIQ+ persons does not amount to the creation of a new right. It is simply an affirmation of existing rights that protects every person, including LGBTIQ+ persons. The Supreme Court of Ghana

101 Section 104(1)(b) of the Criminal Offences Act of Ghana 29 of1960, as amended.

102 See Constitution Review Commission Report (n 100) 654-655.

103 In *Toonen v Australia* Communication 488/1992, Merits, UNHR Committee, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) para 8.7, the Human Rights Committee held that the ICCPR prohibited discrimination on the ground of sex, which includes sexual orientation.

104 *Toonen v Australia* para 8.7.

105 *Rosanna Flamer-Caldera v Sri Lanka* , CEDAW Committee, Communication 134/2018, UN Doc CEDAW/C/81/D/134/2018 (21 February 2022).

106 As above.

107 *Rosanna Flamer-Caldera v Sri Lanka* para 9.2.

108 In India, see *Navtej Singh Johar v Union of India Thr Secretary Ministry of Law and Justice* Writ Petition (Criminal) 76 of 2016. See also in Botswana, *Letsweletse Motshidiemang v Attorney General & Lesbians, Gays, and Bisexuals of Botswana (LeGaBiBo) (Amicus Curiae)* MAHGB-000591-16.

increasingly relies on international case law of regional and global human rights bodies to interpret the Bill of Rights in the 1992 Constitution.[109] This portends well for the future of human rights litigation in Ghana, even though the Court is yet to decide a matter relating to LGBTIQ+ persons rights.

The third and last impediment to using the courts is the lack of a coordinated and well-rehearsed strategy that will attract the sympathy of the public and the courts. Since national debates on homosexuality started in 2006, the anti-LGBTIQ+ community have always had a simple coordinated message that convinces the public that homosexuality is alien to the culture of Ghanaians and a threat to the moral fibre of society. On the other hand, the LGBTIQ+ community and allies have not been able to convince Ghanaians, as the Botswana High Court put it, that 'sexual orientation is innate to a human being. It is not a fashion statement or posture. It is an important attribute of one's personality and identity'.[110] The LGBTIQ+ community has failed to articulate a simple message that encapsulates their lived experiences that the public will identify and empathise with. Such a simple message could form the basis of a strategy that is attractive to a court of law. As Tamale cautions, Africans need to articulate their own lived experiences to dispel the notion that homosexuality is foreign driven and has a neo-colonial agenda.[111] Unfortunately, in the Ghanaian context, not much has been done by LGBTIQ+ led civil society organisations and human rights bodies to displace the notion that homosexuals are seeking to impose their 'lifestyle' on Ghanaians, recruit children, decimate the population and upset the traditional Ghanaian family. While the LGBTIQ+ community is largely closeted, newly formed LGBTIQ+ civil society groups led by young activists are beginning to change the narrative, leading to the backlash discussed above.[112]

109 See for example the case of *Mrs Abena Pokuaa Ackah v Agricultural Development Bank (ADB)* Civil Appeal J4/31/2015, where the Supreme Court relied on case law of the European Court of Human Rights to interpret the right to privacy in the Constitution of Ghana. For a full discussion of the application of international law in human rights litigation in Ghana, See Ako EY 'Towards the decriminalisation of consensual same-sex conduct in Ghana: A decolonisation and transformative constitutionalism approach' LLD thesis, University of Pretoria, 2021, 201-265.

110 *Letsweletse Motshidiemang v Attorney General & Lesbians, Gays, and Bisexuals of Botswana* (n 108) 79-80.

111 S Tamale 'Confronting the politics of nonconforming sexualities in Africa' (2013) 56 *African Studies Review* 41.

112 These groups include Rightify Ghana and LGBT+ Rights Ghana.

5 Rethinking LGBTIQ+ lawfare in response to state-sponsored homophobia

Interestingly, the introduction of the anti-LGBTIQ+ Bill in Ghana,[113] has sparked a new wave of lawfare. LGBTIQ+ led civil society organisations and the LGBTIQ+ community have received a significant boost from allies, drawing from academia, the legal fraternity and other civil society organisations.

We recommend that civil society groups sympathetic to LGBTIQ+ rights in Ghana should form a coalition to contest the constitutionality of section 104 of the Criminal Offences Act and the Anti-LGBTIQ+ Bill currently before parliament, if passed into law. Taking a cue from countries such as South Africa, Botswana, Kenya and Uganda, members of the LGBTIQ+ community must conduct a legitimate lawfare in defence of their rights. The coalition could also contest ongoing violations against LGBTIQ+ based on their sexual orientation in the short term. For instance, the announcement of an LGBTIQ+ conference scheduled for July 2020 caused adverse reactions in Ghana.[114] Individuals, organisations and government officials threatened to shut down such a gathering and prevent persons who were travelling to Ghana from doing so.[115] It is only appropriate to contest such attempts which infringe on the right to freedom of association[116] and threats to the lives of the participants[117] in

113 Promotion of proper human sexual rights and Ghanaian family values Bill, 2021.

114 'We'll halt LGBTIQ+ conference in Ghana by all means – Christian group' *The Independent Ghana 4 March 2020* https://theindependentghana.com/2020/03/well-halt-LGBTIQ+-conference-in-ghana-by-all-means-christian-group/ (accessed 26 September 2020).

115 As above. See also KG Asiedu 'Ghana bans LGBTIQ+ conference after Christian groups protest' *Reuters* 12 March 2020 https://www.reuters.com/article/us-ghana-LGBTIQ+-religion-idUSKBN20Z31L (accessed 26 September 2020); '"*Wallahi Tallahi*", we will stop any LGBTIQ+ conference in Ghana – Chief Imam swears' *GhanaWeb* 27 February 2020 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Wallahi-Tallahi-we-will-stop-any-LGBTIQ+-conference-in-Ghana-Chief-Imam-swears-878911 (accessed 26 September 2020).

116 Article 21(1)(e) of the Constitution of Ghana guarantees 'freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interest'. See also the case of *Mensima v Attorney-General* [1996-1997] SCGLR 676. The Supreme Court upheld the right to association of the Applicant and declared as unconstitutional, Regulation 3(1) on the manufacture and sale of spirits regulations which required membership of a registered distillers association before obtaining and operating the sale of alcohol.

117 Essien & Aderinto (n 3) 121 recount that a planned LGBTIQ+ conference in Ghana in 2006 prompted a response from Ghanaians and the state that threatened the rights of association and other rights of LGBTIQ+ persons.

court. Contesting such issues in court will create a body of jurisprudence for future litigation.

As a starting point, the human rights division of the High Court that determines only human rights cases could be an avenue to test violations of sexual minority rights. As Jjuuko rightly observes, such litigation requires strategic planning as such cases may, even if successful, have negative consequences including backlash and countermobilisation.[118] The examples of India,[119] Botswana,[120] and Kenya[121] confirm that strategic litigation requires adequate planning to challenge the constitutionality of sodomy laws.

Apart from using the courts, the Commission on Human Rights and Administrative Justice (CHRAJ),[122] which is Ghana's National Human Rights Institution (NHRI) offers an avenue to protect LGBTIQ+ rights. Historically, NHRIs are set up to protect the rights of all persons regardless of their sexual orientation.[123] The mandate of NHRIs encompass investigation of human rights abuses, offering avenues for redress and reparation, and educating the public about the rights of

118 A Jjuuko 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay, and bisexual persons in Common Law Africa' LLD thesis, University of Pretoria, 2018.

119 *Navtej Singh Johar v Union of India Thr Secretary Ministry of Law & Justice* (n 108). See the earlier case of *Suresh Kumar Koushal v Naz Foundation* Civil Appeal 10972 (2013).

120 *Letsweletse Motshidiemang v Attorney General & Lesbians, Gays, and Bisexuals of Botswana* (n 108), which declared sodomy law as unconstitutional in Botswana. The decision has since been affirmed by the Apex Court of Botswana. For a discussion of this case see F Viljoen 'Botswana court ruling a ray of hope for LGBTIQ+ people across Africa' *The Conversation* 12 June 2019 https://theconversation.com/botswana-court-ruling-is-a-ray-of-hope-for-LGBTIQ+-people-across-africa-118713 (accessed 21 July 2020). See also, T Esterhuizen 'Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General* (*LEGABIBO as amicus curiae*)' (2019) 19 *African Human Rights Law Journal* 843. For an earlier decision of the Court of Appeal refusing to repeal sodomy in Botswana see *Kanane v The State* 2003 (2) BLR 67 (CA). The Court noted at headnote 3 that 'there was no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women required a decriminalisation'.

121 *EG & 7 Others v Attorney General; DKM & 9 Others (interested parties); Katiba Institute and Another (amicus curiae)* consolidated suit of Petition 150 of 2016 and Petition 234 of 2016. The High Court in Kenya upheld the constitutionality of the sodomy offence claiming that to hold otherwise will be tantamount to offending the right to marry the opposite sex in the Kenyan Constitution. The case is on appeal.

122 Article 216 of the Constitution of Ghana establishes CHRAJ as an independent constitutional body with a tripartite power of human rights, anti-corruption, and administrative justice.

123 A-E Pohjolainen 'The evolution of national human rights institutions – The role of the United Nations' The Danish Institute for Human Rights (2006).

citizens. As an 'A-rated' human rights institution,[124] CHRAJ is required by its constitutional mandate to investigate instances of human rights violations, ensure appropriate redress, and educate the public about the rights and responsibilities.[125]

This chapter makes two recommendations relating to CHRAJ. First, CHRAJ must take the lead on educating the Ghanaian public on the rights of all persons, including LGBTIQ+. CHRAJ's mandate includes educating the public on fundamental human rights and freedoms[126] and has representation in almost every district of Ghana. Evidence available points to the fact that most of the public lack adequate education about sexual minority rights,[127] and the Commission must find ingenious ways to execute this constitutional mandate. Educating the public on LGBTIQ+ rights might be a challenging assignment to carry out in the current homophobic climate in Ghana, but as an independent human rights commission of the state,[128] it is duty-bound to develop strategies to execute this mandate. Through radio and television programmes, and face-to-face discussions in various communities, the Commission should be bold to execute this mandate.

Second, LGBTIQ+ activists should take advantage of the powers of the Commission to investigate violations of fundamental human rights to lodge complaints of violations of their rights. The Commission has powers to mediate such cases but can also resort to a panel hearing where it can make formal rulings. The procedure of panel hearing has generated

124 CHRAJ is recognised by the global alliance of national human rights institutions as an 'A-rated' human rights institution, compliant with the *Paris Principles* ohchr.org/sites/default/files/Documents/Countries/NHRI/Chart_Status_Nis.pdf (accessed 14 May 2022). CHRAJ operates an anonymous online system that receives and investigates complaints of human rights violations against LGBTIQ+ persons.

125 Articles 216-230 of the Constitution of Ghana, 1992; See also Commission on Human Rights and Administrative Justice Act 456 of 1993.

126 Article 218(f) of the Constitution of Ghana, 1992 empowers CHRAJ 'to educate the public as to human rights and freedoms by such means as the Commissioner may decide, including publications, lectures and symposia'; see also sec 7(g) of the Commission on Human Rights and Administrative Justice Act.

127 Odoi (n 2).

128 Article 217 of the Constitution of Ghana, 1992, requires the President of Ghana to appoint the members of CHRAJ. Arguably, even though appointed by the president, the commissioners of CHRAJ have displayed high levels of independence since its formation in 1993, with high profile investigations of government ministers and organs, finding them culpable. The Commission has also taken a bold stand on the discussion on the Anti-LGBTIQ+ Bill 2021, currently before parliament. For a discussion of the independence, powers, and functions of CHRAJ see EY Ako 'An examination of the powers and functions of CHRAJ' LLB thesis submitted to the Faculty of Law, KNUST, 2007 (on file with authors).

a body of human rights jurisprudence which includes the ground-breaking case on sexual harassment.[129]

While CHRAJ operates an anonymous online service for LGBTIQ+ persons, the efficacy of such a system is unknown, and a visit to their online website suggests this service might no longer be available.[130] CHRAJ should also strive to protect the identity of LGBTIQ+ persons who lodge complaints of human rights violations while delivering rulings that will serve as jurisprudence for future cases.

One factor that may affect the effective delivery of CHRAJ's constitutional mandate is the lack of capacity and resources.[131] The Commission has been under-resourced for several years, and its annual budget has been consistently reduced. The lack of resources also affects the retention and attraction of qualified staff at all levels of the work of the Commission, with expertise and knowledge in human rights at sub-regional, regional and global levels.

The financial and human resource challenges of CHRAJ notwithstanding, it is important to dispel the notion that educating the public about LGBTIQ+ rights requires finances rather than a mindset of tackling this all-important human rights issue. To this end, CHRAJ should be commended for its public comments on the Anti-LGBTIQ+ Bill before Parliament.[132] Through this memoranda and public defence of it in parliament, CHRAJ pointed out unequivocally that a better national response to the issue of homosexuality is to engage constructively with the LGBTIQ+ community and other stakeholders instead of the state

129 *Commission on Human Rights and Administrative Justice v Norvor* [2001-2002] 1 GLR 78. The High Court, Accra, enforced the decision of CHRAJ to award damages against the Respondent for acts of sexual harassment that caused injury to the complainant's dignity and self-respect pursuant to sec 18(2) of the Commission on Human Rights and Administrative Justice Act.

130 Human Rights Committee 117th Session 'Summary record of the 3274th meeting held at the Palais Wilson, Geneva, on Friday, 24th June 2016 at 10 am' CCPR/C/SR.3274 (29 June 2016). At para 38, a Deputy Commissioner of CHRAJ, Mr Richard Ackom Quayson assured the Human Rights Committee that CHRAJ had an online reporting system for victims of LGBTIQ+ violations.

131 See for instance CHRAJ 'Twenty-seventh annual report 2020' submitted to parliament in 2021. At page 80 CHRAJ states that it received only '93.5% of the total annual estimated budget' for 2020. This budget is an improvement on previous years' budgets.

132 See CHRAJ 'Memorandum on the proper human sexual rights and Ghanaian family values bill, 2021, comments from the Commission on Human Rights and Administrative Justice (CHRAJ)' chraj.gov.gh/wp-content/uploads/2021/12/memorandum-LGBTIQ+-bill.pdf (accessed 14 May 2021).

passing a law to criminalise the phenomenon.[133] The recommendation is that CHRAJ should engage more on LGBTIQ+ rights through press releases, sensitisation workshops and other forms of media publicity and engagement with citizens.

The Human Rights Council of the United Nations has advised the government of Ghana to consider resourcing CHRAJ adequately for the effective execution of the Commission's mandate.[134] The profound nature of LGBTIQ+ rights and the need to educate and adjudicate sexual minority rights in a homophobic environment require strengthening the capacity of personnel at all levels, especially those at the district and regional levels where most human rights violations occur. Besides addressing resource constraints,[135] CHRAJ must prioritise strengthening staff capacity at all levels, from the national office to the district office, to deal with the intricate issue of sexual minority rights. The Commission can take advantage of scholarship opportunities available for training programmes on sexual minority courses at the Centre for Human Rights at the University of Pretoria. CHRAJ can also liaise with academics and departments in universities in Ghana with expertise on sexual minority rights issues to organise training programmes for their staff. The above recommendations notwithstanding, challenging the constitutionality of laws that criminalise consensual same-sex adult relationships is the way to go. Successful litigation approaches in other jurisdictions, and the seeming lack of resort to the courts to vindicate the rights of LGBTIQ+ persons, could be the focus of future research in Ghana.

6 Conclusion

This chapter has argued that there is a culture of politicisation of LGBTIQ+ rights in Ghana, where politicians focus on making denigrating comments about the LGBTIQ+ community and threats to arrest or pass new restrictive laws to regulate LGBTIQ+ activities in order to score political points instead viewing it as a human rights issue. As a result of the politicisation of homosexuality, LGBTIQ+ persons have endured verbal and physical assaults and routine violations of their rights.

133 CHRAJ 'Twenty-seventh annual report 2020' (n 131).

134 Human Rights Council 'Universal Periodic Review – Ghana Third Cycle' https://www.ohchr.org/EN/HRBodies/UPR/Pages/GHIndex.aspx (accessed 10 July 2020); See also HRC 'Report of the Working Group on the Universal Periodic Review Ghana' A/HRC/37/7 (26 December 2017) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/367/88/PDF/G1736788.pdf?OpenElement (accessed 10 July 2020).

135 CHRAJ 'Twenty-seventh annual report 2020' (n 131).

Despite sporadic media challenges to the law that criminalise same-sex relationships, the LGBTIQ+ community in Ghana has endured state and non-state actors' infringement on their rights. On the promptings of moral entrepreneurs, including politicians, and traditional and religious leaders, the state has used its coercive forces to violate the rights of LGBTIQ+ persons. Whenever LGBTIQ+ persons have created visibility in public, the state has been urged to clamp down on their activities, leading to violations of constitutional rights such as privacy, association and expression. Even during the height of the COVID-19 pandemic, when the LGBTIQ+ community, as a vulnerable group, had access to a few places for security, health, and other purposes to realise their potential, the state moved to arrest, detain, and restrict their movement for exercising their rights to freedom of association and expression.[136] Where offices were opened to offer safe and secured access for members of the LGBTIQ+ community to exchange ideas for the betterment of the community freely, those safe spaces were shut down with brute force, simply because anti-LGBTIQ+ persons and groups who think 'others' should not be visible argue for such areas to be eliminated.[137]

Therefore, this chapter argues that the time has come for LGBTIQ+ led organisations and the LGBTIQ+ community to adopt some of the lawfare strategies employed by their counterparts in other African countries like Botswana, South Africa, Kenya, and Uganda to fight oppression and violation of their rights. The current Anti-LGBTIQ+ Bill before Parliament that seeks to eliminate anything associated with the LGBTIQ+ community, including allies, and civil society organisations, create a police state, which is very concerning. The resistance to the Bill by allies of the LGBTIQ+ community suggests that everyone that is sympathetic to the rights of human beings must come on board to fight the violation of the rights of LGBTIQ+ persons. Whether the Bill is passed in its current form or not, it must be contested in court because a secular, open and democratic society like Ghana has no place for bigotry laws that criminalise a section of society and create second class citizens.

The LGBTIQ+ community and allies should reckon that using the courts as an avenue to protect their rights, will play a vital role in dismantling colonialism, bigotry and homophobia. The time to employ lawfare is now, and the LGBTIQ+ community has nothing to lose but a lot to gain to stand up and be counted in the fight against the violation of their fundamental human rights.

136 'Outcry after 21 people arrested in Ghana for 'advocating LGBTIQ+ activities' (n 13).

137 Williams (n 6).

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10 Senegal: Mobilising for gay rights in the shadow of HIV/AIDS

*Vegard Vibe**

1 Introduction

Despite being a former French colony, article 319(3) of the Senegalese penal code prohibits all acts against the order of nature with a penalty of up to five years in prison.[1] The law is enforced intermittently, but remains a threat to the LGBT-community and activists in particular. Indeed, on several occasions the law has been used to arrest individuals while they were engaged in activism. Repealing the law has therefore become an increasingly important, yet elusive target, for the burgeoning LGBT-movement in Senegal, which includes an estimated 15 organisations and several networks. These organisations have themselves become the source of public polemic as powerful conservative non-governmental organisations (NGOs) have published names and addresses of several of the most prominent organisations.[2] Neither this public attention towards homosexuality nor the existence of LGBT-organisations are a particularly old phenomenon, and they influence each other.

In a country where 95 per cent of the population identifies as Muslim, homosexuality has remained mostly taboo. For a long time, Senegalese society exhibited a relative tolerance towards homosexuals, as long as their existence and behaviour remained hidden from public view. There were discrete identities and social roles reserved for non-gender conforming individuals. In the late 1990s it became apparent that the social structures

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1 The law is clearly inspired by colonial law. The Napoleonic Code, most of which Senegal adopted at independence criminalised sexual relations between people of the same sex under the age of 21. The current law, from 1966, is thus more expansive as it also criminalises same-sex relations between consenting adults. The law is otherwise clearly inspired by the French counterpart, as it uses the same wording of the acts criminalised (for a more thorough analysis see VF Vibe 'Politicization of homosexuality in Senegal' PhD thesis, University of Bergen, forthcoming).

2 'Récépissés délivrés aux homosexuels: Jamra apporte ses preuves et cite les noms' *Senenews* 24 November 2019.

supporting some tolerance for same-sex sexualities were cracking. A concentrated HIV/AIDS epidemic ravaged the LGBT-community, who could stay silent no more. In this context, Senegalese gay men and women started organising. Concurrently, and partly because of this newfound visibility, violence towards LGBT-individuals increased, and political and religious actors capitalised on increased media attention on homosexuality, using it for religious and political gain. This politicisation process has again influenced how the LGBT-community organises and mobilises. It is this symbiotic relationship between politicisation and mobilisation that the chapter explores.

While the literature on social movements focuses extensively on how the political context influences movements and movement outcomes,[3] it rarely considers other contextual factors like politicisation and criminalisation. There has been an increasing turn to formal organisations in many African LGBT-movements, but there is still limited research on them, in particular in Francophone Africa.[4] This chapter contributes to filling these gaps in the literature by analysing data from field interviews conducted during fieldtrips in 2017 and 2018. The interviews were conducted mainly in Dakar, while some were conducted over Skype. Interviewees include LGBT-activists, human rights activists, AIDS-workers, academics, journalists, religious officials and politicians. In total over 70 people were interviewed. Ethical approval for this research was obtained from the Norwegian Center for Research Data. All interviews took place with the informed consent of the interviewees. The interviews were conducted in the place of choice of the interviewee, to make sure they were at ease and comfortable with the interview situation, and in order to protect LGBT-activists. I do not name the LGBT-individuals, but use the names of organisations, with the consent of the organisations named. Interviewees in official positions have in general not been anonymised unless they have so requested. Given my own position as a western scholar, and the highly politicised nature of homosexuality in Senegal, I was very conscious that my asking questions of this nature could be considered offensive. I thus avoided interviewing politicians during the 2017-election, as I was concerned that this could spark opposition and fuel politicisation. Several interviewees were interviewed on multiple occasions, at different points in time. This made it possible to follow changes in mobilisation tactics and interactions with the political context 'in real time'. Interviews from different stakeholders are used to corroborate evidence, as well as other

3 See for example DS Meyer & DC Minkoff 'Conceptualizing political opportunity' (2004) 82 *Social Forces* 1457.

4 C Broqua 'L'émergence des minorités sexuelles dans l'espace public en afrique' (2012) 126 *Politique Africaine* 15.

data sources, including newspaper articles, organisational documents, and archival data.

In the rest of the chapter, I use terms like homosexual, men who have sex with men (MSM), and LGBT. While the terms can to some extent be used interchangeably, they may also have distinct meanings. In the Senegalese context homosexual and homosexuality are both used by the community itself and in the public debate. MSM is mostly used in a medical and associative context and is strongly associated with HIV/AIDS work. It is also used as a safe word, that can be employed without rousing the suspicion of the public (as experienced by the author in several interview situations). The term LGBT is usually employed as a basket term, of all issues, and is also a term that most people outside of the community are not familiar with and is therefore safe to use. Actors who are more attuned to human rights issues often use the term.

The chapter starts with a brief discussion around the historical significance of homosexuality in Senegal, before showing how the gay rights movement developed in a context of HIV/AIDS. I will then show how changing international conditions, alongside extensive politicisation opened the movement to more human rights-oriented activism and lawfare before I conclude by showing the shortcomings in the current approach.

2 Historical significance of homosexuality in Senegal

People not conforming to gender roles has been a well-known feature of Senegalese society for a long time. In Wolof[5] the term *goorjigéen*, literally meaning man-woman, has been interpreted to include homosexuals. The *goorjigéen* had a very distinct and well-defined role in traditional Wolof-society. The *goorjigéen* were important social actors, often linked to powerful female political leaders, so-called 'grandes dammes', who were mobilisers during elections. Leopold Sédar Senghor, the first president of Senegal, and Blaise Diagne, the first African deputy elected to the French parliament in 1916, used 'grandes dammes' and *goorjigéen* in their election campaigns. Niang and Broqua[6] have showed that *goorjigéen* played a crucial advisory role, both politically and socially for these women.

5 Wolof both designates a culture and a language, which are both predominant in Senegal.

6 CI Niang et al '"It's raining stones": Stigma, violence and HIV vulnerability among men who have sex with men in Dakar, Senegal' (2003) 5 *Culture, Health & Sexuality* 499; CI Niang 'Understanding sex between men in Senegal' in P Aggelton & R Parker (eds) *Routledge handbook of sexuality, health and rights* (2010); C Broqua 'Góor-jigéen: la resignification négative d'une catégorie entre genre et sexualité (Sénégal)' (2017) 9

Gender non-conforming people were thus tolerated but not necessarily accepted in society. They were ceremonial masters, leading baptisms, weddings and funerals, whilst being considered among the lower castes of society.[7] The term *goorjigéen* did not necessarily mean homosexuality as it strictly speaking referred to a man who was effeminate, had no gender, and was considered 'natural eunuchs'.[8] Many if not all *goorjigéen* were still what one would consider MSM today, however, the term did not invite such interpretations.[9]

This does not mean that open displays of homosexuality were tolerated in post-colonial Senegal. Indeed, in 1966 the Senegalese parliament changed the colonial penal code, criminalising same sex relations of any age.[10] This was part of a broader effort to provide the legal tools that would allow for a sanitisation of Senegal ahead of the widely mediatised *Festival des Arts Nègres* later that year.[11] The festival was an important political and economic tool in the post-colonial project of Léopold Sédar Senghor. It was supposed to attract tourists, that a failing Senegalese economy needed, and project an image of African culture to the rest of the world that would break with colonial stereotypes.[12] This forced more of the community behind closed doors, but they still kept the ceremonial role discussed above.

In the 1980s and 1990s political, economic and societal crisis went hand in hand with increased reporting on homosexuality in the local press.[13] Simultaneously with increased presence of homosexuality in political and religious discourse, the *goorjigéen* changed meaning, and increasingly became a synonym for homosexuals. The community had yet not started organising and the associations that existed, acted more as meeting grounds rather than as a basis for activism. It was through the

Socio: la nouvelle revue des sciences sociales 163.

7 I Mills *Sutura: Gendered honor, social death, and the politics of exposure in Senegalese literature and popular culture* (2011) 120; Broqua (n 6).

8 M Epprecht *Sexuality and social justice in Africa* (2013) 115.

9 Interview with the Secretary General of Renapoc on 23 May 2017.

10 FK Camara 'Ce délit qui nous vient d'ailleurs : l'homosexualité dans le code pénal du Sénégal' (2007-2008) 34 *Psychopathologie Africaine* 317; CI Niang, EE Foley & N Diop 'Colonial legacies, electoral politics, and the production of (anti) homosexuality in Senegal' in L Boyd & E Burrill (eds) *Legislating gender and sexuality in Africa: Human rights, society, and the state* (2020).

11 Vibe (n 1).

12 LE Taylor *The art of diplomacy in Dakar – The international politics of display at the 1966 Premier Festival Mondial des Arts Nègres* (2019).

13 MT Kassé 'Mounting homophobic violence in Senegal' in H Abbas & S Ekine (eds) *Queer African reader* (2013).

response to HIV/AIDS that the first organisations and forms of activism came about.

3 The gay rights movement in Senegal

In order to understand the gay rights movement in Senegal one cannot ignore the role that HIV/AIDS has played in mobilising the gay community. Its origins in HIV/AIDS work have meant that the organisations have been primarily focused on public health work, while shying away from more politically challenging tactics.

3.1 HIV/AIDS in Senegal: A success story?

Senegal is seen as one of the pioneers and early movers in HIV prevention in Africa and has one of the lowest prevalence of HIV in the whole of Sub-Saharan Africa estimated at 0.3 per cent in 2021.[14] Already in 1986, following the first known cases of the most virulent HIV type, HIV-1, the National AIDS Prevention Committee, under the auspices of the Ministry of Health, was created to coordinate the national, multi-sectoral response.[15] *The Conseil National De Lutte Contre le Sida* (CNLS) replaced the old structure in 2001, after recommendations by the World Bank. The CNLS is placed directly under the Prime Minister, and as such highlights the increased importance given to HIV/AIDS by political authorities. Senegal was also the first country in Africa to make Antiretroviral Therapy (ART) available in 1998.[16]

Senegal has been successful in curbing the epidemic due to several factors. Prostitution is legal in Senegal and female sex workers are required to register with the authorities, which has meant that they are easier to reach, test and inform.[17] Furthermore, in 1978, a national STD programme was put in place, which facilitated prevention, and whose

14 E Pisani *Acting early to prevent AIDS: The case of Senegal* (1999); J Putzel 'The global fight against AIDS: How adequate are the national commissions?' (2004) 16 *Journal of International Development*; J Iliffe *The African Aids Epidemic* (2006); CNLS *Rapport Annuel* (2021).

15 N Meda et al 'Low and stable HIV infection rates in Senegal – Natural course of the epidemic or evidence for success of prevention?' (1999) 13 *AIDS* 1397; Iliffe (n 14) 71.

16 A Desclaux et al 'Access to antiretroviral drugs and AIDS management in Senegal' (2003) 3 *AIDS* S95.

17 Clandestine sex workers, of which there are more, however, are not well integrated within the response to HIV/AIDS and have correspondingly higher prevalence rates (EE Foley & R Nguer 'Courting success in HIV/AIDS prevention: The challenges of addressing a concentrated epidemic in Senegal' (2010) 9 *African Journal of AIDS Research* 325).

laboratories were used to discover the HIV-2 virus in 1986.[18] Other mediating factors is the predominance of Muslim culture which has kept the age of sexual debut high and levels of non-marital sex comparatively low.[19] The continued collaboration with existing health NGOs, alongside support and aid from political and religious leaders is also recognised as very important.[20] In fact, Muslim and Christian leaders held several national and international conferences on the epidemic and religious responses to it in the 1990s. They helped provide information on AIDS and responsible sexual behaviour to the public.[21] While the approach has been successful, the vulnerability of gay men was hardly recognised in Senegal, or in the rest of Africa.[22] The national HIV/AIDS strategy released by the CNLS in 2001, symptomatically only referred in passing to homosexuality as a risky behaviour.

3.2 The 'discovery' of MSMs

In the mid-1990s the seeds of change were sown when a team of researchers led by anthropologist Cheikh Ibrahima Niang based at the Cheikh Anta Diop University in Dakar (UCAD) conducted a study on migration and HIV/AIDS. During their research, they were alerted by female sex workers to the existence of networks of MSM, experiencing high levels of HIV-prevalence and stigma.[23] This led to a more targeted study of the MSM-community in 1999. Almost 50 per cent had experienced verbal abuse, and 13 per cent indicated they had been physically abused by police.[24] The report also emphasised the reluctance of many MSM to go to medical facilities, for fear of being ignored or outed.[25] With low condom use, high levels of STI-symptoms and a high prevalence of bisexual behaviour, it presented a large risk for the general population. The report spurred increased awareness of the issue and the need for 'developing non-stigmatizing interventions for MSM'.[26] A task force, consisting of NGOs

18 Meda et al (n 15) 1401.

19 Iliffe (n 14) 56.

20 Meda et al (n 15); Putzel (n 14).

21 Meda et al (n 15) 1402; Pisani (n 14).

22 R Parker, S Khan & P Aggleton 'Conspicuous by their absence? Men who have sex with men (MSM) in developing countries: Implications for HIV prevention' (1998) 8 *Critical Public Health* 329.

23 Interview with Amadou Moreau on 3 July 2017; Interview with Cheikh Ibrahima Niang on 2 February 2018.

24 CI Niang et al 'Meeting the sexual health needs of men who have sex with men in Senegal' Horizons Final Report (2002) 12-13.

25 Niang et al (n 24) 15.

26 Niang et al (n 24) 17.

and the USAID mission, supervised by the CNLS, was put in place to develop and coordinate the inclusion of MSM in the response to HIV. The task force was supposed to train peer educators, sensitise service providers, liaise with police to reduce violence, and to engage in capacity building of MSM leaders and create spaces for MSM where they can exchange information in a safe environment.[27] Subsequent research in 2004 by the same team confirmed the findings in the first epidemiological study on HIV prevalence among the gay community. Twenty-one point five (21.5) per cent of MSM were HIV-positive, between 20 and 30 times higher than in the general population.[28]

This research acted as a moral shock, leading to the recognition that something had to be done in order to both help the MSM-community, but also, and perhaps most importantly to keep the disease from spreading to the general population. As one of the initial researchers put it:[29]

> So we brought the problem to the attention of the political authorities, the authorities of the health system, to tell them, listen, if you want Senegal to remain a model in the response to HIV, and if you want to achieve good results with regards to all of the communities ... it is time to act.

This can be seen as an important critical juncture in the development of LGBT-associations in Senegal. It changed the goals, resources, alliances and ultimately the strategies that MSM employed. Prior to the early 2000s the few associations that existed, like *And Ligueey*, were primarily support networks of friends; there was no interaction with the state, or other actors. With this research, a new category of people, the MSM, was created. It opened the space for an extensive collaboration between state actors, civils society, international actors and the MSM community.

In order to reach the community, health NGOs (*ANCS*, *ACI* and *ENDA-Santé* primarily) and researchers decided to train and build on existing informal leaders in the MSM-community.[30] [31] These were thought

27 As above.

28 AS Wade et al 'HIV infection and sexually transmitted infections among men who have sex with men in Senegal' (2005) 19 *AIDS* 133.

29 Interview with Amadou Moreau on 3 July 2017; AC Mbaye *Les discours sur l'homosexualité au Sénégal. L'analyse d'une lutte représentationnelle* (2018) 258.

30 Interview with Abdou Diop on 14 July 2017.

31 A more cynical view is espoused by some of the activists. They claim that this was primarily a strategy by the state to disentangle itself from responsibility at the same time as they could attract substantial funds from the Global Fund. If this became a public issue the government could just deny any responsibility, and they could claim that the state did not in any way encourage this behaviour (Interview former leader

to be better able to reach hiding MSMs who did not trust official health providers. These proved crucial when researchers wanted to engage in research on the issue both in 2004 and in 2007. In order to better reach the community, the health NGOs and medical division of the Ministry of Health encouraged and facilitated the creation of MSM-associations. Over a three-year period four of the most important associations, *Prudence* (2003), *Adama* (2003), *Espoir* (2004), and *Aides-Senegal* (2006), were created, all in Dakar.[32] With leaders who were trained as peer educators or mediators, their main objective was to reach MSM with prevention messages and material, which they appear to have been successful at. Between 2004 and 2007 the percentage of MSM that reported being members of identity organisations had increased from 11 to 41 per cent.[33] According to the authors this is indicative of a burgeoning 'milieu homosexuel', although they are quick to note that there might be substantive selection biases in the sample.

The strategic focus was initially mainly centred on prevention. Peer educators, initially around 40, went into the communities to talk with MSM about prevention, risky behaviour and condom use.[34] This initial mobilisation was purely within a public health approach and was based on service provision, including distribution of condoms and lubricants.[35] The peer educators went to bars and places known to be frequented by gays, and for home visits to people who were in hiding. Frequently the educators would use focus groups (causeries) to reach as many people as possible.[36]

After an initial prevention phase there was also an increased focus on treatment. Allies within the state structure focused on creating a network of sensitised health providers in order to increase access to stigma-free healthcare for MSM. Around 2006, there was an increasing realisation,

AIDES-Senegal on 4 July 2017). This view is certainly not without merit, especially when considering how central politicians have dealt with the issue once it has become public.

32 NN Gning 'Analyse d'une controverse: les discours sur l'homosexualité dans l'espace public au Sénégal' (2013) 13 *Stichproben - Vienna Journal of African Studies* 93.

33 J Larmarange et al (2009) 'Homosexualité et bisexualité au Sénégal: une réalité multiforme' (2009) 64 *Population* 756.

34 A Moreau et al *Implementing STI/HIV prevention and care interventions for men who have sex with men in Senegal* (2007).

35 CI Niang et al 'Targeting vulnerable groups in national HIV/AIDS programs' *Africa Region Human Development Working Paper Series* (2004).

36 K Lavoie 'VIH/sida, homosexualité et innovations sociales en matière de prévention au Sénégal : le rôle des médiateurs de santé' (2015) 22 *Aspects Sociologiques* 35; Moreau et al (n 34).

however, that this was not enough, and in order to get MSM to make use of health services a number of MSM leaders were trained by the DLSI to be mediators in several health facilities.[37] It was thought that it would be easier for MSM to go to these health facilities if familiar faces accompanied them. These had received training in health issues including how the health structures function. As one of these former mediators said: 'our role was to convince our peers to come to the health services'.[38] The mediators engaged in similar activities as the peer educators, but also included supporting – physically, mentally and financially – people to go to health centres or hospitals.[39] Focus groups were also used by mediators, where messages of support were accompanied with educational information related to prevention. While this originated in Dakar, there are now mediators and health stations for MSM present in all of Senegal.

In many ways the public health approach has been quite successful. The fight against AIDS has provided an opportunity for the LGBT-community, and a space where different actors can work together. It offers a discourse under which organisations have been formed and funded, policies have been made and advances in rights can be attempted. This has become a safe space where the community is listened to, and as such creates a sort of 'therapeutic citizenship', in the absence of regular political citizenship.[40] The community is firmly represented in the CNLS and other decision-making areas, and the MSM-community remains a key focus for mainstream HIV/AIDS organisations.

At least since 2006 the Country Coordinating Mechanism (CCM) of the Global Fund has included organisations that either directly or indirectly worked with MSM. Key populations were later directly represented in the CCM. First by one representative, and later, at the recommendation of the Global Fund this was increased to three.[41] This affords them considerable leverage over how HIV/AIDS funds are spent and ensures the community a voice. Because of the Global Fund's exigence that key populations are represented and included in the process they have gained considerable leverage over the state, because it needs the community's cooperation in order to obtain funds from the Global Fund. The Senegalese state, being heavily reliant on these funds to finance the HIV/AIDS response, has in many ways become dependent on the LGBT-community. As the secretary-general of Renapoc sees it: 'If it weren't for our signature Senegal would

37 Moreau et al (n 34).

38 Interview with President of Aides Senegal on 30 May 2017.

39 Lavoie (n 36).

40 VK Nguyen *The republic of therapy* (2010).

41 Interview with President of Renapoc on 8 March 2017.

probably not get the Global Fund funding'.[42] Being represented in country coordinating mechanisms has been a significant challenge in the Global Fund-framework for LGBT-movements elsewhere in Africa, and their inclusion must therefore be seen as a substantial success.[43]

Concretely, the public health approach also appears to have been successful in stabilising and reducing the prevalence rate of HIV in the gay community. In the early 2000s it was estimated that around 21.5 per cent of MSM were HIV-positive.[44] A study in 2007 found similar levels with a prevalence rate of 21.8 per cent.[45] While the HIV-prevalence rate among MSM still remains much higher than the general prevalence rate, in 2014 there had been a significant decrease to around 18.5 per cent.[46] This is reflected in condom use and risky behaviour, which is respectively increasing and decreasing. Linked to this MSM receiving ART have also increased over the past years. Outside of HIV/AIDS, the public health approach has responded to other health-related needs in the community. For example, interventions made by the movement have proved effective at reducing internalised stigma[47] and medical treatment has not been limited to HIV/AIDS.[48]

This initial reliance on a health framing is not uncommon in Africa, and many organisations have emerged from the fight against HIV/AIDS, much in the same way as in Senegal.[49] While the creation of LGBT-organisations, and subsequent inclusion into the public health response has been successful from a public health point of view, it has also projected

42 Interview with the Secretary General of Renapoc on 23 May 2017.

43 ST Fried & S Kowalski-Morton 'Sex and the Global Fund: How sex workers, lesbians, gays, bisexuals, transgender people, and men who have sex with men are benefiting from the Global Fund, or not' (2008) 10 *Health and Human Rights* 127; A Seale, A Bains & S Avrett 'Partnership, sex, and marginalization: Moving the Global Fund sexual orientation and gender identities agenda' (2010) 12 *Health and Human Rights in Practice* 123.

44 Wade (n 28).

45 S Abdoulaye et al 'Reduction in risk-taking behaviors among MSM in Senegal between 2004 and 2007 and prevalence of HIV and other STIs. ELIHoS Project, ANRS 12139' (2010) 22 *AIDS* 409.

46 CNLS 2016 *Rapport Annuel 2015* 5 Dakar: CNLS; Diop (n 30).

47 CE Lyons et al 'Potential impact of integrated stigma mitigation interventions in improving HIV/AIDS service delivery and uptake for key populations in Senegal' (2017) 74 *Journal* of *Acquired Immune Deficiency* Syndromes S52.

48 Diop (n 30).

49 MW Roberts 'Emergence of gay identity and gay social movements in developing countries: The AIDS crisis as catalyst' (1995) 20 *Alternatives* 243; C Broqua 'Les formes sociales de l'homosexualité masculine à Bamako dans une perspective comparée: entre tactiques et mobilisations collectives' (2012) 31 *Politique et Sociétés* 113 at 128.

the MSM onto the public's mind, which has led to a response from politicians, religious actors, and the media.[50] In the following I will show how this intense politicisation, alongside donor requirements have pushed the movement towards an emphasis on human rights.

3.3 Towards human rights

With increased visibility demanded by HIV/AIDS and encouraged by health actors in Senegal, homosexuals were increasingly demanding inclusion in the response to HIV/AIDS. This alerted the religious and societal actors, in particular a Muslim NGO called Jamra, which was a central religious actor in the fight against HIV/AIDS. Jamra used this opportunity to mobilise against homosexuality.[51] Homosexuality burst onto the public arena in 2008, when photos from an alleged gay marriage were published in a relatively unknown magazine, *Icône*, which overnight became the best-selling magazine in Senegal.[52] Later, in December 2008, the International Conference on AIDS and STIs in Africa (ICASA) took place in Dakar, and homosexuality once again adorned the front pages of Senegal's many newspapers. MSM were openly included in the conference for the first time. This visibility was met with opposition by religious organisations and led to death threats and use of violence against spokespersons for the movement.[53] In the aftermath of the conference nine members of the MSM-group *Aides-Senegal* were arrested in the vicinity of their office. While they were not caught having sexual relations, the main evidence being lubricants and condoms used in training of peer educators, they were charged with acts against nature, and being part of a criminal group. This resulted in an eight-year prison sentence, three years more than the law against homosexual behaviour prescribes.[54] National civil society actors put together a *comité de crise* to manage the situation, and engaged in intense lobbying alongside international actors, such as the French government. Following the efforts, the nine men were released, many of whom then had to flee the country. This period was marked by intense media focus, violence, and political and religious threats.[55] Other forms

50 N Angotti, T McKay & RS Robinson 'LGBT visibility and anti-gay backlash' (2019) 5 *Sociology of Development*.

51 C Broqua 'Islamic movements against homosexuality in Senegal: The fight against AIDS as catalyst' in A van Klinken & E Chitando (eds) *Public religion and the politics of homosexuality in Africa* (2016); Gning (n 32).

52 President of Renapoc (n 41).

53 President Renapoc (n 41); interview with Programme Manager African Consultants International on 2 March 2017.

54 Broqua (n 51).

55 Kassé (n 13).

of discrimination also occurred, including exhuming bodies of presumed homosexuals, arbitrary arrests and violence committed by other citizens.[56]

The incredibly hostile reactions towards homosexuals that emerged in the aftermath of these events had large repercussions for the public health response to HIV/AIDS. Associations and their members went into hiding for fear of exposure and lynching. Many individuals stopped treatment, fled the country, or isolated themselves. Moreover, even service providers felt stigmatised for providing services to these people. Several of them received threats, including a fatwa[57] released against Cheikh Niang by the University Mosque at the UCAD. They also became the protectors of the community who sought refuge from stones and abuse. As one of the doctors that accompanied the movement detailed:[58]

> I arrived one morning at work, and found many people in front of my office. They sought refuge here, because they didn't know where to go, as they had been chased from their houses.

According to research by Poteat et al[59] MSM-organisations were forced to stop their activities, which impacted treatment and prevention activities and accessibility to prevention-materials. The arrests and subsequent homophobia also had an impact on allies among civil society, some of whom were threatened and thus had to suspend activities. There was also a sharp decline in medical visits by MSM, which is corroborated by the CNLS which reported that the number of MSM consulted and reached with prevention efforts dropped compared to 2008, and that this is attributable to the 'turbulences of 2008'.[60] The events ruptured social networks and diminished the almost ten years of social trust that had been built up among and with the MSM.

The arrests led to a recognition in the community as well as among allies within civil society, that the public health approach was not enough. Following the release of the nine in April 2009, allies within civil society converted the *comité de crise* into a *comité de restraint*. The new structure, comprising members of the LGBT-community, HIV/AIDS organisations,

56 Gning (n 32) 103.

57 An islamic legal opinion released by an Islamic jurist.

58 Diop (n 30).

59 T Poteat et al 'HIV risk among MSM in Senegal: A qualitative rapid assessment of the impact of enforcing laws that criminalize same sex practices' (2011) 6 *PloS One*.

60 CNLS *Rapport de situation sur la riposte nationale à l'épidémie de VIH/SIDA Sénégal: 2008/2009* (2010) 26.

as well as human rights actors set out to create a new advocacy strategy.[61] The strategy was a response to an increased fear in the NGO-community that arrests and homophobia would undermine the efforts and the advances that had been made in HIV/AIDS.[62] The three-pronged strategy consisted of creating messages of correct information both on HIV, and on fundamental rights; training MSM, journalists and police; and the creation of alliances with religious leaders, politicians, and human rights organisations. In the meantime, the CNLS had taken the initiative to create a *Groupe de Reflexion sur les MSM* (GRMSM), into which the group was incorporated. This signalled a shift in the focus of the community and its allies, which would prove to be quite controversial.

While the public health approach did not disappear, and most of the funding, activities and attention was at the time of publication still centred on public health and HIV/AIDS, there has been a reorientation towards more human rights. This newfound emphasis on human rights has for example materialised in several activities where MSM leaders talk openly about their sexual orientation in front of and together with members of the community, police and religious leaders.[63] This is less, or only tangibly linked to HIV/AIDS and public health and focuses on the rights of the individual to privacy and non-discrimination, together with developing a rights consciousness in the community. Sessions on self-esteem and sexual orientation are also regularly conducted.[64] In the premises of a Spanish health NGO, weekly sessions explaining terminology and increasing the autonomy of members of MSM-organisations are conducted as well.[65] These are all examples of what could be labelled as rights talk, a process by which individuals come to understand their individual problems as linked to human rights.[66] The development of rights consciousness is a crucial step in seeking justice either through court-based lawfare or other forms of mobilisation.

On an organisational level there is also evidence of growing human rights approaches. In 2016 a new network saw the light of day including almost all LGBT-associations in Senegal. The PAC-DH (*Plate-forme des*

61 Africa Consultants International *De l'intervention en temps de crise au plaidoyer à long terme : Promouvoir la tolérance et le respect des droits des groupes vulnérables au Sénégal* (2011).

62 Africa Consultants International (n 61) 7-9.

63 Interview with the former manager at the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Senegal on 13 July 2017.

64 President AIDES Senegal (n 38).

65 Programme manager of the Spanish Health NGO on 18 July 2017.

66 S Engle Merry 'Rights talk and the experience of law: Implementing women's human rights to protection from violence' (2003) 25 *Human Rights Quarterly* 343.

associations communautaires pour la promotion des droits humains) includes 12 associations. While the aim is still to 'contribute to the improvement of the health context in Senegal', and that it is not about breaking with the public health approach, the network aims to complement this approach with human rights activities.[67] This network could specifically be useful in cases when arrests or high stigma prevents allies and health NGOs from interfering. Other networks and organisations have more recently been engaging in rights talk, and other forms of societal lawfare including petitioning and limited media campaigns. This includes most notably the *Collectif Free*, which is a Franco-Senegalese network, regrouping some 15 organisations, that both targets Senegalese public opinion through petitions and media campaigns and the LGBT-refugees coming to France. In Senegal, in addition to providing refuge and helping arrested individuals, they have released at least two petitions focusing on the respect for human rights for LGBT persons in Senegal, and a press release calling for the repeal of article 319(3) of the Senegalese Penal Code.[68] The first, addressed to President Sall originated in late 2020 following months of arrests and calls for stronger criminalisation.[69] The second targeted deputies in the National Assembly, calling on them to halt a bill that would double the penalty for same-sex relations in late 2021.[70] While the Bill did not pass, this is most probably linked to political considerations by the Sall regime than concrete pressure by the *Collectif Free*.

There are multiple reasons for this newfound turn to human rights. As mentioned, it is partly related to the growing sensation that public health was not enough:[71]

67 Minutes meeting PAC-DH on 13 February 2016.

68 'Sénégal: Nous demandons à ouvrir sans délai un débat autour de l'article 319 – alinéa 3!' *76 Crimes* 10 December 2020 https://76crimesfr.com/2020/12/10/nous-demandons-a-ouvrir-sans-delai-un-debat-autour-de-larticle-319-alinea-3-au-senegal/ (accessed 19 June 2022).

69 'Au Sénégal, nous voulons le mêmes droits pour tous/toutes' *Collectif Free* 5 November 2020 https://action.allout.org/fr/m/102074e8/?utm_source=facebook&utm_medium=social_organic&utm_campaign=mgp-102074e8 (accessed 19 June 2022).

70 'Sénégal: STOP à la « loi de criminalisation de l'homosexualité »' *76 Crimes* 24 December 2021 https://76crimesfr.com/2021/12/24/petition-senegal-stop-a-la-loi-de-criminalisation-de-lhomosexualite/ (accessed 19 June 2022).

71 Interview with Leader of Adama on 10 March 2017.

> When there were a lot of arrests, we realized that our rights are being violated, that MSMs are being persecuted, so we said we also had to focus our activities on human rights.

The leader and founder of the PAC-DH, who is concurrently also the leader and founder of AIDES-Senegal similarly argues that:

> We saw that there were a lot of support activities, and prevention, but still there were more infections, how come? It is not a lack of information, it is not a lack of prevention, but the people don't dare to go, so why?[72]

The public health framing was also seen as excluding other groups, in particular lesbians. Public health has favoured an almost exclusive focus on MSM who have a higher risk of contracting HIV. While this may be understandable from a public health approach it silences even further other groups like lesbians and transgender, because 'as soon as we talk about homosexuality, we think only of men'.[73] These groups are doubly marginalised, in society as well as within the movement. Prominent civil society leaders have stated that lesbians do not form part of key populations and therefore do not belong in the new health network for key populations.[74] Thus, an important actor in pushing for stronger rights focus has been lesbian activists who do not feel represented within the public health framework. In reflecting over the creation of her organisation, a lesbian leader said that 'we realized that there are associations fighting just against HIV, but there has to be an association focusing on human rights'.[75]

A further weakness in the public health approach was the increasingly strong link being made between homosexuality and HIV/AIDS. This is reflected in surveys of religious leaders,[76] and in statements by important anti-gay actor Jamra.[77] They have on several occasions alleged that HIV/AIDS is a gay disease. The implication is that anti-gay laws must be strengthened in order to curb the epidemic. This is particularly pertinent

72 President Aides-Senegal (n 38).

73 Interview with Leader of Sourire des Femmes on 11 March 2017.

74 Leader of Sourire des Femmes (n 73).

75 As above.

76 DA Ansari & A Gaestel 'Senegalese religious leaders' perceptions of HIV/AIDS and implications for challenging stigma and discrimination' (2010) 12 *Culture, Health & Sexuality* 633.

77 Agence de Presse Sénégalaise *La participation des homosexuels à l'ICASA 2008 était «inopportune», selon Jamra* 11 December 2008 ; interview with Bamar Gueye on 31 May 2017.

in the Senegalese case which has a much more concentrated HIV/AIDS epidemic than other countries. For some, the very term MSM is stigmatising, and reinforces the notion that homosexuality is all about sex,[78] even though it has been thought to be less controversial than focusing on human rights and identity.[79] Evidence of this can also be found in the records of the constituent assembly of PAC-DH, where it says:[80]

> Health, the point of entry for advocacy, can become a prison and an instrument for stigmatization for example in the hands of this NGO [Jamra] which accuses certain vulnerable groups of 'propagating HIV' in Senegal. This NGO clearly states that their stigmatizing accusations are relying on data from the Minister of Health.

The human rights approach has also been championed by new international actors, including the Office of the United Nations High Commissioner for Human Rights (OHCHR), which since the arrival of new staff in 2013 has been organising several activities concerning sexual orientation rights. They immediately identified that there were already many efforts in the health domain, and there was mounting fear that the approach was increasing stigma against gay men, and creating the impression that homosexuals were the cause of HIV/AIDS.[81]

International institutions and organisations also influence the strategic choices of the organisations as it remains the main funder of the organisations. In the same period the appearance of new funds and changes to existing funding mechanisms, expanded the tactical repertoire of the Senegalese movement. There is a decrease in the overall level of funding for HIV/AIDS in general, and Senegal in particular.[82] This fear was noted already in 2014, and reflected in declining budget allocations. There is a gradual decrease from over 14.2 billion FCFA spent in 2014, to only 8.5 billion FCFA that was available for 2017.[83] There was also a change in the modalities of funding, which increases the emphasis on rights. In the Global Fund's new funding mechanisms, for example, human rights play a more prominent role than before. The increased importance of rights is also evident in the development of recent strategic plans. From

78 Secretary General Renapoc (n 42).

79 T Boellstorf 'But do not identify as gay: A proleptic genealogy of the MSM category' (2011) 26 *Cultural Anthropology* 304.

80 PAC-DH (n 67).

81 Former programme manager OHCHR (n 63).

82 CNLS *Plan Stratégique National de Lutte Contre le Sida 2014-2017* (2014).

83 As above.

the 2011-2015[84] plan there is a more explicit focus on human rights for sexual minorities, while from 2014-2017 lesbians and transgender were also mentioned.[85]

Increasingly, actors within the response to HIV/AIDS are fearful that public health approaches that only involve prevention and treatment will receive less funding, especially since Senegal is a country that has succeeded in preventing a generalised epidemic. In discussions within the GRMSM in 2012-2013 this became evident as several actors suggested a strategic shift towards human rights was needed, in order to attract funds.[86] This is also what is seen in the diversification of funding actors. Before, almost the entire budget was channelled through the CNLS or the ANCS as main beneficiaries of the Global Fund and other international funds. Now, there are more independent funders, including different embassies and international NGOs like the Africaso, Amsher, Heartland Alliance, COC and a Spanish health NGO. While these funds are still small, diversification of funds allows for a diversification of activities. The availability of funds for LGBT has increased in general over the past years, and the events of 2008-2009 brought to the attention of international actors the LGBT-population.

The increased focus on human rights in the movement has occurred concurrently with an increasingly proactive state. The Senegalese state is facing a strategic dilemma between on the one hand wanting to prevent HIV from spreading and limiting international naming and shaming, and on the other hand facing political criticism from an increasingly vocal opposition that has weaponised homosexuality. Indeed, when Macky Sall, former Prime Minister under Abdoulaye Wade, stated that he would approach the issue of homosexuality in a modern way during the presidential election campaign in 2012, he quickly became known as the gay candidate.[87] Sall was elected, but questions surrounding his alleged gay friendliness did not disappear. This forced Macky Sall to strengthen his anti-LGBT rhetoric, famously opposing the then US President Barack Obama's call to decriminalise in June 2013.[88] This has remained a preferred weapon of the opposition ever since, and therefore precluded any public advancement of LGBT-rights. At the same time authorities are under pressure by international donors and foreign governments at the

84 CNLS *Plan Stratégique National sur le Sida 2011-2015* (2010).

85 As above.

86 Minutes of meeting, Groupe de Reflexion Sur Les MSM on 4 January 2013.

87 Gning (n 32).

88 B Bertolt & LEJS Massé 'Mapping political homophobia in Senegal' (2019) 18 *African Studies Quarterly* 21 at 27-28.

same time as they try to portray Senegal as a modern, stable and secular state in a region that is marked by instability and religious extremism.

3.4 Interactions with the state

The movement's interactions with the state are multifaceted. On the one hand movement members risk arrest by state actors, abuse by politicians and lack of treatment in public hospitals. They also, however, receive treatment at specialised clinics and funds to run organisations. The convoluted relationship with the state is also illustrated in the fact that certain state actors have tried to protect LGBT persons, sometimes because of activism and sometimes out of political opportunism. In the aftermath of the egregious arrests in 2008 and 2009 the GRMSM was founded, as discussed above. This was one of the first attempts by civil society to open dialogue with the state to prevent arrests from occurring. Since then, dialogue, bureaucratic advocacy and targeted attempts of sensitisation of decision-makers became a common reoccurrence.

A frequent venue for advocacy has been the National Assembly. The GRMSM or other parts of the community have participated at yearly workshops for parliamentarians on HIV/AIDS. The focus of these workshops is primarily on 'key populations' which is a term used in the HIV/AIDS industry to designate populations that are particularly at risk for HIV/AIDS within a given context. In Senegal female sex workers (FSW) and MSM have been considered key populations since the early 2000s. During the workshops, which are facilitated by the CNLS, focus is purely on HIV/AIDS, but includes sessions on MSM, and even the rights of MSM, and the detrimental consequences of the anti-gay law.[89] Legal officers within the CNLS were also tasked with making sure that key populations who are arrested received adequate medical care, and preventing strong media attention whenever arrests occur.[90]

While legal change seems to be out of the question due to the political situation, some progress has been made through bureaucratic or administrative channels, so-called regulative lawfare. The perhaps most significant was a temporary unspoken moratorium on the anti-gay law. In early 2016 several gay men were arrested in Kaolack. This led to a prolonged period of tension, which also spilled into the political arena. A new Bill was tabled, and the topic became a central issue in the 2016 constitutional referendum. This was highly problematic for the government. To mitigate the political costs, the former minister of justice of the time Sidiki Kaba

89 Interview with Djibril Niang on 9 March 2017.

90 Niang (n 89); interview with Safiatou Thiam on 2 June 2017.

appears to have ordered that the law should not be enforced.[91] This caused a decrease in the number of arrests. The involvement of the Minister of Justice – a former human rights lawyer who had previously received a lot of criticism for pro-LGBT statements – can be understood both as political opportunism and as a consequence of activism by local and international actors.[92] It certainly appears to be an effort by the political authorities to defuse the political situation ahead of the 2017 legislative elections and the 2019 presidential elections, and avoid homosexuality becoming a central issue as in the 2012 presidential elections and 2016 constitutional referendum. These efforts appear to have been successful as homosexuality never became the same hot button issue during these elections.

The temporary moratorium and active involvement of the minister of justice in these matters, appear to have subsided, and arrests are increasing. In 2020 alone, the International Lesbian and Gay Association (ILGA) counted at least 36 arrests of suspected gay men.[93] While the moratorium did not stay in effect for very long, this form of state lawfare from above may still, however, be the best hope of the movement in the current political climate.

3.5 Prospects for court-based lawfare?

In many parts of Africa court-based lawfare has become more and more common, also in exceptionally politicised contexts like the Senegalese. In Senegal the courts have, however, rarely been the site of contestation, beyond judging individuals charged under article 319(3). A nefarious example is the judge who convicted the nine activists following the *ICASA*-conference in late 2008. Disregarding the law, the judge sentenced the activists to eight years in prison, not the five years that the law prescribes. The judge also disregarded the fact that none of the activists were actively engaging in sexual relations when they were arrested.[94] The evidence was sex toys, lubricants and condoms, which were routinely used by the activists in sensitisation campaigns with the community.[95] The decision

91 Leader Sourire des Femmes (n 73); interview with Seydi Gassama on 8 February 2018; JL Ferguson '"There is an eye on us": International imitation, popular representation, and the regulation of homosexuality in Senegal' (2021) 86 *American Sociological Review*.

92 Ferguson (n 91).

93 LR Mendos et al *State-sponsored homophobia 2020: Global legislation overview update* 122.

94 Human Rights Watch *Fear for life – Violence against gay men and men perceived as gay in Senegal* (2010) 26.

95 Human Rights Watch (n 94) 26.

was however overturned on appeal, which is not an uncommon fate for cases brought under article 319(3).[96]

Many activists mentioned that they were engaging with the police and the courts, but almost exclusively in reaction to concrete arrests – in an effort to free the detainees or provide medical assistance – or as part of sensitisation campaigns to prevent arrests or conviction. Courts are rarely perceived as a venue for proactive legal change. Despite being a civil law country, founded upon the French legal system, the Senegalese Constitutional Council (*Conseil Constitutionnel*) can engage in limited judicial review.[97] There are however three other large obstacles preventing the courts from being used.

Standing in the Senegalese system is limited. In order to challenge the constitutionality of a law, citizens need to be a contending party at a trial at the Supreme Court. Alleging a violation of their constitutionality, they can demand 'an appeal for concrete constitutional review at the CC [Constitutitonal Council]'.[98] Moreover, organisations do not have standing, and the applicant needs to be an individual.[99] Very few homosexuals were open about their sexual orientation in Senegal today, due to the risk to their personal life if they were to do so. This severely curtails any attempt to challenge actions, regulations or laws in the courts. Many of the civil society actors also lack of training in human rights, and did not support the gay rights cause. Some human rights organisations, like the *Ligue de Droits de l'Homme* have actively opposed homosexual rights in Senegal, while others like RADDHO are silent on the issue.[100]

The independence of the judiciary also limits the prospects for the courts to make decisions favouring gay rights.[101] The constitutional justices are elected by the president, who also presides over the powerful

96 Interview with François Patuel on 8 March 2017.

97 IM Fall *Evolution constiutionnelle du Sénégal* (2009) 76.

98 C Heyl *The contribution of constitutional courts to the democratic quality of elections in Sub-Saharan Africa: A comparative case study of Madagascar and Senegal* D Phil dissertation, University of Duisberg-Essen, 2017 at 144.

99 SD Kamga 'An assessment of the possibilities for impact litigation in Francophone African countries' (2014) 14 *African Human Rights Law Journal* 449.

100 President Renapoc (n 41).

101 M Samb 'Etat des lieux de la justice. Réflexions sur une governance en crise' in MC Diop (ed) *Sénégal (2000-2012) Les institutions publiques à l'épreuve d'une gouvernance libérale* (2013); EHO Diop 'Réviser la Constitution au Sénégal: Consolider la démocratie ou « honorer » le Président' in MC Diop (ed) *Sénégal (2000-2012) Les institutions publiques à l'épreuve d'une gouvernance libérale* (2013).

'Conseil Superieur de la Magistrature'.[102] The Council decides among other things on judicial promotions. There are also several examples of informal interferences by the executive towards the judiciary.[103] As one moves further down the judicial hierarchy other challenges to judicial independence occur. Lower level judges are often employed in so-called positions of 'nécessités de services', and can freely be moved around the country. In these cases the principle of immovability, which protects judges from being arbitrarily moved around against their will, becomes mute.[104] This practice effectively hinders the constitutional protection afforded to judges. In this context, were a judge to issue a ruling that accords rights to the LGBT community in some way, they could come under intense pressure from the media and the religious sphere, and so would the political authorities. This may restrain judges from making pro-LGBT decisions.[105] Since the limited independence of courts is well known in society, any major court decision would be associated with the ruling party, therefore preventing the executive from enacting controversial legal change hiding behind a court decision, as has been the case in several European countries.[106]

A third issue is the level of training in human rights that judges receive. Indeed, according to some informants this can be as little as a two-weeks course.[107] This means that judges have very little experience with how to handle these cases and as such are not equipped to make a legal case for LGBT-rights. This is shown in some of the lower-level decisions where LGBT-individuals have been met with very harsh penalties, that also do not conform to national law. Moreover, this is exacerbated by the fact that lawyers charge exuberant amounts of money for representing homosexuals, often also requiring them to renounce their sexual orientation.[108]

Given the lack of locus standi and minimal support structures, lack of judicial independence and little human rights training for judges, the fact

102 S Teliko 'L'indépendance de la justice au Sénégal' (2019) 3 *Les Cahiers de la Justice* 483 at 490-491.

103 See Heyl (n 98) 152-155 for some examples.

104 Teliko (n 102) 488.

105 But see Ferguson (n 91) for a discussion on how lower court magistrates resist interference by the Ministry of Justice in prosecutions of homosexuals precisely by invoking their independence.

106 LR Helfer & E Voeten 'International courts as agents of legal change: Evidence from LGBT rights in Europe' (2014) 68 *International Organization* 77.

107 Programme Manager African Consultants International (n 53).

108 President Renapoc (n 41).

that court-based lawfare is lacking in the Senegalese context should come as no surprise.

4 Concluding thoughts and prospects for court-based lawfare

Senegal remains an important case for understanding both politicisation of homosexuality and proactive mobilisation by the LGBT-community across Africa. This chapter has showed that the politicisation of homosexuality may engender a powerful response from the community and among international actors. After violence and strong mediatisation national and international allies of the community mobilised. New structures were erected which were conducive to a strategic change in the way LGBT organisations and allies would mobilise. At the same time, the intense politicisation has prevented public political action. Repealing article 319(3) is not likely in such a political environment.

This case study explores both the merits and the pitfalls of employing a public health approach. Emphasising public health may in many contexts be the only way that LGBT-organisations can mobilise. It is also the only area in which most governments can provide some form of rights or concessions. One should not think of this as some form of benevolence. Rather this is a very politically rational choice. By allowing MSM to be part of the HIV/AIDS response Senegalese authorities were seeking both to contain the epidemic, keeping it from spreading, and curing the favours of the international community. The activities are often shrouded in international terminology to make them impenetrable for local conservatives and avoid attention.

There is an undeniable turn towards human rights within the gay rights movement in Senegal. Several organisations have engaged in various forms of rights talk, trying to build legal consciousness among the community. Others have engaged in limited forms of societal and legislative lawfare by engaging with or petitioning the legislature. Within the state the community has found pockets of allies, that have been able to provide meaningful change to the community. It is however still a fact that most funds are tied to HIV/AIDS. The human rights frame continues to remain underdeveloped and has yet to involve court-based lawfare.

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11

From a 'crusade to root out homosexuality like malaria' to a 'non-issue': The absence of sexual minority lawfare in The Gambia

*Satang Nabaneh**

1 Introduction

Following 22 years of dictatorship, The Gambia is currently undergoing a transition from Jammeh's autocratic rule to a fully-fledged democracy. Former President Jammeh ruled The Gambia until he was forced into exile in early 2017, following the disputed presidential election on 1 December 2016.[1] Jammeh's rule saw ample violation of human rights, including leading the crusade against lesbian, gay, bisexual, and transgender (LGBT) persons. This was mainly seen through legal changes in which Jammeh weaponised the law and his vociferous public utterances.

Information on the status of sexual and gender orientation and sexual behaviour is sparse in The Gambia. Sexual minorities, specifically lesbians, gays, bisexuals, and transgender people (LGBT) in The Gambia keep their orientation hidden from their families and the public. Those in the 'open' are primarily found in the urban area, while openly identifying queer persons live in the diaspora.[2] Given the increasing risk of HIV and other sexually transmitted infections (STIs), men who have sex with men (MSM) have been identified as a vulnerable group.[3] However, most MSM in The Gambia identify as heterosexual rather than as gay.

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1 S Nabaneh 'The Gambia' in R Albert et al *I·CONnect-Clough Center 2020 Global Review of Constitutional Law* (2021) 293.

2 No information could be found regarding the situation of LGBT persons in the rural areas of The Gambia. See also K Mason et al 'Stigma, human rights violations, health care access, and disclosure among men who have sex with men in The Gambia' (2015) 7 *Journal of Human Rights Practice* 139.

3 'An integrated bio-behavioral survey of most at risk populations (MARPS) including female sex workers (FSW) and men who have sex with men in The Gambia' (2012). Draft report on file with author. See also K Mason et al 'A cross-sectional analysis of population demographics, HIV knowledge and risk behaviors, and prevalence and associations of HIV among men who have sex with men in The Gambia' (2013) 29 *AIDS Research and Human Retroviruses* 1547.

The Gambia is a culturally and religiously conservative country.[4] Recent public opinion polling in The Gambia finds a low degree of social tolerance towards members of the LGBT community. Afrobarometer data from 2018 show that 96 per cent of Gambians reported they would strongly dislike having a homosexual as a neighbour.[5] This negative attitude or perception of LGBT people is prevalent despite a majority of Gambians not having ever had any contact with them openly.

Due to religious conservatism and deeply patriarchal beliefs concerning sex, marriage, and family values, intertwined with politics, homosexuality has been portrayed as foreign or 'unAfrican' in many African countries, including The Gambia.[6] However, scholars have argued that different sexual identities, contrary to just heterosexuality as the norm, have traditionally existed and continue to exist in the contemporary context. For example, Isatou Touray (former Vice President of The Gambia) noted that:[7]

> In The Gambia, lesbianism is taboo, and many people do not believe that it exists. It is not recognised by society and is seen as an unacceptable social relationship. It is referred to as the practice of an alien culture by those who are psychologically and spiritually lost. Lesbian relationships do, however, exist among women in The Gambia, but are kept secret for fear of social rejection. Lesbianism in The Gambia has a historical association with families with powerful women.

Despite this historical context that lesbian relations were largely tolerated, the patriarchal nature of Gambian society curtails women's freedom, including expression of or desire for same-sex relationships. In Gambian society, notions of marriage, motherhood, and femininity are highly placed considerations.[8] As a result, advocacy and health interventions have

4 It is 96 per cent Muslim, with an economically influential Christian minority. Traditional religious practices also coexist with both Islam and Christianity.

5 Afrobarometer 'Afrobarometer Round 7: Survey in The Gambia' (2018) 61.

6 See MJ Tswanarising 'Global gayness: The 'unAfrican' argument, Western gay media imagery, local responses and gay culture in Botswana' (2003) 15 *Culture, Health, & Sexuality: An International Journal for Research, Intervention and Care* 88.

7 I Touray 'Sexuality and women's sexual rights in The Gambia' (2006) 37 *Institute of Development Studies (IDS) Bulletin* 82.

8 S Nabaneh 'The Gambia's political transition to democracy: Is abortion reform possible?' (2019) 21 *Health and Human Rights Journal* 170. See also S Chant & I Touray 'Women and gender in The Gambia: Problems, progress and prospects' in A Saine, E Ceesay & E Sall (eds) *State and society in The Gambia since independence 1965- 2012* (2012) 434

generally focused on MSM as target populations for HIV programmes.[9] Issues particular to lesbian and bisexual women have mainly been ignored and elsewhere. As Amina Mama notes 'lesbianism hardly enters public discussion'.[10]

Queer lawfare, the strategic use of rights and law by different types of actors to advance or restrict LGBTI rights, has been limited in its application in The Gambia. Under the Jammeh regime, homophobia was deployed as an issue of political contestation with an evident active threat to the rights of LGBT persons. Under the new government, there is a shift to latent homophobia. Despite these very different environments, the use of rights, law, and the courts has not necessarily been used for advancing sexual minorities advocacy or movement-building, which is non-existent in The Gambia. I argue that there has not been substantive litigation or lawfare in The Gambia because of several challenges, including the socio-cultural and religious attitudes and practices, conservative legal culture, lack of reforms in the judiciary, lack of transformative constitutional framework, and general fear of prosecution.

This chapter uses primary and secondary data to account for The Gambia's trajectory of politicisation of homophobia, also referred to as state-sponsored homophobia and its impact on the LGBT community and its ability to mobilise. Primary data was generated through qualitative semi-structured interviews conducted with seven members of the LGBT community and civil society activists. Due to the sensitive nature of the data, all participants have been anonymised. Secondary sources of data include published and unpublished materials on LGBT. I searched, identified, compiled, and analysed existing information by both global and local organisations. This also included media analysis of debates about homosexuality in traditional media, blogs, and social media accounts, including Facebook and Twitter.

Issues of sexual orientation and gender identity remain primarily unrepresented in academic writings in The Gambia. Therefore, this chapter assesses the legal framework for same-sex relations with a focus on developments over time through legal changes and the impact of broader political and societal dynamics on pro or anti-queer lawfare. The chapter is divided into six sections, with section two focusing on the existing criminalising laws and persecution of LGBT persons. There are two distinct periods in the chapter. First, the very repressive authoritarian period and then a more democratic post-transition, contemporary period.

9 See Mason et al (n 2) 139-152.

10 A Mama *Women's studies and studies of women in Africa during the 1990's* (1996) 39.

Thus, in section three, I provide an overview of the state's strategic use of law during the Jammeh regime. I argue that homophobia and intolerance of sexual diversity are a by-product of Jammeh's anti-gay rhetoric that served as a diverting tool during his 22 years of autocratic rule. Section four addresses the state of affairs in 'New Gambia' after the end of the dictatorship. This is followed by section five, which addresses both visible and covert perspectives of pro or anti-queer activism. Section six concludes the chapter.

2 Legal context

The Gambia, like many African states, has criminalised consenting sexual activities between persons of the same sex based on colonial legacy of anti-sodomy law.[11] Like most other former British colonies in Africa, The Gambia's criminal law is predominantly derived from English criminal law. The Criminal Code and Criminal Procedure Code in The Gambia were enacted by Acts 25 and 26 of 1933 respectively, modelled after Kenya's 1930 Penal Code.[12] A vast body of English laws not only survived in an independent Gambia, but continue to evolve by way of amendments, or judicial interpretation.

Chapter XV of The Gambia Criminal Code deals with offences against morality. While substantial changes have not been made to the Criminal Code overall, since its adoption, it has undergone 30 amendments between 1937 and 2015. For example, while several provisions, including rape have been repealed through the enactment of the Sexual Offences Act 2013,[13] the rest of the offences in the chapter have not been repealed or amended, and consequently 'sodomy' or 'unnatural offences' remain as provided in the Criminal Code.[14]

While The Gambia does not have a standalone enacted anti-homosexuality law, similar to former British colonies, the Criminal Code

11 Criminal Code Act 25 of 1933. See P Semugoma, S Nemande & SD Baral 'The irony of homophobia in Africa' (2012) 380 *The Lancet* 312-314.

12 Nabaneh (n 8) 170. See also HF Morris 'A history of the adoption of codes of criminal law and procedure in British Colonial Africa, 1876-1935' (1974) 18 *Journal of African Law* 6.

13 Act 15 of 2013. These include rape (section 121), punishment for rape (section 122), attempted rape (section 123), indecent assault on females (section 126), defilement of girls under 18 (section 127), defilement of idiots and imbeciles (section 128) and procuring the defilement of woman by threats or fraud or administering drugs (section 130).

14 Nabaneh (n 8) 170. See also S Nabaneh 'The impact of the African Charter and the Maputo Protocol in The Gambia' in VO Ayeni (ed) *The impact of the African Charter and Maputo Protocol in selected African states* (2016) 82.

criminalises 'carnal knowledge of any person against the order of nature' (amended to cover lesbians in 2005).[15] Section 144, in practice, categorises acts of homosexuality as 'unnatural offences'[16] and levies punishment of 14 years' imprisonment. According to section 145 of the Act, a person who attempts to commit any of the offences specified in section 144 commits a felony and is liable on conviction to imprisonment for a term of seven years. Section 147 criminalises 'gross indecency' committed in public or private between males punishable by up to five years in prison. This section was amended in 2014 to include females. Section 147(2) reads:

> A female person who, whether in public or private, commits an act of gross indecency with another female person, or procures another female person to commit an act of gross indecency with her, or attempts to procure the commission of any such act by any female person with herself or with another female person, whether in public or private, commits a felony and is liable on conviction to imprisonment for a term of five years.

The Act also further categorises an act of gross indecency to mean any homosexual act.[17] Through the National Assembly enactment of the Criminal Code (Amendment) Act in 2014,[18] aggravated homosexuality was introduced. Section 144A provides as follows: [19]

> (1) A person commits the offence of aggravated homosexuality where the –
> (a) person against whom the offence is committed is below the age of eighteen years;
> (b) offender is a person living with HIV/AIDS;
> (c) offender is a parent or guardian of the person against whom the offence is committed;
> (d) offender is a person in authority over the person against whom the offence is committed;

15 Act 3 of 2005. African countries such as Zambia also expanded the scope in the same year.

16 Sec 144(2) states 'carnal knowledge of any person against the order of nature includes […] (*c*) committing any other homosexual act with the person'.

17 Sec 147(3) of the Criminal Code.

18 Act 11 of 2014 https://www.refworld.org/docid/54759cd04.html (accessed 5 June 2022). Former president Jammeh assented to the Act on 9 October 2014 contrary to recommendations from the Universal Periodic Review (UPR) that happened at the same time. See Human Rights Council 'Report of the Working Group on the Universal Periodic Review: Gambia' A/HRC/43/6 (2020).

19 The provision is taken literally verbatim from Uganda's Anti-Homosexuality Act, which was overturned by Uganda's Constitutional Court in August 2014 on technical grounds. See generally S Gloppen & L Rakner 'LGBT rights in Africa' in C Ashford & A Maine (eds) *Research handbook on gender, sexuality and the law* (2020)

(e) victim of the offence· is a person with disability;
(f) offender is a serial offender; or
(g) offender applies, administers or causes to be administered· by any man or woman, any drug, matter or substance with intent to stupefy or over power him or her, so as to enable any person to have un-lawful carnal connection with any person of the same sex.

(2) A person who commits the offence of aggravated homosexuality is liable on conviction to imprisonment for life.

The wording of this provision is vague and can result in abuse by authorities as it could be used to arrest or detain any person perceived to be gay or lesbian. [20]

Gender expression is also criminalised under 'cross-dressing' as provided in section 167 (rogues and vagabonds) of the Criminal Code (Amendment) Act, 2014. It provides that any male person who 'dresses or is attired in the fashion of a woman' in a public place shall be deemed a 'rogue and vagabond' and is guilty of a misdemeanour and subject to up to five years' imprisonment, a fine of 20 000 Gambian dalasis (approximately USD 400), or both. The prohibition of 'cross dressing' is a violation of the right to freedom of expression as guaranteed under section 25 of the Constitution of The Gambia.

These laws exist within a constitutional framework that guarantees fundamental human rights as provided in the 1997 Constitution.[21] The Gambia has also ratified major international human rights laws including the African Charter on Human and Peoples' Rights,[22] the International Covenant on Civil and Political Rights[23] and the International Covenant on Economic, Social and Cultural Rights.[24]

20 Amnesty International: Public statement 'Gambia: Principal Act raises serious human rights concerns' (2013) https://www.refworld.org/docid/51934a4c4.html (accessed 24 June 2019).

21 These include the right to life (sec 18), the right to personal liberty (sec 19), protection from inhuman treatment (sec 21), the right to privacy (sec 23), freedom of speech, conscience, assembly, association, and movement (sec 25).

22 OAU, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

23 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999, p 171.

24 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993, p 3.

3 The emergent politics of state-sponsored homophobia under the Jammeh regime

Sexual minority groups faced discrimination and marginalisation in The Gambia under the previous regime.[25] Jammeh spearheaded this with his anti-gay rhetoric to further his political cause, portraying himself as a Pan Africanist fighting against Western imperialism and anti-donor tirade.

In 2008, Jammeh gave an ultimatum to homosexuals, and other criminals, to leave The Gambia or face serious consequences if caught.[26] He described homosexual conduct as a criminal practice and told the police to arrest persons practicing homosexual activity and close motels and hotels that accommodated them. A year later, in another speech before the National Assembly in March 2009, Jammeh called homosexual conduct 'strange behaviour that even God will not tolerate'.[27] In a 2009 speech to army officers, Jammeh announced that he wanted a professional army free of gays and saboteurs. Jammeh stated:[28]

> We will not encourage lesbianism and homosexuality in the military. It is a taboo in our armed forces. I will sack any soldier suspected of being a gay, or lesbian in The Gambia. We need no gays in our armed forces.

Arrests and harassment of LGBT persons were all too frequent in The Gambia during Jammeh's regime.[29] In 2009, a 79-year-old man from the Netherlands was found guilty of gross indecency with several Gambian men. A court in Banjul sentenced Frank Boers to pay 100 000 Gambian dalasis (approximately USD 2 500) in lieu of a two-year prison sentence. He was arrested at the city's international airport on 23 December 2008 when officials found him in possession of nude pictures of himself and some Gambian men and other pornographic materials.[30]

25 United Nations General Assembly Human Rights Council 'Report of the Working Group on the Universal Periodic Review Gambia' A/HRC/14/6 (2010).

26 'Gambia: President tells gays to leave the country' *Daily Observer* 19 May 2008 http://www.wluml.org/node/4656 (accessed 20 November 2019).

27 United States Department of State '2010 Country Reports on Human Rights Practices – The Gambia' (2011) https://www.refworld.org/docid/4da56d7fa5.html (accessed 30 November 2019).

28 'Jammeh threatens to sack gay and lesbian soldiers in Gambia' *Freedom Newspaper* 7 December 2009.

29 United Nations General Assembly Human Rights Council (n 25).

30 T Grew 'Dutchman fined for gay "indecency" in Gambia' *Pink News* 6 January 2009 https://www.pinknews.co.uk/2009/01/06/dutchman-fined-for-gay-indecency-in-gambia/ (accessed 20 November 2019).

A significant crackdown involving the arrest and detention of alleged LGBT persons occurred on 6 April 2012, when police arrested two women and 18 men and charged them with 'attempt to commit unnatural offences' and 'conspiracy to commit a felony'.[31] They were found cross dressing at a dance ceremony for tourists at the village of Kololi. The prosecution had argued as evidence of 'unnatural acts' that some of the men were found wearing women's clothing. They were detained for two weeks even though they had pleaded not guilty to the charges when they were arraigned before the Kanifing Magistrates' Court.[32] The case was later dismissed for lack of sufficient evidence against the accused persons.[33] However, their photos were published in newspapers along with their names despite the charges getting eventually dropped.

In response to the cross-dressing case, Jammeh, during the opening of the legislative year in 2012, condemned the practice of homosexuality stressing that no form of aid would make him accept or tolerate homosexuality in the country. He noted the following:[34]

> If you are to give us aid for men and men or for women and women to marry, leave it; we don't need your aid because, as long as I am the President of The Gambia, you will never see that happen in this country.

Jammeh reiterated that The Gambia will never be colonised or enslaved twice and that, under his leadership, he will never bow down to international pressure to allow what he referred to as ungodly practices in the name of human rights. He noted that 'one thing we will never compromise, for whatever reason, is the integrity of our culture, our dignity and our sovereignty'.[35] In essence, his anti-gay stance was to protect cultural identity noting that:

> [A]s a member of the international community, we would abide by the international conventions that we have signed, but as a country, we will pass

31 C Stewart 'Dancing in Gambia: 18 gays, 2 lesbians face felony charges' *76Crimes* 20 April 2012 https://76crimes.com/2012/04/20/dancing-in-gambia-18-gays-2-lesbians-face-felony-charges/ ((accessed 2 December 2019).

32 United States Department of State Bureau of Democracy, Human Rights and Labor *Country Reports on Human Rights Practices in The Gambia* (2012).

33 As above.

34 L Darboe 'Jammeh condemns homosexual practices, as he opens 2012 legislative year' *The Point* 23 April 2013 http://thepoint.gm/africa/gambia/article/jammeh-condemns-homosexual-practices-as-he-opens-2012-legislative-year (accessed 20 November 2019).

35 As above.

> legislation that will preserve our culture, our humanity, our dignity and our identity as Africans, West Africans and Gambians.[36]

In March 2013, in a televised statement, he went on to say:[37]

> Homosexuality is anti-god, anti-human, and anti-civilization. Homosexuals are not welcome in The Gambia. If we catch you, you will regret why you are born. I have buffalos from South Africa and Brazil, and they never date each other.

Jammeh also stated he was undeterred by threats of the United Kingdom and the United States Governments to cut aid to countries, which persecute LGBT people, saying defiantly: 'We are ready to eat grass, but we will not compromise on this. Allowing homosexuality means allowing satanic rights. We will not allow gays here'.[38]

During his infamous speech at the 68th Session of the UN General Assembly in 2013, Jammeh stated:[39]

> We know for a fact that all living things need to reproduce for posterity. They become extinct when they can no longer reproduce. Therefore, you will agree with me that any person promoting the end of human reproduction must be promoting human extinction. Could this be called promoting the end of human reproduction when you advocate for a definitive end to human reproduction and procreation? Those who promote homosexuality want to put an end to human existence, it is becoming an epidemic and we Muslims and Africans will fight to end this behaviour. We want a brighter future for humanity and the continuous existence of humanity on this planet, therefore, we will never tolerate any agenda that clearly calls for human extinction.

On 18 February 2014, Jammeh in a speech on state television to mark the 49th anniversary of The Gambia's independence stated that his government 'will fight these vermin called homosexuals or gays the same way we are fighting malaria-causing mosquitoes; if not more aggressively'.[40] Jammeh's

36 As above.

37 'Gambia's president says no gays allowed; if caught, "will regret being born"' *LGBTQNation* 30 March 2013 https://www.lgbtqnation.com/2013/03/gambias-president-says-no-gays-allowed-if-caught-will-regret-being-born/ (accessed 20 November 2019).

38 As above.

39 Statement by the President of the Republic of The Gambia at the 68th Session of the UN General Assembly (2013).

40 'Gambia's Jammeh calls gays "vermin", says to fight like mosquitoes' *Reuters* 18 February 2014 https://uk.reuters.com/article/us-gambia-homosexuality/gambias-

statement was a response to the threats by donor countries, including the European Union (EU), to stop aid to his government if it passes anti-gay laws. He further noted that 'we will therefore not accept any friendship, aid or any other gesture that is conditional on accepting homosexuals or LGBT as they are now baptised by the powers that promote them'.[41] He further stated that The Gambia would not spare any homosexual and that no diplomatic immunity would be respected for any diplomat found guilty or accused of being a homosexual.[42] Adding that, 'as far as I am concerned, LGBT can only stand for Leprosy, Gonorrhoea, Bacteria and Tuberculosis; all of which are detrimental to human existence'.[43] The next day, United States' Former Secretary of State John Kerry condemned President Jammeh's comments, calling on the international community to send a clear signal that statements of this nature are unacceptable and have no place in the public dialogue.[44] In a May 2014 speech in Basse, Jammeh stated, 'some people go to the west and claim they are gays and that their lives are at risk in The Gambia, in order for them to be granted a stay in Europe. If I catch them, I will kill them'.[45]

These blatant statements set the stage for enacting the anti-gay law in October 2014. In November 2014, the National Intelligence Agency (NIA) arrested eight people including a 17-year-old boy and three women on suspicion of homosexual activities, following a security operation targeting persons suspected of being involved in illegal activity.[46] The arrested individuals were allegedly subjected to torture and ill-treatment to intimidate them to confess to their so called 'crimes' and to reveal information about other individuals perceived to be gay or lesbian. The NIA has been known to use torture methods such as beatings, sensory

jammeh-calls-gays-vermin-says-to-fight-like-mosquitoes-idUKBREA1H1S820140218 (accessed 10 November 2019).

41 '"Gays are vermin," says Gambia president Yahya Jammeh' *Euronews* 19 February 2014 https://www.euronews.com/2014/02/19/gays-are-vermin-says-gambia-president-yahya-jammeh (accessed 10 November 2019).

42 As above.

43 As above.

44 A Alman 'John Kerry denounces Yahya Jammeh's "unacceptable" Anti-LGBT comments' *HuffPost* 19 February 2014 https://www.huffpost.com/entry/john-kerry-yahya-jammeh_n_4819310 (accessed 19 November 2019).

45 H Brown 'Gambian President threatens gay asylum seekers: "If I catch them, I will kill them"' *Think Progress* 16 May 2014 http://thinkprogress.org/world/2014/05/16/3438789/gambian-president-threatens-gay-asylum-seekers-if-i-catchthem-i-will-kill-them/ (accessed 1 December 2019).

46 Amnesty International 'Gambia must stop wave of homophobic arrests and torture' 18 November 2004 https://www.amnesty.org/en/latest/news/2014/11/gambia-must-stop-wave-homophobic-arrests-and-torture/ (accessed 2 December 2019).

deprivation and the threat of rape.[47] Amnesty International also reported that the 'detainees were told that if they did not "confess," a device would [be] forced into their anus or vagina to "test" their sexual orientation'.[48] Former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez during his 2015 mission to The Gambia, noted that there were 'accounts of severe and routine torture of those charged with "aggravated homosexuality"'.[49]

While the three ladies were released, three of the detainees, AS, MS and MLB, appeared before a magistrates' court in 2014 charged under the 'aggravated homosexuality' amendment Act, but the case was later transferred to the Banjul High Court.[50] In July 2015, the Court acquitted and discharged the accused persons on the basis that the prosecution failed to prove their case as the witnesses did not present sufficient evidence that the accused had committed the acts of which they were accused.[51]

Given the repressive regime, there was not much Gambian-based outcry on this development. For example, Josh Scheinert noted the lack of pro-active resistance from the Gambian people given that there was no protest to President Jammeh's opposition to LGBT rights in 2014 and that still few were willing to speak out.[52] Political leaders were mainly silent except for a few. For example, the then minority leader, Samba Jallow, of the National Reconciliation Party (NRP) noted that although he did not condone homosexuality, he voted against the latest bill and one other lawmaker as it did not amount to a 'treasonable offense'.[53] The then leader of the Peoples' Progressive Party (PPP), Omar Jallow (OJ), was also visibly voicing his objection to Jammeh in 2014. He noted that although he did not support homosexuality, he was against the 'life sentence law against the gay people [which] is wrong and it should be repealed immediately

47 See also Human Rights Council 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez: Mission to The Gambia' A/HRC/28/68/Add.4 (16 March 2015) paras 30-32.

48 Amnesty International (n 46).

49 Human Rights Council (n 47) para 24.

50 B Samateh 'Arrested "homosexuals" arraigned, remanded' *The Point* 30 December 2014. H Ceesay 'Alleged homosexuals deny any wrongdoing' *The Point* 10 February 2015.

51 R Jadama 'Gambia: Court acquits two men charged with homosexuality' *Foroyaa Newspaper* 2 August 2015.

52 J Scheinert 'No truth for Gambia's queer people' *Mail & Guardian* 15 March 2019 https://mg.co.za/article/2019-03-15-00-no-truth-for-gambias-queer-people (accessed 2 December 2019).

53 J Rush 'Gambia passes bill imposing life sentences for "aggravated homosexuality" - which includes having AIDS or being HIV positive' *Mailonline* 9 September 2014.

[noting that] gays should have their rights respected as human beings'. He acknowledged that 'lesbianism and homosexuality are as old as the human race and nobody in the world can eradicate it'. He further noted that the 'whole issue about gays is to divert people's attention from pressing issues, particularly about the serious failures and deficiencies of the Jammeh regime'.[54] In response, Seedy Njie, a member of Jammeh's party, the Alliance for Patriotic Reorientation and Construction (APRC) shared in an interview that OJ was misleading the Gambian people and that he was 'out to advocate, support and call for an end to the world and the extinction of human[ity]'.[55]

In response to the anti-gay law and Jammeh's dismal human rights records, the EU eventually cut aid by blocking 13 million euros.[56] In turn, Jammeh sought funds from other countries in the Middle East including Qatar and Kuwait, where homosexuality is outlawed.[57] In response to the aid cut, Jammeh told a crowd in Farafenni in 2015:[58]

> If you do it [in The Gambia] I will slit your throat – if you are a man and want to marry another man in this country and we catch you, no one will ever set eyes on you again, and no white person can do anything about it.

His declaration that 'no white person' can save Gambian gays was not only a direct response to the EU but also advancing the argument that sexual minority rights were a western imposed idea and neo-colonialist export to re-colonise Africa. A sentiment shared by other anti-gay African leaders, including the President of Uganda, Museveni.[59] Not surprisingly, Jammeh

54 'Gambia must repeal anti-gay law immediately, argues OJ' *Standard* 12 December 2014 https://standard.gm/gambia-news/gambia-must-repeal-anti-gay-law-immediately-argues-oj/ (accessed 5 May 2022).

55 'Seedy Njie tackles OJ over pro-gay comments' *Standard* 16 December 2014 https://standard.gm/gambia-news/seedy-njie-tackles-oj-over-pro-gay-comments/ (accessed 5 May 2022).

56 'EU cuts aid to Gambia over human rights concerns' *Euractiv* 10 December 2014 https://www.euractiv.com/section/development-policy/news/eu-cuts-aid-to-gambia-over-human-rights-concerns/ (accessed 17 November 2019).

57 M Hussain 'Middle East funds Gambia as EU cuts aid over human rights concerns' *Reuters* 10 December 2014 https://www.reuters.com/article/us-gambia-rights-donors/middle-east-funds-gambia-as-eu-cuts-aid-over-human-rights-concerns-idUSKBN0JO19520141210 (accessed 17 November 2019).

58 K Ruble 'Gambian President says he will slit gay men's throats in public speech' *Vice News* 11 May 2015 https://news.vice.com/article/gambian-president-says-he-will-slit-gay-mens-throats-in-public-speech (accessed 1 December 2019).

59 'President Museveni's full speech at signing of Anti-Homosexuality Bill' *Daily Monitor* (24 February 2014) https://www.monitor.co.ug/News/National/Museveni-s-Anti-Homosexuality-speech/688334-2219956-4xafil/index.html (accessed 10 June 2022).

led thousands of Gambians on 9 December 2015 on a march through the capital Banjul denouncing the EU for withdrawing foreign aid over the country's new anti-gay law.[60] A petition against homosexuality was read on behalf of protesters by the then permanent secretary at the Ministry of Lands and Regional Government, Saihou Sanyang. OJ in reacting to the anti-gay protest, alleged that it was a 'gathering funded and supported by the government in order to promote the agenda of Yahya Jammeh and not the Gambian people'.[61]

There were further reports of LGBT persons fleeing to neighbouring countries due to fear of arrest.[62] A Gambian woman who identifies as a lesbian arrested on suspicion of homosexuality in September 2014 noted:[63]

> The first time I was arrested was in mid-September [2014]. I was in my house, then some policemen came in. They were talking to my girlfriend. They asked her if we can follow them, but she told them, for what reason? They said, 'You guys are lesbians'.

The crackdown on homosexuality resulted in state-sponsored homophobia, one in which former President Jammeh was highly vocal in denouncing same sex relations, which set the tone for a climate of intolerance and fuelled strong societal discrimination against LGBT individuals. As documented in the highlighted public statements by Jammeh and other political leaders, this often led to persecution and violence against sexual minorities.

What motivated Jammeh's anti-gay vitriol? It is contended that Jammeh's very hostile remarks over time were a tactic in deflecting from his failure in governing and also served as a political tool of manipulation to further his dictatorial rule and power. He played on and magnified

See also H McEwen 'Suspect sexualities: Contextualizing rumours of homosexuality within colonial histories of population control' (2019) 11 *Critical African Studies* 266.

60 T Senzee 'Thousands of Gambians attend antigay rally' *Advocate* 12 December 2014.

61 'Gambia must repeal anti-gay law immediately, argues OJ' *Standard* 12 December 2014 https://standard.gm/gambia-news/gambia-must-repeal-anti-gay-law-immediately-argues-oj/ (accessed 5 May 2022).

62 United States Department of State 'Gambia: Country report on human rights practices for 2016' (2017) 27 https://www.state.gov/reports/2016-country-reports-on-human-rights-practices/the-gambia/ (accessed 25 November 2019).

63 Interview with a Gambian woman who identifies as a lesbian by Human Rights Watch (30 April 2015) as cited in See Human Rights Watch 'State of fear: Arbitrary arrests, torture, and killings' (16 September 2015) 49 https://www.hrw.org/report/2015/09/16/state-fear/arbitrary-arrests-torture-and-killings (accessed 1 December 2019).

homophobia in the country, while painting himself as the lead defender of Gambian cultural and religious values.[64] His anti-colonial rhetoric, evident in his withdrawal of the country from the Commonwealth in 2013,[65] is rooted in colonial and postcolonial politics. This is also similar to his challenge against 'foreign' and globalised AIDS programming when he announced in early 2007 that he can 'cure' AIDS based on herbal, Islamic and traditional medicine.[66] The condemnation from Western donor countries played right into his unrelentless resolve of rejecting the imposition of homosexuality by the West and gaslighting his bold resistance to present-day colonialism.

The language of political leadership was full of venom for LGBT persons. The neo-patrimonial nature of the Gambian state has led to legitimising homophobia, which has also been centred on reciprocal networks between religious and traditional political leaders. Within the traditional and religious community, there is a high incidence of politicisation or partisanship, which sways them toward the various political leaders, but more so toward the incumbent. By virtue of the political dispensation in terms of the laws and institutions, especially in local governance, where social and cultural structures meet with politics, the political system takes prominence. As a result, the Executive's influence, in particular the President, has over the traditional and religious leadership is immense. The religious leadership is represented mainly by the Supreme Islamic Council of The Gambia and The Gambia Christian Council even though some sects and clerics do not belong to any of these groups such as the Ahmadiyya Muslim Jama'at. The traditional leadership is also a legal structure represented by the National Council of Seyfolu,[67] comprising all the chiefs in the country. It is a highly politicised body simply because chiefs are directly appointed by and serve at the pleasure of the President. Therefore, the major concern of this group is their security of tenure, hence, this is always prioritised and generally informs their overall actions. That notwithstanding, traditional, and religious leaders still hold significant influence on the population despite the colossal credibility gap they still suffer emanating from their involvement with, and control by Jammeh.[68]

64 See A Saine *Culture and customs of Gambia* (2012).

65 J Butty 'Gambia withdraws from Commonwealth' *VOA News* 3 October 2013.

66 See R Cassidy & M Leach 'Science, politics, and the presidential AIDS "cure"' (2009) 108 *African Affairs* 559.

67 See sec 131A of the 1997 Constitution and Local Government Act, Cap 33.01.

68 See generally, M Darboe 'Gambia: When Imams opposed "the leader of the people of faith"' *Justiceinfo* 27 January 2020 https://www.justiceinfo.net/en/43670-gambia-when-imams-opposed-the-leader-of-the-people-of-faith.html (accessed 15 April 2022).

Culture, tradition, and religious norms are used to discriminate and exclude LGBT persons from society.[69] Religion, customs and traditions play a very important role in the lives of Gambians, thus religious and traditional leaders have strong influence over their followers. For instance, the then president of the Supreme Islamic Council, Alhagie Momodou Lamin Touray, condemned homosexuality stating that Islamic law sanctions death on persons in intimate same-sex relationships.[70]

4 Democratisation process: The new government's attitude

While former President Jammeh promulgated anti-LGBT laws, the current government has largely been silent on its position regarding the rights of LGBT persons. In 2018, Barrow dismissed homosexuality as a 'non-issue' in The Gambia.[71] Barrow further noted that his government would not prosecute LGBT persons.[72] His response was measured and starkly contrasted with Jammeh's hate speeches. In an article 'One year after Jammeh: Is Barrow's gov't keeping its promises?' it was noted:[73]

> So far, there seems to be no gender-specific discrimination on the government's agenda. There are no reported incidents of state-perpetrated online abuse or attacks on the basis of gender or sexuality. This government may have a softer stance on sexual diversity.

In 2018, Human Rights Watch noted the following:[74]

> The human rights climate in Gambia improved dramatically as the new president, Adama Barrow, and his government took steps to reverse former President Yahya Jammeh's legacy of authoritarian and abusive rule … President Barrow's government has promised not to prosecute same-sex couples for consensual sexual acts, which sharply contrasted with Jammeh's hate-filled rhetoric toward lesbian, gay, bisexual, and transgender (LGBT)

69 J Rehman & E Polymenopoulou 'Is green a part of the rainbow? Sharia, homosexuality and LGBT rights in the Muslim world' (2013) 37 *Fordham International Law Journal* 6.

70 B Samateh 'GSIC President preaches against homosexuality' *The Point* 15 December 2014.

71 Freedom House 'Freedom in the World 2019: The Gambia (2019) https://freedomhouse.org/report/freedom-world/2019/gambia (accessed 15 November 2019).

72 USSD 'Country report on human rights practices 2018 – Gambia' (13 March 2019).

73 'One year after Jammeh' *Jollofnews* 3 December 2017.

74 Human Rights Watch 'World Report 2018: Gambia – Events of 2017' (2018) https://www.hrw.org/world-report/2018/country-chapters/gambia (accessed 15 November 2019).

> persons. However, the government has not repealed laws that criminalise same-sex conduct, including an October 2014 law that imposes sentences of up to life in prison for 'aggravated homosexuality' offenses.

When the new Barrow government took office in 2017, Ousainou Darboe who was then the Minister of Foreign Affairs, hinted at the potential repeal of the relevant sections in the Criminal Code. He stated that:

> Homosexuality was perhaps something Jammeh imagined in order to bamboozle the clerics that were surrounding him … He used gay as a propaganda tool in order for him to continue to repress people.[75]

He went on to say that 'aggravated homosexuality was a distraction, and it should be taken out of the laws'. This position has since shifted as the current general position of government as well as other political actors has been that the issue of homosexuality is not a priority. To illustrate, in the 2019 national report submitted by Gambia for the 34th Universal Periodic Review stated: 'LGBTQ is not largely accepted in The Gambia and the Government does not plan to decriminalize it'.[76]

On 17 May 2020, while making the International Day Against Homophobia, Transphobia and Biphobia, the EU delegation in The Gambia shared pro-LGBTI statements. In response to this, Darboe himself changed his previous position noting that 'homosexuality cannot be decriminalised in this country ... No matter what'.[77] Government spokesman Ebrima Sankareh further denied claims of government plans to soften homosexuality laws in exchange for financial aid, noting that government had guided 'has no plans to either decriminalise or even entertain a review of laws on homosexuality'.[78] This stance is aligned with the notion of linking homosexuality to development agendas, which have persisted from the Jammeh era. In essence, countering the argument that through the instrument of international aid, the Barrow government will not be forced to recognise the equality of LGBT people.

75 Human Rights Watch 'Political leaders in The Gambia support repeal of anti-LGBTQ Law' 18 May 2017 https://www.hrc.org/news/political-leaders-in-the-gambia-support-repeal-of-anti-lgbtq-law [accessed 10 May 2022].

76 National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/250/00/PDF/G1925000.pdf?OpenElement (accessed 11 July 2022).

77 'The Gambia denies plan to decriminalise homosexuality' *Agence France Presse* 23 June 2020.

78 As above.

Despite the shift from active to latent threat in the new regime, the continued existence of these laws violates the fundamental human rights of the LGBT community, and the lives of these persons and their defenders remain under threat.[79] The continued criminalisation of same-sex relations means that the arbitrary arrest, detention, and prosecution of LGBT persons are possible.

In October 2019, I interviewed seven LGBT persons, the majority of whom were non-gay-identified, though behaviourally bisexual men who do not publicly disclose and were aged 21 years and older. I focused on their experiences of human rights violations, knowledge, attitudes and behaviours, and sexual history.[80] For this group, only one person reported that they disclosed their same-sex practice status to a family member. Two of them have family members that knew about their same-sex sexual practices, and four of them noted that none of their family members knows their sexual orientation. The non-disclosure to family or close community members is due to rejection, possible loss of their jobs, stigma, and harsh treatment from society. Several of them described how they were regularly harassed by people based on their sexual orientation, and they still face homophobia, stigma, and harassment. Some noted that law enforcement has come to their rescue in several instances when there was a 'witch-hunt' by the community. The consequences include pervasive fear, which drives them underground, including accessing healthcare.

During a 2019 closed-door consultation organised by OHCHR to prepare a stakeholder report for The Gambia's third UPR, LGBT persons described the continuous stigma, harassment and arrest they face by the police. Participants reported incidents where police have arrived in their houses and arrested them on suspicion of engaging in homosexual behaviours.[81]Amnesty International also observed that LGBT persons continued to suffer discrimination and threats from both state and non-state actors in The Gambia.[82] For example, religious and traditional groups constitute the major organised opponents of same sex relations in

79 See generally, AS Patterson *Africa and the global health governance: Domestic politics and international structures* (2018) 63.

80 Given time constraints, limited resources and access to the community, the author used the chain referral system of snowball sampling and participants were only based in the urban area.

81 Women in Liberation and Leadership, Fajara (The Gambia); African Men for Sexual Health and Rights, Johannesburg (South Africa) & Sexual Rights Initiative, Geneva (Switzerland) 'Universal Periodic Review of The Gambia: Joint submission' (November 2019) para 5.

82 Amnesty International 'Gambia 2017/2018' (2018) https://www.amnesty.org/en/countries/africa/gambia/report-gambia/ (accessed 11 July 2022).

The Gambia. People draw inspirations from their spiritual leaders be it in Islam or Christianity. Religious and traditional leaders on a consistent basis preach against homosexuality by deploying major discourses, including the rhetoric that the acceptance of homosexuality will sound the death knell for Islam and their culture.[83] It was reported that in January 2019, during a radio talk show on Al-Falaah radio, the presenter revealed the secret locations of safe houses for LGBT persons in The Gambia. The host of the programme asked the listeners to attack the places and destroy them.[84] This also points to the important role that media can play in serving as a platform for hate speech, misinformation and reinforcing homophobia.

With the peaceful transition that began in January 2017 after 22 years under an authoritarian regime, the new government of The Gambia, headed by President Barrow is undertaking measures to restore good governance, rebuild public confidence in key institutions, and uphold human rights.[85] These measures are twofold: first dealing with past human rights violations and abuses; and second, ensuring that the governance architecture upholds the highest standards of respect for human rights, the rule of law and justice. To this end, 2018 saw the operationalisation of the transitional justice mechanisms: the Truth, Reconciliation and Reparations Commission (TRRC), Constitutional Review Commission (CRC) and National Human Rights Commission (NHRC) with the goal of consolidating democracy and aligning governance architecture with regional and international human rights standards.[86] Thus, a critical question that arises within the consolidation of democracy is whether the transitional justice process provides a space to have conversations and chart better legislative protections on issues such as sexual minority rights.[87]

83 'Gambian's criminalization of homosexuality is inhumane and un-Islamic' *Muslims for Progressive Values* 1 December 2014 https://www.prlog.org/12401139-gambians-criminalization-of-homosexuality-is-inhumane-and-un-islamic.html (accessed 2 December 2019).

84 Women in Liberation and Leadership, Fajara (The Gambia); African Men for Sexual Health and Rights, Johannesburg (South Africa) & Sexual Rights Initiative, Geneva (Switzerland) (n 83) para 14.

85 Nabaneh (n 8) 174.

86 G Sowe & S Nabaneh 'The Gambia: The state of liberal democracy' in R Albert et al *The I·CONnect-Clough Center 2017 Global Review of Constitutional Law* (2018) 99.

87 See Nabaneh & Sowe (n 86) 107-111.

5 The transitional justice mechanisms

Following the enactment of the Truth, Reconciliation and Reparations Commission (TRRC), Act 2017,[88] the Commission was formally launched on 15 October 2018. The TRRC Act was established to create a historical record of the nature, causes, and extent of violations and abuses of human rights committed during the period July 1994 to January 2017.[89] The Commission's mandate includes initiating and coordinating investigations into violations and abuses of human rights; the identity of persons or institutions involved in such violations; identifying the victims; and determining what evidence might have been destroyed to conceal such violations.[90] The hearings, which began on 7 January 2019, served as an initial first step towards securing justice, truth, and reparations in The Gambia.[91]

There was an expectation that the persecution of the LGBT persons under the Jammeh regime would be a theme the Commission would investigate. However, this did not happen. In one of the sittings of the TRRC, reference was made to how the conditions of detention, particularly the overcrowding in the prisons, have resulted in same-sex activity thereby promoting homosexuality.[92] Some of the TRRC Commissioners were visibly upset about same-sex relations and referred to homosexuality as a 'shameless and very low activity.'[93]

The TRRC worked for more than two years and submitted its final report with findings and recommendations to President Barrow on 25 November 2021. A month later, the government through the Ministry of Justice made the report public on 24 December 2021. As per the

88 Truth, Reconciliation and Reparations Commission (TRRC) Act 9 of 2017 https://www.lawhubgambia.com/truth-reconciliation-reparations-commission (accessed 8 October 2019).

89 Section 13 of the TRRC Act.

90 Section 14 of the TRRC Act.

91 'TRRC hearings begins today' *The Point* 7 January 2019.

92 Sanna Sabally, a key member of a once feared military leadership, Armed Forces Provisional Ruling Council (AFPRC) during his testimony before the Commission in April 2019 shared how he experienced forms of torture to him including waterboarding, castration and enforced homosexual behaviour at the state central prisons at Mile 2. See YouTube 'Sanna B Sabally TRRC sittings' https://www.youtube.com/results?search_query=sanna+sabally+trrc (accessed 11 July 2022).

93 'TRRC sitting' *EyeTVAfrica* 22 January 2019 https://www.youtube.com/watch?v=rLk3GmqkDRI (accessed 11 July 2022). This statement during a line of questioning by Bishop James Yaw Allen Odico on the occurrence of homosexual acts despite the overcrowding of the Mile 2 prison can be from 54 minutes of the video.

TRRC Act, the government had six months to issue a White Paper.[94] The civil society shadow report contained recommendations in relation to decriminalisation of homosexuality and intensifying efforts to support and protect vulnerable social groups and communities such as LGBT persons.[95]

During the drafting of the now rejected 2020 Draft Constitution, the Constitutional Review Commission (CRC) received submissions against the inclusion of LGBT persons as part of the definition of minority groups.[96] In particular, they pointed out that it was against 'Gambian culture, tradition, values, and norms'.[97] In addition, the debate was also over the non-inclusion of the word, 'secular' in the Draft Constitution. On the one hand, the pro-secularism camp has argued that the exclusion of the term would make The Gambia somewhat of an Islamic State, with the majority of decisions favouring Muslims. On the other hand, the anti-secularism camp argued that inclusion of the term would mean acceptance of same-sex relations and the inability to practice Islam as it should be practiced.[98] This thinking is aligned to general assumptions of human rights that 'imply sexual permissiveness and secularism', resulting in 'Africans employ[ing] culture and religion in attempts to externalize homosexuality'.[99] This suspicion brought together political and religious actors on the premise that the word 'secular' would open the floodgates to special human rights for LGBT persons. As a result, while the word 'secular' eventually does not appear in the 2020 Draft Constitution, section 1(1) declares The Gambia as a sovereign republic and also prohibits both the president and National Assembly from establishing any religion as a state religion.[100]

94 'Gambia: Truth and Reconciliation report must lead to justice and reparations for victims' *Amnesty International* 25 November 2021 https://www.amnesty.org/en/latest/news/2021/11/gambia-truth-and-reconciliation-report-must-lead-to-justice-and-reparations-for-victims/ (accessed 5 May 2022).

95 WILL 'TRRC Shadow Report: Perspectives of women, girls and marginalized communities on sexual and gender based violence' (2022).

96 Constitutional Review Commission (CRC) Final Report (30 March 2020).

97 CRC Final Report (n 96) para 276.

98 'Gambia Supreme Islamic Council (GSIC): Response to the Draft Constitution' *Gainako* 19 December 2019 https://gainako.com/gambia-supreme-islamic-council-gsic-response-to-the-draft-constitution/ (accessed 10 April 2022). See also SM Jaw & T Isbell 'All in This Together? Social Tensions in the Post-Jammeh Gambia' Afrobarometer dispatch 404 (2020) 1

99 K Kaoma 'The Vatican anti-gender theory and sexual politics: An African response' (2016) 6 *Religion and Gender* 287.

100 See secs 88(5)(b) and 153 (1)(b) of the 2020 Draft Constitution respectively.

The Barrow government has also engaged with UN organisations and other treaty monitoring bodies who have brought recommendations in the context of sexual minorities.

6 Engagements and recommendations from treaty monitoring bodies

Human rights treaty monitoring bodies have been putting pressure on The Gambia to decriminalise same-sex relations. The Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[101] in 2015 noted its concern over the acts of incitement and hatred directed against lesbians and bisexual women as well as arbitrary detention of women perceived to be part of the community.[102] Thus, called on the state to repeal the provisions of the Criminal Code on 'unnatural offences' and 'aggravated homosexuality'.[103]

In July 2018, the Human Rights Committee reviewed The Gambia's implementation of the International Covenant on Civil and Political Rights (ICCPR). The Gambia submitted a report in response to the list of issues *in lieu* of its second periodic report.[104] The Gambian delegation was made up of representatives from various government ministries, including the Ministry of Justice and the Office of the President. The country's delegation stated that the government had no immediate plans to reverse or change the law though the law was not enforced. The delegation noted the following:[105]

> The issue of LGBT is not considered to be a problem in The Gambia because even though it is criminalised the LGBT community are not subjected to any form of discrimination and harassment. At this point of our nation's history, the Gambian people have not accepted homosexuality as a lifestyle and so the

101 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, p 13.

102 CEDAW, Concluding observations on the combined fourth and fifth periodic reports of The Gambia, 28 July 2015, UN Doc CEDAW/C/GMB/CO/4-5 (2015) para 44.

103 CEDAW (n 102) para 45.

104 Human Rights Council 'Replies of The Gambia to the list of issues' CCPR/C/GMB/Q/2/Add.1 (12 June 2018). See also, Human Rights Committee 'List of issues in the absence of the second periodic report of The Gambia' CCPR/C/GMB/Q/2 (1 December 2017).

105 HRC (n 104) para 140.

> government as the representative of the people does not plan to decriminalise the practice of homosexuality.

The Human Rights Committee in its 'Concluding observations on The Gambia in the absence of its second periodic report' made observations relating to non-discrimination noting the 'absence of comprehensive anti-discrimination legislation in the State party'.[106] It also observed that:

> [C]onsensual same-sex relationships are criminalized in the State party and that lesbian, gay, bisexual, transgender and intersex persons reportedly continue to be subject to arbitrary arrest and violence.

It recommended the following:[107]

> The State party should adopt anti-discrimination legislation which (a) provides full and effective protection against discrimination in all spheres, including the private sphere, and prohibits direct, indirect and multiple discrimination; (b) contains a comprehensive list of grounds for discrimination in line with the Covenant, including sexual orientation and gender identity; and (c) provides for access to effective and appropriate remedies for victims of discrimination. It should also decriminalize same sex relationships between consenting adults and take measures to change societal perception of lesbian, gay, bisexual, transgender and intersex persons and protect them from arbitrary arrests and violence.

In addition, the Universal Periodic Review (UPR) also provided a unique opportunity to assess states' compliance with their international obligations related to the rights of LGBTI persons.[108] The Gambia has undergone three review cycles in February 2010, October 2014, and November 2019 respectively. In the first cycle, The Gambia rejected all the recommendations on decriminalisation of homosexuality and taking action to combat violence based on sexual orientation and gender identity.[109] During the second UPR cycle in 2015, The Gambia

106 Human Rights Committee 'Concluding observations on The Gambia in the absence of its second periodic report' CCPR/C/GMB/CO/2 (30 August 2018) para 11.

107 HRC (n 106) para 12.

108 See UN Office of the High Commissioner for Human Rights 'UN Human Rights Council: Universal Periodic Review' https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx (accessed 10 December 2019). See also the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) 'SOGIESC UPR advocacy tool: A guide for defenders working on sexual orientation, gender identity and expression and sex characteristics' (2017) https://ilga.org/downloads/SOGIESC_UPR_Advocacy_Toolkit.pdf (accessed 10 December 2019).

109 See Human Rights Council 'Report of the Working Group on the Universal Periodic

received 12 recommendations relating to criminalisation of same-sex sexual orientation and gender identity and expression. It noted all the recommendations related to protection of LGBT persons in The Gambia but have not implemented the recommendations.[110]

In its national report on the third review in 2019, the current government, in terms of status of implementation on previous recommendations relating to sexual minority issues and same-sex relationships, noted that homosexuality is not accepted in the country, hence, the government does not plan on decriminalising it.[111] In its first complementary report to the Human Rights Council, the National Human Rights Commission (NHRC) made submissions to the Working Group on the UPR relating to human rights of specific categories of people, namely women, children, persons with disabilities and LGB persons. The NHRC is a permanent, independent body with a mandate to promote and protect human rights and fundamental freedoms in The Gambia, investigate human rights violations and provide redress and remedial actions to victims.[112] The Commission recommended the decriminalisation of same-sex relationships between consenting adults.[113]

During the UPR process, there was particular focus on the situation of LGBT persons in the country. For instance, Belgium's advance question focused on whether the government intends to decriminalise same-sex relationships between consenting adults in the future. It further enquired on whether the government of The Gambia intends to take measures to change societal perception LGBTI persons and protect them from arbitrary arrests and violence.[114]

Twelve countries' recommendations, which were 'noted' by The Gambia broadly focused on adopting comprehensive anti-discrimination legislation, repealing all legislation that criminalises same-sex activities,

Review – Gambia,' A/HRC/14/6 (24 March 2010) (Recommendations 100.4, 100.5, 100.6, 100.7, 100.8, 100.9, 100.10, 100.11, 100.12, 100.13 and 100.14).

110 See Human Rights Council 'Report of the Working Group on the Universal Periodic Review-Gambia-Addendum' A/HRC/28/6/Add.1 (24 March 2015) (Recommendations 109.49-109.56)

111 Human Rights Council 'Universal Periodic Review 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Gambia' A/HRC/WG.6/34/GMB/1 (22 August 2019) para 39.

112 Sowe & Nabaneh (n 83) 97-101.

113 National Human Rights Commission 'Report on state of compliance with international minimum standards of human rights by The Gambia under the universal periodic review mechanism, third cycle' (2019) 8.

114 UPR Advance questions to The Gambia (Second batch) 2.

and guaranteeing the investigation and punishment of all acts of violence against LGBT persons. [115]

While merely noting recommendations is a good step, it does not go so far as to signify the state's political commitment to protecting the human rights of sexual minorities in the country. A proposal was made during the review process of the criminal code to decriminalise same-sex activity. However, this was not accepted by the Ministry of Justice. Sections 129 and 130 of the Draft Criminal Offences Bill 2019 on unnatural offences makes it a misdemeanour and is liable on conviction to imprisonment for a term of two years. The section on cross dressing has been removed. While this is a welcomed move, the National Assembly should substantially revise the proposed new criminal code to meet international human rights standards.

7 Civil society organising in The Gambia

Activists who advocated for sexual minority rights and the LGBT community or defended such individuals were under constant threat and persecution under the former regime. In fact, people who are very critical of the LGBT situation in The Gambia, only openly condemn LGBT issues if they were not residing in The Gambia. For example, the majority of information related to issues of LGBT in The Gambia is published on international platforms and not by traditional media platforms or social media within The Gambia.

Before 2014, programming targeted at MSM was mostly around addressing their vulnerability to HIV, which NGOs and UNAID did. This did not necessarily have any substantive opening for organising around MSM issues because of the political and legal regime. Although most activists may support gay rights, many engage in self-censored activism because of fear of retaliation or arrest. This has resulted in dissent being suppressed and any open support for the recognition of rights for all persons, including homosexuals, will be uncharitably condemned and was certain to be left with no other choice but to deny their sexual orientation and play safe. Defenders of sexual minority rights risk their personal safety and a 'life sentence' of harassment and intimidation from state and non-state actors.

115 These included: 7.1 (Iceland); 7.5 (Myanmar); 7.6 (Netherlands); 7.7 (Spain); 7.8 (Argentina); 7.9 (Australia); 7.10 (Canada); 7.11 (Chile); 7.12 (Croatia); 7.13 (France); 7.14 (Germany); and 7.15 (Italy). See Human Rights Council Working Group on the Universal Periodic Review 'Draft report of the Working Group on the Universal Periodic Review' A/HRC/WG.6/34/L.3 (7 November 2019) 13-14.

Based on the legal, political, and sociocultural contexts, persons belonging to the LGBT community, human rights defenders, allies, and those perceived to be part of the community are at risk of having their rights violated. The continued criminalisation of same-sex relations means that the arrest, detention, and prosecution of LGBT persons remain a possibility. On 5 April 2022, a man was brought before the High Court in Banjul and charged with aggravated homosexuality. The prosecution alleged that he unlawfully had carnal knowledge of a 12-year-old boy through the anus. The case was subsequently transferred to the Kanifing Magistrates' Court. The case is currently ongoing.[116]

As noted earlier, anti-LGBT rhetoric by the former president, prior to his ousting from power in December 2016, played on and has magnified existing societal homophobia. The resultant effects are that there is no pro-LGBT movement in The Gambia.[117] The majority of mainstream human rights organisations do not address sexual minority issues. Being openly pro-LGBT has social repercussions.[118] Given the risks involved, including arbitrary detention and arrest, social stigma, and violence, there are no formally registered public organisations. Hence, lawfare is not entrenched as a strategy for the community. Although informal support groups provide safe spaces when individuals are rejected by their family, experience violence, or lose housing or employment due to their sexual orientation. This underground community exists and has been able to tap into the resources of human rights activists that are usually present during the sessions of the African Commission on Human Rights and other international organisations in providing safe passage to safe countries.

There have not been any court-centred strategies aimed at advancing LGBT rights. For example, a test case has not been brought before the courts about the registration of queer organisations, or constitutional infringement such as freedom of association as guaranteed in the 1997 Constitution. This is mainly due to the existing conservative legal and judicial culture that does not encourage effective advocacy around substantive 'hot-button' rights issues, such as sexual minority rights. Though attempts have been made at constitution-making, more substantive rights promulgation has not been achieved yet. Thus, the current constitutional framework does not allow for a rights revolution.

116 B Asemota 'Man charged with homosexuality' *Gambia News* 6 April 2022.

117 US Department of State '2014 Country Reports on Human Rights Practices – The Gambia' https://www.refworld.org/docid/559bd53328.html (accessed 11 July 2022).

118 University of Pennsylvania 'Preliminary working report presented to the International Development and Law Organization' (2019) 63.

Recently, there has been little traction in activism and using rights contestation spaces as a joint report was submitted during the UPR review, which documented violations faced by the LGBT community.

While there may not be significant visible queer lawfare to advance the rights of LGBT persons in The Gambia, this is a small step towards raising public awareness of the situation of LGBT persons. This also indicates the broader need for human rights organisations in The Gambia to engage in queer advocacy as an intersecting issue and part of broader social issues to tackle. Independent institutions such as the NHRC, as mentioned above, has also made recommendations for the decriminalisation of same-sex relationships between consenting adults. However, it remains puzzling that LGBT groups remain largely unable to organise even online or in conjunction with allies as they could ideally register as sexual and reproductive health organisations. Years of authoritarian rule have consequently left the LGBT community with entrenched fear of government and societal discrimination and stigma. It has been six years since the end of Jammeh's rule, and it will take time for the community to deal with its past and present vulnerabilities.

8 Conclusion

The Gambia's law on 'aggravated homosexuality' is similar to other laws across the African continent. The rhetoric surrounding sexuality and gender diversity has increasingly been politicised in The Gambia. The vitriolic responses to same-sex relationships culminated in state-sponsored homophobia rooted in Jammeh's relentless campaign to maintain autocratic rule. During his 22 years of (mis)rule, state oppression of LGBT persons was very systematic, backed by broader societal discrimination and silencing. Although the current government under the Barrow administration has taken a softer stance, homosexuality remains illegal. The continued politicisation, criminalisation and strong societal discrimination negatively impact the LGBT communities. This is evident in their inability to mobilise publicly and engage in legal activism.

While there was hope that the end of dictatorship will serve as a catalyst that 'produce[s] radical turning points in collective action',[119] this has not necessarily resulted in the proliferation of opportunities for marginalised groups, including LGBT persons to express themselves and mobilise. While the situation under Jammeh and Barrow are starkly different, as illustrated above, it has not led to the embracement of diversity. The

119 A Morris 'Reflections on social movement theory: Criticisms and proposals' (2000) 29 *Contemporary Sociology* 452.

transformative political change has not spurred social change in favour of LGBT persons in The Gambia.

On the way forward on the legal front in protecting the rights of sexual minorities in The Gambia, there is a need to 'publicly' speak up for the LGBT community. Madi Jobarteh, The Gambia country representative for the Westminster Foundation for Democracy (WFD), reiterated that this would be a very 'significant decision given the cultural setting and people's perception and understanding of LGBT issues'.[120] This will have implications for LGBT rights and legal activism in The Gambia.

As part of the new democratic dispensation, the platform should be provided for the country to replace a culture of impunity with accountability with regard to the plight of LGBT persons. More studies, however, are needed to understand what lawfare strategies may enhance the protection and rights of LGBT people in The Gambia.

120 As cited in Scheinert (n 52).

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12 Digital lawfare and activism by lesbian, gay and bisexual persons in Ethiopia

Getnet Tadele & Woldekidan Amde***

1 Introduction

Ethiopia, similar to many African countries, criminalises homosexuality and there is a high level of heteronormativity. As a result, the physical or public space including mainstream media is almost completely closed to any activism around lesbian, gay and bisexual (LGB)[1] persons. As a way of responding to this harsh environment, LGB activists have resorted to digital measures to find relationships and support, and to circumvent and push back against the reality that either denies their existence or is determined to make them invisible. This chapter explores the state of the 'digital rights' movement in Ethiopia and how LGB persons respond to homophobia and heteronormativity through digital lawfare. It closely looks at how the triple and intricate barriers of criminalisation, hostile social norms, and stifling political environment contribute to absence of visible activism, both offline and online. While acknowledging the complexity of the relationship between these triple barriers and LGB spaces, the chapter highlights how the community's dependence on the digital space is a reflection of the exclusionary and controlling physical reality that they find themselves in. The digital space provides a possibility to navigate through such context and constantly negotiate a space to exist, love and live. But at the same time LGB persons are invisible to the public. These paradoxical relationships and temporal existence in both spaces amplify how persistently individuals resist the social and legal code of life and defy heteronormative law and cultural values by maintaining alternative digital media visibility and cultivating a space to connect with other LGB persons in the country and beyond and to advocate for their rights.

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1 Gender identities or sexual orientation beyond LGB (including transgender, queer, intersex, asexual) hardly feature in any published or grey literature in the country.

This chapter emerges from a broader research project that examines the state of LGB persons' health and wellbeing and its determinants in Ethiopia. The study employed a mixed-methods approach[2] and sought to explore access and use of digital spaces among LGB persons, and experience of rights engagement online and offline. The questionnaire and interview guides explored to a varying degree multiple themes that helped to tease out experiences of LGB persons and how they navigate the online and offline spaces in order to engage or not in politicisation and activism. The qualitative and quantitative data collection was conducted concurrently and was completed within a period of two months (November and December 2017) using snowball sampling. The chapter heavily draws from an earlier study that covered the views of men who have sex with men (MSM) regarding activism and social mobilisation to change the status quo.[3] All names mentioned in this article are pseudonyms to protect the identity of the respondents.

Getting ethical clearance for the research has been difficult in Ethiopia both because of the social and political sensitivity of the issue and due to the absence of an Institutional Review Board (IRB) for social science research in the country. The National Research Ethics Committee and the IRB at the College of Health Sciences are mandated to issue ethical clearance, but judging from the authors' past negative experience, they would not have approved research involving persons in same-sex sexual relationship due to deeply entrenched heteronormativity in the institutions and among members of the ethics committees. The researchers have put in place multiple mechanisms to ensure that the study would be conducted in line with proper ethical principles of autonomy, justice and beneficence. Researchers were cognisant of the social and legal risk participants run in the case of exposure. The protection of participants was therefore of utmost priority during recruitment, data collection, and write up. Participants were informed of the nature of the study and its purpose, and the voluntary nature of their participation. They were assured that they were free to pull out at any stage. All participants were requested to provide verbal consent. All the interviews were conducted in private spaces considered safe by participants. While keeping track of the LGB persons who took part in the study, care was taken not to have any identifying information such as name or address in the questionnaire or transcribed interviews to ensure confidentiality. While integrating excerpts of responses, participants were

2 See JW Creswell et al 'Best practices for mixed methods research in the health sciences' Commissioned by the Office of Behavioral and Social Sciences Research (OBSSR) (2011); JW Creswell *Research design: Qualitative, quantitative and mixed methods approaches* (2009).

3 G Tadele 'Under the cloak of secrecy: Sexuality and HIV/AIDS among men who have sex with men (MSM) in Addis Ababa' (2008).

mentioned using a combination of age and data source to avoid linking responses to participants. Physical and digital data from the questionnaire, interviews, and focus group discussion do not have any information that links data to a particular person. Data is kept safe in secure spaces.

2 The legal status of same-sex relations and LGB organising in Ethiopia

The 2004 Penal Code explicitly outlaws same-sex sexual acts.[4] Article 629 on Homosexual and other Indecent Acts states that: 'Whoever performs with another person of the same sex a homosexual act, or any other indecent act, is punishable with simple imprisonment'.[5] Contrasting views prevail about the degree of enforcement of this law in the country. LGB activists claim that many LGB persons have experienced the brunt of the discriminatory and harsh legal environment.[6] The government, in contrast, argues, in defence of its human right record in international human rights fora, that it has not been enforcing the provisions of the criminal code on same-sex conduct.[7] On the other hand, religious groups have long urged the government to enforce the laws, revise the Constitution to explicitly reject homosexuality, and uphold the nation's conservative culture.[8]

The 2009 Charities and Societies Proclamation Law,[9] has a provision that denies registration to any association that has been deemed illegal or appears to purport violation of 'public morality', which by extension appears to apply to organisations or associations that seek to advance the rights of LGB persons.[10] An attempt to establish a legal association for LGB persons was promptly turned down by the government, and the individual who attempted to register the association eventually had to leave the country because of harassment.[11]

4 Federal *Negarita Gazeta*, Proclamation 414/2004: The Criminal Code of the Federal Democratic Republic of Ethiopia, at 182-183.

5 As above.

6 See for example C Overs 'Interview with Beki Abi of DANA Social Club, Ethiopia' IDS Opinion, 25 November 2019 https://www.ids.ac.uk/opinions/interview-with-beki-abi-of-dana-social-club-ethiopia/ (accessed 4 April 2022).

7 LR Mendos *State-sponsored homophobia* (2019) https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf (accessed 28 April 2021).

8 'Gay gathering sparks row between Ethiopia's churches and state' *Reuters* 29 November 2011 https://www.reuters.com/article/idUS302027486920111129 (accessed 4 July 2022).

9 Federal Negarit Gazeta, Proclamation 621/2009: Proclamation to provide for the registration and regulation of charities and societies, at 1-2.

10 Mendos (n 7).

11 T Thomas 'The secret lives of homosexuals in conservative Ethiopia' *MedIndia*

There are stories of persecution, arrests, and prosecution of sexual minorities encountered in Ethiopia. Zeberga (a male sex worker) was arrested by the police and imprisoned for a month for engaging in homosexual sex, he stated:

> The police took me and said they have received information that I engage in homosexual sex and I said that it is indeed correct and I do but I have never raped anyone or done it without the consent of a partner. And the commander of the police station was furious when he heard me saying that. He screamed, 'Are you telling me that you are a bushti [faggot]?' and hit me on my forehead with the butt of his pistol. And I objected that there is no reason why he should hit me, that I haven't forced any one to have sex with me, that all I have done is satisfy my feeling with someone else who had the same feelings [*yewiste simet new beqa yenekahut yasgededkut sew yelem*]. They held me for about one month and then they took me to court and the judge asked what I was there for and they read the charges. And the judge asked me if I have done what they have accused me of. I told him I have but I have never done it without consent. And he said if I haven't been caught in the act and if there is no one who is accusing me of forcibly having sex with them, the court cannot sentence me guilty just because I have said I have done it and told the police to release me on bail [*yemetawekia wass*] … there were about 26 other guys who were arrested around Giorgis for the same thing … And they were released too.[12]

Zeberga also indicated that many other gay persons were caught by covert policemen, who approached male commercial sex workers as if they were clients:

> The police caught them posing like gay, you know, going there and asking some guys for sex as if they were customers, and they catch them when the guys go to them thinking they have got clients.

Ayele, an elite[13] informant, also reported a story of a gay person who was detained and went through a horrible experience. The police caught two gay persons having oral sex around St George Church. The police arrested, tied and beat them and told them that they would be released if they admitted the truth and gave out names of other gay persons. Then, the arrested persons gave the names of alleged gay persons to the police.

19 May 2009 https://www.medindia.net/news/The-Secret-Lives-Of-Homosexuals-In-Conservative-Ethiopia-51528-1.htm (accessed 28 April 2021).

12 Interview with Zerbega (date and place withheld for confidentiality reasons).

13 For the purpose of this paper the term elite refers to those with good economic and social status and who claimed that they were not involved in male sex work.

Someone who knew that his friend was gay tipped off the police and then he was arrested in the piazza:

> The police took him, along with others, and locked him without any evidence. There were around 20 people who were locked up. All of them denied the allegation. But, they were severely beaten. He had been in prison for three months along with 20 alleged homosexuals without being taken to court. He was bailed out at last. Even after being released, he was abused by police. The police threatened his mother that they would arrest him again unless she bribed them with some money, and his family suffered a lot. Finally, they were able to send him to England. I even asked him why he doesn't write it and share to the Yahoo groups. He told me that it is a long story and he would like to write a book about it.

All these examples suggest that there is sporadic enforcement of the law against homosexuality, and such arrests resulted in inhumane treatment in correctional institutions – not only by the agents of the criminal justice system, but also by fellow detainees or inmates. Correctional institutions in many developing countries like Ethiopia are notoriously harsh environments (overcrowded with little or no basic facilities) in which mistreatment and abuse pose serious challenges. As the above narrative suggests, detained homosexuals are subject to harsher experiences than other detainees or inmates. The police officers we interviewed also supported the stories above that prisoners suspected or known to be gay are made to endure unspeakable treatment from fellow prisoners.

Jemal, who engages in sexual activity with other men and is a sex worker, also stated that he was tired of harassment by the public and the police. He, however, seemed to have adopted a strategy of telling the truth to the police instead of denying it:

> [F]or instance, street children, or others living by side streets may insult you, they may become suspicious when they see you strolling on the street again and again. They may be suspicious when they watch you getting in automobiles and at times the police may follow you. In fact, I know some policemen who are themselves gay and in such cases they even threaten to arrest us unless we are willing to have sex with them for free. I have been once caught by a policeman and I was very melancholic and told him all my problems. He felt very sad about my story and advised me to pray and to remember always God so that I can give up this sexuality and set myself free very sooner. If I am caught, I would admit that I am gay politely and with regret. I would tell the policemen all the stories and that I am not happy at all in this gay life, just like I am telling you right now. And I am very persuasive and they usually let me go after giving me some pieces of advice. If some guys

> deny that they are gay and if they try to tell the policemen lies, they hate them for being cheaters and would beat them, tear their clothes and harass them.

In the absence of a court trial, Jemal adopted what is known as 'bargain justice'[14] and he asserted that 'pleading guilty' enabled him to escape police brutality. In a way, he was acting out his agency and circumventing the policed environment surrounding his sexuality. He admitted his sexuality to the police in a very convincing way, embracing the public sense of shame, and depicted himself as helpless and unhappy. By doing so he created a space to avert the worst outcomes (violence or arrest/detention). The situation indicates the complexities that homosexuals go through while expressing their policed sexuality.

Overall, from the stories above, it appears that there is occasional enforcement of the law and many of them reported about others who were arrested and experienced unspeakable suffering in prison.

3 Public opinion on LGB rights in Ethiopia

Notwithstanding criminalisation, many studies note that deep-seated heteronormative social norms remain the most potent force against acceptance of homosexuality, and account for the invisibility of any form of same sex sexual relationship in public spaces or LGB activism in the country.[15] There are strong heteronormative structures in place that quell any expression of homosexuality. A 2007 PEW global attitude survey found that 97 per cent of Ethiopians are in favour of criminalisation of homosexuality.[16] In a 2020 Afrobarometer national survey of 2 400 adults across the country, nine out of ten participants expressed strong dislike to having homosexuals as neighbours.[17] These findings demonstrate the close alignment between law and morality, and specifically the synergy between the conservative discriminatory social norms, and the criminalising legal environment. LGB persons have to grapple with hidden powers manifested in self-censorship, fear and anxiety.

14 R Henham 'Bargain justice or justice denied? Sentence discounts and the criminal process' (1999) 62 *Modern Law Review* 515.

15 As above.

16 PEW Global '47-Nation PEW Global Attitudes Survey' (2007) 35 https://www.pewresearch.org/wp-content/uploads/sites/2/2007/10/Pew-Global-Attitudes-Report-October-4-2007-REVISED-UPDATED-5-27-14.pdf (accessed 5 July 2022).

17 Afrobarometer 'Summary of results: Afrobarometer Round 8 Survey in Ethiopia, 2020' (May 2020) https://www.afrobarometer.org/wp-content/uploads/2022/02/afrobarometer_sor_eth_r8_en_2020-07-03.pdf (accessed 4 July 2022).

Perhaps swayed by the negative public opinion, Beqalu (a male sex worker himself) is one of those informants who called for harsh measures to be taken against homosexuals (in addition to warning people not to be involved in it). He also argued that homosexuality should not be allowed to spread, and people should pray so that their children should not fall into the trap of homosexuality:

> You can't control it; I mean you can't control all the people in Addis for example. So control cannot make it disappear. I think people should be warned, for example. You can warn people that they would be executed if they are caught doing such things. I don't think it should be allowed to spread. It will be spoiling the young ones. But the young ones are too greedy and it will surely spread. They would go along and sleep with you for a few beers or a pair of new clothes and they would be calling you every other day asking you to meet again. So I don't know what can be done to stop it. I guess people should pray to God to protect their kids from this. That is all I can think of. Parents should pray that their children may not fall into it, and they should bring them up properly. And I am sure street children will all be gay because they grow up seeing it. They see their mother having sex for money all the time; and the kid will grow up thinking I can make money, too. He will get his ear pierced and in no time he is a prostitute like his mother.

The above response depicts the cognitive dissonance homosexuals experience in the face of extreme heteronormativity to the extent that they summon the worst forms of punishment upon themselves and people with similar sexual orientation.

4 The internet as a form of lawfare

The role of the new digital media is highly contested in the literature. In addition to the widely dominant congratulatory narrative that upholds digital media as a panacea,[18] there are perspectives or views that insist on more nuanced and complex takes on the new digital media.[19] The internet offers an alternative space for the less powerful such as minority groups like LGB persons and activists. However, the access to and freedom in this space is constrained by powerful actors such as the government, certain institutions, and the community who seek to undermine opposing views

18 M Nekrasov, L Parks & E Belding 'Limits to internet freedoms: Being heard in an increasingly authoritarian world' LIMITS 2017 — Proceeding of the 2017 Workshop on Computing within Limits (2017) 119-128.

19 S Srinivasan, S Diepeveen & G Karekwaivanane 'Rethinking publics in Africa in a digital age' (2019) 13 *Journal of Eastern African Studies* 2.

and narratives, and uphold dominant social norms.[20] To this end, these actors engage in actions that compromise safety and freedom of members of the less powerful groups, who are often subject to relentless online and offline hounding and violence. Further strictures exist in the form of self-censorship that individuals experience in order to keep their sexual identity private.[21]

Ethiopia is listed as one of the countries that has the lowest access to Information Communication Technology (ICT) and the internet in Africa. A gender gap prevails, with far more men (12 per cent) using the internet than women (4 per cent). Access to the internet is also largely restricted to urban areas and among digital literates.[22] Power outages and intermittent internet disruption for political and other reasons are common. The government has a stronghold on online spaces through the Ethiopian Telecommunication Corporation, which is the only institution with the mandate to provide internet access across the country. This coupled with a massive rural population that dwell in settings devoid of even the most basic infrastructure has been cited as major impediments to internet access. Despite international[23] and national[24] provisions that seek to protect freedom of speech and the right to information, the government engages in activities that stifle opposing political views. The government has the leverage to do so as it is the sole provider of internet service in the country.[25] In other words, although the internet has the potential to overcome constraints of space and time and could bring real power to the people, digital authoritarianism[26] as manifested through internet blackouts and surveillance stifle its powerful potential for social change, and turn it into another government control apparatus.

20 OpenNet Initiative 'Internet filtering in Ethiopia' (2009) 1-9 https://opennet.net/sites/opennet.net/files/ONI_Ethiopia_2009.pdf (accessed 28 April 2021); Nekrasov, Parks & Belding (n 18); A Shishkina & L Issaev 'Internet censorship in Arab countries: Religious and moral aspects' (2018) 9 *Religions* (2018) 358.

21 See Nekrasov, Parks & Belding (n 18).

22 J Poushter 'Smartphone ownership in emerging economies continues to climb in and internet usage but advanced economies still have higher rates of technology use' Pew Research Centre (22 February 2016).

23 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III); and UN Human Rights Council Resolution, The promotion, protection and enjoyment of human rights on the Internet, 18 July 2016, UN Doc A/HRC/RES/32/13 (2016).

24 Constitution of the Federal Democratic Republic of Ethiopia (1994) art 29 on the right of thought, opinion and expression.

25 OpenNet Initiative (n 20).

26 T Dragu & Y Lupu 'Digital authoritarianism and the future of human rights' (2021) 75 *International Organisation* 991.

The internet is thus a contested space where diverse groups seek to advance their respective narratives and counter narratives.[27] In light of the prominence of online platforms, authors like Pantazidou[28] have emphasised the need to look into issues of power in these spaces:[29]

> As an increasing amount of norms, beliefs, negotiations and mobilisations are shaped through virtual, online spaces, a further question arises about who has access to those spaces and what are the sources of power and terms of engagement within them.

Findings from an earlier publication show that the majority of research participants prefer to get information on sexual health needs, meet partners, and engage in activism online.[30] This high uptake and usage of online media platforms has encouraged the authors to investigate further experiences of LGB persons online including practice of use, culture of 'coming out', experience of arrests, benefits and danger/vulnerability associated with activism and claiming rights through physical or digital spaces as LGB in Ethiopia.

Living under multifaceted scrutiny and facing multiple forms of exclusion in public spaces the LGB community in Ethiopia turns to the internet as an alternative space to be part of imagined communities, 'live and love', have a voice, and access information.[31] This is further enabled by the growing prominence of the internet as a medium of communication globally[32] and the staggering uptake of social network platforms such as Facebook among internet users.[33]

By and large, those for and against exploit the internet to advance their causes. MeskelSquare for instance was one of the blogs sites that entertained discussions on homosexuality in Ethiopia. It generated highly emotional insults and sometimes violent rhetoric from both sides. Both

27 M Pantazidou 'What next for power analysis ? A review of recent experience with the powercube and related frameworks' (2012) 44 *IDS Working Papers* 1.

28 As above.

29 As above.

30 G Tadele & WK Amde 'Health needs, health care seeking behaviour, and utilization of health services among lesbians, gays and bisexuals in Addis Ababa, Ethiopia' (2019) 18 *International Journal for Equity in Health*.

31 Tadele & Amde (n 30); Srinivasan, Diepeveen & Karekwaivanane (n 19).

32 OpenNet Initiative (n 20); Nekrasov, Parks & Belding (n 18).

33 Poushter (n 22).

opposing and supporting views are posted as the following examples from two bloggers indicate:[34]

> The only reason we see more gays in different parts of the world is because people come to terms of understanding and supporting us. I know Ethiopia may not be ready to come to full acceptance of gay people at this time ... but I am sure there are some grass root activities going on ... sooner or later our rights and existence will be acknowledged and supported. The only message I may have is 'do not judge us because of our sexuality ... and remember every family have someone gay very close to them ... we can be your brother, sister, uncle, aunt, father, mother ... or cousins and best friends ... so before you say something bad about us think twice about it for a second'.

> Hell no! There is no way Ethiopia will allow openly Gay Practice. We the real people of Ethiopia would rather die than approving Gay right in Ethiopia. First of all, this shit has become topical among White Europeans who still want to demolish that beautiful and unmixed culture of Ethiopia. We Ethiopians (Muslim to Christianq) will hold hand in unison and push back the issue as we did to Fascist Italy! I absolutely agree that Ethiopian Gay people are those who were born in different country specially in Europe or USA otherwise we are clean as blue sky in the summer![35]

These views reflect a human rights perspective on the one hand and a strong negative reaction on the other. The first position reflects on the rights perspective while the second view sheds light on a homophobic stance (anger, disgust and discomfort with homosexuals). The second writer argues that Ethiopian gays were not born on Ethiopian soil. Rather, they were born in the Western world. In other words, homosexuality is imported from the West and is not inherent to Ethiopian society.

In the absence of any institutions/interventions seeking to advance the interests of LGB persons, there were reports of organised efforts by LGB persons themselves online, but this is largely done using the HIV angle:

> There are … Facebook [groups]. There are no organisations working on our issues so the only choice we have is to [do it] ourselves … the only thing we can do is to teach anonymously online. Because it is difficult to do it in person. So my friends and I have a page that provides information on health issues. We post twice a week on HIV or STI/STD. So people could discuss

34 Anonymous http://www.meskelsquare.com/archives/2005/04/holding_hands.html (accessed 28 July 2012).

35 As above.

> there and if they have any questions they will inbox us and we will answer as much as we can. Once a week after work a friend of ours who is also like us and who is a health professional talks to people who need help or advice. We have over four thousand followers. I would rather not tell you the name of the page but we are doing a good thing on health issues but we are not working on advocacy yet. All we can do is to try to help people get condoms and lubricants for free.[36]

Others admitted campaigning for the rights of LGB persons online but with no success:

> I am vocal online so when these sorts of things happen people come to us. There are stories when we campaigned for the release of imprisoned guys. For example, there were two guys who got caught in a hotel room and the people who caught them beat them and called the police and the police took them. I know more than four people who are still in prison for more than two years … they do not tell you their charges officially. I tried to visit them and it is very horrible that the fellow prisoners pulled out the nails from the toes and fingers of one of them. But there is nothing we can do other than campaigning online. We talked to some foreigners and we took them with us but they were not able to help because our legal system is very difficult.[37]

LGB persons have increasingly enlisted digital platforms such as Facebook, Twitter, WhatsApp, Viber, Telegram, Instagram, Google+, yahoo groups and websites, which have profoundly impacted their lives. Benefits of being on digital space are well documented in the literature in many contexts:

> Digital media provide[s] new possibilities for people to interact with one another and with the world around them. They alter existing forms of social exchange and belonging, and create new ones. Social media platforms like Facebook, WhatsApp and Twitter are increasing awareness of shared identities that transcend physical place in everyday activities and routines. In so doing they are giving rise to new forms of 'networked sociality' that are inflected by, or in conflict with, local cultural values and norms. [38]

36 Interview with a 25-year-old interviewee (date and place withheld for confidentiality reasons).

37 FGD informant 2 (date and place withheld for confidentiality reasons).

38 S Srinivasan, S Diepeveen & G Karekwaivanane 'Rethinking publics in Africa in a digital age' (2019) 13 *Journal of Eastern African Studies* 2.

A recent study in Ethiopia found that the LGB participants heavily rely on online spaces for various purposes.[39] The use of internet by 9 out of 10 LGB respondents in the survey (90 per cent of respondents) is hardly a reflection of the access rate nationally, which stood at 8 per cent.[40] The LGB community's dependence on the digital spaces evident in this research is a reflection of the criminalising and heteronormative physical reality that LGB persons find themselves in, and which fosters social exclusion and violence. The digital space, provides a possibility to navigate through such context and constantly negotiate a space to exist, love and live while remaining invisible in public. Srinivasan et al emphasise the importance of examining and understanding the African's lived experiences in the social, political, and economic spheres in this digital era to appreciate 'the disruptive effects of digital transformations across the continent'.[41]

It was evident that online social network platforms play a key role in the lives of LGB persons, allowing them a degree of freedom to circumvent the legal and social strictures. Online platforms provide an alternative space that facilitates visibility of LGB communities and their embodied experience of power and structural violence. Most importantly the digital space is where LGB persons feel safe to connect and exist as LGB individuals, experience a sense of belonging with fellow LGB persons, be part of online communities, get respite from depression and communicate sexual health and mental health issues. Some also use the space to educate fellow LGB persons and engage in online activism and politicisation.

The significance of digital space on LGB lives suggests the chasm in the experiences of LGB persons, and the isolated and precarious existence of many without such access, either on account of low education, non affordability of smart phones or internet, or lack of infrastructure. One Ethiopian LGB activist intimated: '[M]ost queer lives are lived in complete isolation and there aren't even small LGBT sub cultures you can find in other parts of East Africa.'[42] One activist in a recent interview further describes: 'Our activism, information and support functions mainly happen online. These are complemented by small and very secret meetings, a bit like the "cells" of an underground resistance movement'.[43]

39 Tadele & Amde (n 30).

40 Poushter (n 22).

41 Srinivasan, Diepeveen & Karekwaivanane (n 19).

42 Overs (n 6).

43 As above.

Despite being an alternative space for LGB persons to get on with their lives, it is difficult to describe the space safe, as online spaces are not immune to violence and almost all LGB using the digital platforms found it necessary to use pseudonyms. Thus, LGB persons face risk of being outed on these spaces due to breach of security, lack of protection, or poor digital literacy. This turns the platform to become a space for abuse, and further threat on the wellbeing of LGB persons. When privacy and safety of LGB persons on the digital space is compromised, the digital space seems more an extension of the physical world than an alternative to it.

The sense of insecurity and the implications of being outed makes the researching of online experience of this group a daunting challenge. Illustrating the ethical dilemmas and challenges faced when researching LGBT issues, Odoyo[44] reported the acute anxiety that LGBT persons experience in online spaces, challenging the notion of safety that online spaces are supposed to provide. LGBT persons reiterated a feeling of being constantly spied on online.

This hostility towards the LGB community raised security concerns that affected the validation of the findings of this study. By the point of validation, members of the queer community in Addis Ababa reported that they were being surveilled by the government after receiving word that the government somehow had compiled a database bearing the names, social media identities, addresses and contact information of at least 200 queers with no indication of the reason for the existence of said database. They reported monitoring of foreign embassies by the government who are purported to have also collected information about any visits to said embassies by members of the queer community. These concerns made the community understandably reluctant to communicate via email, social media or even meet. As a result, most members of the community have deleted their social media presence, changed their email addresses and consequently fled Ethiopia and sought refuge in other countries such as Kenya.[45]

Some LGB persons expressed facing abuse online and not doing anything about it. But in some instances when adversaries are trying to out them, by posting their identities including photos and address, they report to Facebook and are able to get the photos removed.

44 R Odoyo *Outsider citizen: A landscape analysis of the human rights of sex workers and LGBT people in Ethiopia 2014-2015* (2015) https://globalphilanthropyproject.org/wp-content/uploads/2016/03/Outsider-Citizen.pdf (accessed 9 July 2022).

45 Odoyo (n 44) 9.

According to a study in Ethiopia, despite the various measures meant to stifle free speech or internet access in the country, the use of online tools that help circumvent government censorship are widely used:

> Now many are aware of getting around government blocks by using proxies and VPN (Virtual Private Network) technologies. Circumventing technologies, which were unheard of before or left for the tech savvy ones, become common on daily conversations of the youth in Ethiopia … The accessibility of circumventing tools also helps internet users to avoid self- censorship.[46]

These tools which afford private and secure online communication and browsing did not come up in this study. This is perhaps because the LGB persons do not feel being under the watchful eyes of the government, or perhaps due to lack of know-how and access to these mechanisms.

5 Limitations of online lawfare

There are online counter movements against LGB persons as well. Participants mentioned that the online spaces are fraught with vocal detractors of the LGB agenda, who seem to enjoy resurgence in popularity especially as they vociferously spearhead protests against events that they consider too liberal and alarming, for example hosting of international HIV conferences locally: 'There were [online] pages opened by the religious leaders. They used to post quotes from the Bible about us.'[47]

The interviews reveal the nature of violence and insecurity LGB persons experience online from being called names and unsolicited advice to convert to heterosexual, to threats of murder and violence. Despite homosexuality being illegal, LGB persons emphasised that much of the abuse they encounter is from religious individuals and groups, and less from law enforcement bodies:

> Whenever people discuss homosexuality with us online no one ever says that I will report you to the police because it is a crime; they say it's a sin, they say it's not our culture and threaten to kill us or beat us or if they are tolerant enough they will tell us to go to the West because that's where people like us belong.[48]

46 HH Abraha '*Examining approaches to internet regulation in Ethiopia, Information & Communications Technology Law'* (2017) 26:3, 310.

47 FGD informant 1 (date and place withheld for confidentiality reasons).

48 FGD informant 7 (date and place withheld for confidentiality reasons).

> People have called me names or even sent me threats [online] telling me that they are going to find me and kill me. In the beginning I used to be so scared and intimidated to the point of losing sleep or having nightmares.[49]

The qualitative data further shows that LGB persons are still fearful of being outed online, which could affect their relations offline with families and communities. Hence, many resort to using pseudonyms and having multiple accounts to protect identity:

> I have two Facebook accounts. Sometimes you chat with someone and when you reveal your sexuality, you might be mistaken and he mig*ht* overreact. He might expose you … I have two Facebook accounts. One for family, colleagues and straight friends and another with a pseudonym for my gay friends.[50]

> I have an account my family doesn't know about in a different name; because my brother and sister go through my phone, I use another phone not the one I formally use.[51]

Despite all these they are prone to their security being compromised, and they face the most acute anxiety of their significant others finding out, and being humiliated and excluded:

> Someone went as far as posting my picture online using anonymous account. But my friends and I reported the picture and got it taken off from Facebook.[52]

This relates to the level of internet literacy of some of the LGB persons, that is they were able to get in touch with the company to retract the post. The responsiveness of the corporation is commendable. However, that may be too little too late once word is out about the sexual and personal identity of the victims. Further, not all LGB persons took measures to address online abuse and violence, which they often face from people who do not really know their real identity. When asked how they dealt with crime (violence attacks, physical assault, etc) committed against them online/on social media, 17 LGB persons said they did nothing in response. The qualitative responses also suggest a sense of helplessness in the face of violence and discrimination.

> When your name, phone number and pictures are posted [by someone who want to publicly out you] It is scary. Yes [the person posted] my real name

49 32-year-old interviewee (date and place withheld for confidentiality reasons).

50 FGD informant 4 (date and place withheld for confidentiality reasons).

51 23-year-old interviewee (date and place withheld for confidentiality reasons).

52 25-year-old interviewee (date and place withheld for confidentiality reasons).

> along with the name I told you 'natty' [pseudonym] and my phone number was posted and more than five of my friends were on the list as well. So we had to leave the country.[53]

The extent of shock and fear is palpable from the above response. It is common for individuals to leave their country for fear of persecution from the government due to political reasons and the fate of LGB persons also seems the same.

6 An uncomfortable agreement: Justifications for continued online lawfare in Ethiopia

The LGB movement in Ethiopia largely exists online, rather than physically. According to a respondent:

> Nobody is willing to take the risk of being out. I know if I was to come out and speak up there would be change but I would be dead for sure. And I can't live in the country.[54]

> Most people do not engage in activism – online or otherwise because of fear. Let alone LGB activism, political activism for the general population is dangerous here. But still there are some people who are in a movement. They don't totally expose themselves but like they take pictures wearing a rainbow flag and things like that. There are also online websites. Because I am not that much interested, I do not follow deeply.[55]

The reason for this is largely due to the fear of harassment and the security concerns that rise from engaging in activism. Those who oppose advocacy towards decriminalisation of same-sex relations prefer to maintain the status quo. They recognise the benefits in terms of visibility of LGB issues, many also feel that risks of activism outweigh the benefits. LGB persons fear that activists actually endanger their wellbeing and lead to closure of emerging LGB spaces both online and offline. Here is a practical example:

> There was a problem after ICASA [2011 International Conference on AIDS and STIs in Africa that took place in Addis]. … [S]ome of my friends and I had to leave the country for six months or more. People were posting our names and photos on different pages. I believed I was secure but somehow

53 25-year-old interviewee (date and place withheld for confidentiality reasons).

54 32-year-old interviewee (date and place withheld for confidentiality reasons).

55 FGD informant 5 (date and place withheld for confidentiality reasons).

> people would find something. So they had my name, phone number and pictures and they were saying 'these are gay activists.' something like that.[56]

Some informants sound very cynical about the purpose that politicisation online could accomplish in a very conservative society. Hence, they mentioned that they are not keen to be part of such a movement considering how heteronormative society is and the implications of visibility to their safety and wellbeing.

> But I can't be out in public as a gay man and debate on TV like they do in Kenya. So I don't see the need for politicisation.[57]

Others make further distinctions about the goal of the advocacy. They emphasise the importance of changing people's perceptions more than advocacy for decriminalisation of same sex sexual relationships.

> I don't believe changing the law on paper would help change peoples' mind. I think we need some sort of campaign like those done in 1990s to change the stigma against people living with HIV/AIDS or those done to stop gender based violence and female genital mutilation or to empower women. The reason most people are against homosexuality is not because it is a crime rather it is because of their religion and culture. So if we want to change their mind we need more than changing laws.[58]

And yet others feel that maintaining the status quo allows space for LGB people to exist and as such activism should wait for societal attitudes to change:

> I am not saying the society has the moral obligation to put us in jail, or discriminate against people because of their sexuality … but so far I know it was peaceful!! No one is executed or taken to jail because he is gay, even if there is a rule that is written with black and white! So I would say the society and government were so quiet about it so far, let us not provoke the government/the public and invite further complication on us [*ena agul qoskusen yemayehon neger anamita*!!!] Believe me, they have the legal power to take every one of those petitioners to prison!!!! I strongly recommend for us to enjoy the things we have at hand and demand for legal rights later, very later in the day. Because legality by itself is nothing, it is not going to stop discrimination or mistreatment. How many in this group really accepted themselves? Before asking others to accept us, first let's get done with ourselves (*yewistachinin*

56 Interview with a 25-year-old (date and place withheld for confidentiality reasons).

57 FGD informant 7 (date and place withheld for confidentiality reasons).

58 FGD informant 4 (date and place withheld for confidentiality reasons).

> *meche cheresin-na new*?) … and even if that right is granted, believe me it won't happen any time soon, what are you planning to do with it? Get married? For God's sake, if those people who demand for their 'right' are in this group, please, please, don't move faster than your environment (Society)!!! Because you would end up crushing.

Another person added:

> Asking for rights I think, what these guys did is not completely an act of stupidity. They lack some comprehension of the current situation of our society and what the consequence of their act. They should have done the cost-benefit calculation thoroughly. To the best of my knowledge, there is not any special discrimination against Gay people. What do they mean by saying 'right?' Right for what? Marriage? To do whatever they want to do in public? At least, they could post their plan in this forum and get some opinions because we are stakeholders in the situation. You can stay in the closet as long as you want and still have a fulfilling and happy gay life. Coming out only makes your life easy, and I don't recommend it if it does the opposite- makes your life even worse. Coming out to others is optional, but it is absolutely mandatory to come out to yourself (accepting and loving yourself as you are). Because no matter what you do, you can never change who you are!

Mamush, another young man from a well-off family, also considers homosexual life as a hassle because he has to be mindful of it so that his family and other significant others should not uncover that he is homosexual. He said that, even if homosexuality is legalised, he would not come out openly; and he expressed his preference for homosexuality to remain illegal: 'I don't think it would be better for it to be legal and acceptable. We are much better off doing it behind closed doors as we used to.'

Despite the overwhelming opinion not to outrightly engage in activism, some individuals in Ethiopia are in favour of activism and legalisation. Male sex workers in particular, expressed a slightly different position arguing that homosexuality should be legalised. And, such legalisation at least may allow them to be on an equal footing before the law when they are abused or harassed by the public. Thus, they expressed the need for freedom and protection by the government:

> The government should help us exercise our right to move freely and live in our way without harassment. We are subject to name calling and are stoned

> whenever we pass streets. They call us *bushtis*. We are even abused by street children.[59]

Bitew also argued along those lines saying that he longs to see the day gays in Ethiopia have the freedom that gays in the Western society enjoy:

> Let me tell you something that will make me happy. If you take Europe, gays have their own places where they enjoy freely and get married without any fear. I want Ethiopian gays to enjoy those freedoms. Then, I would like to come out to my family. I would be really happy if our government grant us the freedom to marry, wear whatever clothes we want, enjoy in our places and do everything we want like the European or American gays do. The government issued a policy to stop stigma and discrimination against HIV victims here in Ethiopia. I would really be happy if the government takes the same step: declaring to stop stigma and discrimination against gays. I also want my family to know who I am. That would really make me happy. The message I would like to convey to the government and the public is that they should let us enjoy our freedom like any other members of society [heterosexuals]. We want to go out and enjoy ourselves freely. There are many gays who hide themselves in schools. I really want the people to change their attitude towards homosexuals like the Europeans. Whether we like it or not, homosexuality is prevalent in our country. This is a real fact. So, I want the people and the government to change their current attitude and stop stigma and discrimination towards gays.[60]

He continued and said that he plans to come out to his family when their rights are protected by the government and when he manages to have his means of livelihood.

> If the government declares our rights, I will be coming out of my closet. Right now, I don't have my own things to support myself. I don't want to fall out with my family. So, I have to settle and have my own things before I disclose to them. Even if I have my own things, I don't want to depart with my family by disappointing them.

Bitew argued from the rights perspective and pleaded for legalisation. Legalisation is, in fact, one step forward to stop stigma and discrimination as the victims will have legal ground to sue those who discriminate. When suggestion was made of the limits of legalisation and negative public opinion even in the West, Bitew reacted in the following way:

59 Interview with Dagmi (not real names) (date and place withheld for confidentiality reasons).

60 Interview with Bitew (date and place withheld for confidentiality reasons).

> I didn't mean legalisation is the only way to stop the harassment we encounter in the street. Actually, the streets where we hang out are not the kind of places to respond to verbal attacks hurled at us. If we do so, the police would come and drag us into jail if they identify us as gays. But, if our way of life becomes legalised, the police wouldn't take sides with those who call us names; and wouldn't take us to prison as both of us have an equal right to live freely. That is why I said I would be happy if the government declares homosexuality legal. Should the government states that our way of life is legal officially, I won't at least be subject to harassment in the streets, and I could also rent a house freely.

His argument advances the point that legalisation could help in protecting LGB persons from the double standard exercised by the police and other agents of the criminal justice system when they face harassment and verbal attacks by the public on the streets.

Another informant (Berhe) echoed the same line of thought, arguing how HIV is affecting MSM because of stigma and discrimination coupled with illegality. He expressed his rage against the government in the following words:

> I tell you many guys have been victims of HIV. And [the sad thing is] the government is not doing anything about it. Just because it is out of our culture and way of life, we don't have to die. [*gena legena bahil teblo, kotetam bahil yeteyaze sew iko*]. I can only live my own life, I can't live someone else's life. And just because there are laws for how men should be, we can't all be forced to live that way [*sew wend silehone wendawi hig wetito indih hun ayibalim*]. We all have our own peculiar ways and our own lives, there are many things that are just our own [as individuals]. So the government can't have all of us behaving in the same way. And there are women as well who are lesbians and they have [places in Arat Killo] and some places in Bole [where they meet]. But theirs isn't as wide spread [as ours]. But there are quite many guys who might have got HIV because of the secrecy, stigma and discrimination related to homosexuality.

Others advocated for secluded and limited freedom or autonomy, which partly meant securing exclusive gay locations which could not be accessed by heterosexual persons.

From the foregoing discussion, informants are divided concerning what the legal status of homosexuality should be in the country. The informants seem to have trouble embracing their criminalised and ostracised identity as a gay person, and dread the repercussions of being open or outed to their social capital and the resulting stigma and

discrimination. In addition to external stigma, they are also haunted by internalised stigma and experience cognitive dissonance about their sexuality, and the associated strain on their mental health. This is not a surprising finding, given that the majority, if not all, grew up in a conservative, homophobic and heteronormative society and heterosexual families, where sexual feelings (even to the opposite sex) must be repressed. Lower class gays particularly male sex workers harbour the same feelings, but they seem to be invested less in conventional norms and have less of a stake in conformity. Essentially, the less someone has to lose, the more likely they are to take risks. Thus, male sex workers were relatively out in the public with implicit forms of activism (with their conspicuous ways of dressing, walking and etc) and advocated for recognition and protection of homosexuals.

7 The conspicuous absence of advocates, civil society groups and HIV/AIDS programming

The foregoing discussion suggests that rights discourse is at its infancy or non-existent in Ethiopia when it comes to sexual minorities. How one can account for these excessively heteronormative or homophobic attitudes among the LGB persons themselves and lack of organised, or even underground, activism is a question that begs an answer or further research. It is our impression that this can be ascribed to the triple barriers: criminalisation; heteronormative social norms; and a political environment hostile to all forms of political mobilisation. Though the context and level of authoritarianism and illegality of homosexuality differs, many other African countries criminalise[61] homosexuality and do have repressive regimes. All the same, some of these, unlike in Ethiopia, seem to have a relatively vibrant and resilient gay community and activism that push back on the draconian legal system and authoritarian rules against homosexuality and homosexuals. Many authoritarian African countries where homosexuality is illegal still tolerate HIV/AIDS programming for the gay community. The health programming exception does not apply in Ethiopia, and hence not a single programming targeting sexual minorities exists in the whole country. Thus, the relationship between legal status, heteronormativity and the authoritarian system on the one hand and the gay spaces on the other hand is complex, fluid, ambiguous and sometimes contradictory and requires a more nuanced contextual understanding.

61 Nearly three-quarters of the continent or at least 38 countries have outlawed consensual gay sex, see PEW Global (n 16).

A high level of heteronormativity and strong family ties or ties with significant others backed by indigenous religion[62] are perhaps the most influential reasons for such invisibility. Thus, of all barriers, a deep-seated heteronormative attitude remains the most potent force against acceptance of homosexuality, and accounts for the invisibility of any form of same-sex sexual relationship in public spaces or LGB activism in the country. Homosexuality is thus so strongly condemned that it is virtually impossible to talk about it or come across the topic being discussed. The issue of homosexuality is also willfully conflated with pedophilia to the extent that even an association that works to help male sexual assault victims has been a victim of prejudice. 'We rarely receive any funding apart from UNAIDS and a number of other US-based organisations' Sultan Muhe, a former homosexual sex worker and child rape victim, says of his NGO, the Bright for Children Voluntary Association. He added that 'I have even encountered insults. One NGO president once labelled my organisation "a bunch of faggots" and asked me to leave his office'.[63]

Because of the above and other reasons, strong feminist scholarship and movement that focus on issues of class, human rights, ethnicity, popular culture, body and the self, reproduction, sex work, gender identities and sexual orientation, discrimination, oppression and stereotyping also do not seem to exist in Ethiopia. This is in contrast to the situation in Uganda, for example, where feminist scholars and advocates like Sylvia Tamale and Stella Nyanzi are instrumental in making the gay rights' movement more visible.

A combination of lack of awareness and poor judgment has also led to socially widespread conflation of male child sexual abuse (pedophilia) and homosexuality. Of the more than 10 000 rape cases in one year, 22 per cent involved young boys, some even as young as two.[64] Several expatriates from western countries have been implicated in such incidents. The most notorious occurred in the mid 1990s when dozens of young victims of Ethiopia's 1984 famine were sexually abused in an orphanage run by Swiss-based charity group Terre des Hommes. The involvement of some western expatriates in sexually abusing male children reinforced already deeply entrenched public discourse that homosexuality is an imported practice from the global north and a discourse that conflates homosexuals

62 It is also puzzling that in many other African countries, Pentecostal churches that are openly anti-gay are present in large numbers but such Christian denominations in Ethiopia are a minority in a country where approximately 45 per cent and 35 per cent are followers of the Ethiopian Orthodox Church and Islam respectively.

63 Cited in Thomas (n 12).

64 G Tadele '"Unrecognized Victims": Sexual Abuse against Male Street Children in Merkato Area, Addis Ababa' (2009) 23 *Ethiopian Journal of Health Development* 174.

with pedophiles. All these developments reinforced strong public negative attitude towards homosexuality which in turn dwarfed activism and rights discourse.

HIV/AIDS in many African countries played a key role in bringing sexuality research to light albeit in a very restricted public health focus on sexual behaviour as it relates to HIV transmission and prevention. HIV/AIDS has also opened the doors to MSM HIV/AIDS programming thereby leading to visibility and 'recognition' by NGOs and even by some governments to closely work with gay activists or gay led organisations. There is no MSM HIV/AIDS programming in Ethiopia and why this has not happened is puzzling. The 2009 Civil Society Law also did not allow organisations receiving more than 10 per cent of their funding from abroad to work on the rights issues or advocacy[65] and this crippled any foreign organisations from supporting grassroot movements focusing on rights issues. Geopolitical importance of the country and capable authoritarian leader (the late prime minister, Meles Zenawi) who was able to negotiate aid without yielding to western demands of good governance, democracy and human rights must have also contributed to an almost muted stance of donors in pressing the government to open the space for the gay community. For instance, Ethiopia was able to receive many rounds of huge funding from Global Fund to Fight AIDS, TB and malaria without including MSM HIV/AIDS programming.

8 Conclusion

Are rights of LGB persons part of the discourse in Ethiopia? Is there a rights awareness or a sense that their human rights are being violated? How do they view the law criminalising same sex intimacy? The range of information presented in this article has a number of implications regarding these questions. It emerges from the stories presented above that there is no open mobilisation or activism by LGB persons in the public sphere in Ethiopia, and very little even in the digital world.

Thus, the existing social and political environment in the country promotes discrimination, violence and stigma against homosexuality. Societal attitudes toward homosexuality, as is the case in many societies, are characterised by conservatism emanating, most importantly, from religious beliefs that recognise the act as sinful indulgence inviting or meriting God's wrath, and cultural beliefs that reckon it as degrading masculinity:

65 SA Yeshanew 'CSO law in Ethiopia: Considering its constraints and consequences' (2012) 8 *Journal of Civil Society* 369.

> It is however worth noting that the degree of legal repression, and the use of judicial mechanisms, against homosexuality in Ethiopia can be considered lenient compared to countries with more enforcement and far more grave punishment, such as the death sentence. All the same, the very fact that homosexuality is criminalised seems to have given license to all kinds of hate crimes and violence against this community, emboldening offenders to act with impunity. It does not seem likely that there will be a change in the legal arena any time soon, as reflected by the fact that the Penal Code of the country was revised for the first time in 2005, after 48 years, and maintained the criminalisation of homosexuality. Of course, there was no development to promote any change in this regard, as there were no visible efforts promoting the cause of this group, and most homosexuals were closeted. As shown above, the Ethiopian gay cyber-community, particularly the elites, are too dispersed or discordant to be a strong agent of change, at least for now.[66] As highlighted above, there is even division among the homosexual community about the desired legal status of homosexuality. Some even seem to accept the existing legal repression, and do not consider homosexuality as a sexual orientation or lifestyle worth pursuing.

Feminist social constructionist theory argues that the body is first and foremost defined by the society and community structural and cultural discourses from defining pink for a girl and blue for a boy, to disciplining the body to the ways of heteronormative society at large, or defining what deviant sexuality looks like. Thus, it is important to consider the invisibility or hidden sexual performances and expressions of Ethiopian LGB persons from such influential and nuanced societal values and control. So much of this discussion offers insights into a deeply marginalised community, not having the power and reluctant to engage in claiming their rights.[67]

Overall, living under such multifaceted scrutiny and facing multiple forms of exclusion in public spaces, the LGB community in Ethiopia turn to the internet as an alternative space to be part of imagined communities, 'live and love', have a voice, build solidarity networks and access information.

66 A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth* (2013).

67 For more information on this see, CO Izugbara & C Unide 'Who owns the body? Indigenous African discourses of the body and contemporary sexual rights rhetoric' (2008) 16 *Reproductive Health Matters* 159; G Tadele 'Heteronormativity and "troubled" masculinities among men who have sex with men in Addis Ababa' (2011) 13 *Culture Health Sexuality* 457.

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13 Activism from the closet: Fear of a double backlash against a nascent queer movement in Sudan

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1 Introduction

Sodomy (*liwat*), in Sudan, is a crime according to the 1991 Criminal Code. However, there is no history of widespread enforcement of the sodomy article. The law is completely silent on the status and protection of other sexual and gender minorities. However, queer persons have faced risk of arrest and harassment by public order police especially under a vaguely defined so-called Public Morality Law. Although it is popularly known as the public order laws, it is in reality a mix of different types of legal sources, including the state level public order laws and several articles within the 1991 Criminal Code under the section on honour and public morality. These laws, embodying patriarchal heteronormative ideals, were codified during the dictatorship of Omar al-Bashir (1989-2019) and were introduced as part of larger calls for Islamisation. Sodomy was even branded as a crime against God.

This chapter explores queer lawfare, or rather a lack of lawfare, in Sudan which recently introduced modest, yet significant legal changes to the rights and status of LGBTQ+ persons in the country. The changes were introduced by the transitional government led by Abdallah Hamdok which came into office after a popular uprising ousted Bashir and his Islamist supporters in April 2019. Although the Hamdok government did not make any clear stance on LGBTQ+ rights, their mission to respond to the demands of the revolutionary slogan 'freedom, peace and justice', culminated in the announcement of a series of legal reforms and amendments. The following legal changes were introduced:

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(1) As part of the Miscellaneous Amendments Law of 2020 (Repeal or amend the provisions restricting freedoms) changes were introduced with regards to the crime of sodomy (article 148) of the 1991 Criminal Code. Although sodomy remains a crime, the penalties of flogging and death were removed. Now the act is punished by imprisonment not exceeding 5 years upon first offence and 7 years upon second offence, and life imprisonment upon third offence.
(2) One of the first acts of the Hamdok government was the repeal of the state level public order laws and the specialised public order police. As part of the Miscellaneous Amendments Law of 2020, the articles under the section on honour and public morality were reformed. The latter has, however, been critiqued as replacing vague definitions with new vague definitions of what constitutes public morality. Although on paper the 'public order law' has been repealed, the police can in principle still make arrests based on their perception of 'obscene acts' defined ambiguously as 'act of a sexual nature in a public place or issues signals with sexual meanings that cause harassment of the public's feeling or public modesty'.[1]

Since the political environment has been hostile and homophobia widespread, the queer community has been largely invisible in domestic political and public discourses including during the recent and short-lived transitional period.

The legal reforms, therefore, did not come about because of queer lawfare as the queer organisations are fearful of a double backlash which is defined in this chapter as a violent retrograde response or reaction aiming to revert to an imagined heteronormative social order. Still in their nascent stage after decades of political oppression, they have engaged in what El Menyawi has termed 'activism from the closet' by supporting women's groups particularly in their efforts to repeal the public order laws.[2] This involves the strategy of not explicitly advocating for queer rights, but rather advocating for human rights that will greatly benefit LGBT+ persons. In addition, they are working within the queer community to create self-acceptance in a context of widespread (and internalised) homophobia where queerness is religiously rejected and culturally tabooed. The few organisations which are active are unregistered and operate largely in Khartoum only and to a great extent (but not exclusively) online with no physical office buildings.

1 Miscellaneous Amendments Law of 2020.

2 H El-Menyawi 'Activism from the closet: Gay rights strategising in Egypt' (2006) 7 *Melbourne Journal of International Law* 28.

2 Fieldwork in Khartoum

There is scarce information available about queer rights and organisations in Sudan. There is no scholarly work published on this issue and very few media articles and reports to retrieve. There is one article published by queer activists in the *LGBT Policy Journal* which rely on 'a series of anecdotes'.[3] The queer community remains largely hidden and the organisations have worked clandestinely, especially during the Bashir regime. In the words of a queer individual in Khartoum 'we live inside the closet. No one knows anything about us. We live two different lives. We are actors'.[4] One of few international organisations that have interviewed queer persons (specifically lesbians, gays and bisexuals) and published some information as part of a larger report on human rights state that 'almost no such research exists, reflecting the extreme difficulty of access to the deeply clandestine existence of LGB networks in Sudan'.[5] However, queer organisations in Sudan are increasingly documenting the history of discrimination and gendered violence which LGBT+ persons face in the country.[6] But as they themselves write, they have to do so with great care without putting participants or themselves at risk. In a recent report by the Arab Foundation for Freedoms and Equality in collaboration with queer organisations in Sudan it is stated:

> Researchers who have conducted the interviews for this report will not be mentioned. The reason is that activists documenting violations and helping abuse victims are also at risk of being prosecuted under anti-LGBTQ+ laws, imprisoned, harassed, or socially stigmatized.[7]

The topic is not only politically sensitive, but largely religiously rejected, and culturally tabooed. As such gaining access to the queer community is not only difficult, but great care has to be taken not to put interlocutors at risk. Despite the challenging context, we were able to conduct 22 individual interviews and two group interviews with queer activists during May-August 2018 before the popular uprising against the dictatorship

3 S Berkouwer, A Sultan & S Yehia 'Homosexuality in Sudan and Egypt: Stories of the struggle for survival' (2015) *LGBT Policy Journal*.

4 A quote from a participant in the film produced by Mesahat Foundation for Sexual and Gender Diversity 'Queer Voices From Sudan ... What is it like to be Queer in Khartoum?' (2017).

5 The Equal Rights Trust 'In search of confluence: Addressing discrimination and inequality in Sudan' (2014) 148.

6 See for example Mesahat Foundation (n 4).

7 The Arab Foundation for Freedoms and Equality 'Human rights violations against the LGBTQI+ Communities in Egypt and Sudan' (2021) 11.

of Omar al-Bashir started in December 2018. We were able to conduct an additional 18 interviews after the 2019 revolution, in February and April 2020. In addition, we rely on ten interviews with young feminist activists who have emerged as strategic allies of the queer movement after the 2019 revolution. Ethical approval for this research was obtained from the Norwegian Center for Research Data (approval number 456175). The interviews were conducted with the informed consent of the interviewees and due care has been taken to ensure their anonymity.

Those queer activists we interviewed were between 25-45 years of age; had higher education; resided in Khartoum and a few abroad. They were recruited through two research assistants who are also queer activists themselves.[8] The two queer activists reached out to their networks within the two main queer organisations active in Sudan today. These are Shades of Ebony and Mesahat Foundation for Sexual and Gender Diversity.[9] These organisations are not officially registered as NGOs and have no physical presence in the country. The only 'public' traces of them are online, where the Sudanese activists' identities are never exposed. The individual interviews included questions related to gender-based violence and discrimination, the history and current organisation of the queer movement in Sudan, and mobilisation for legal and social change under shifting political circumstances, including their participation in the 2019 revolution. The two group interviews discussed particularly organisations' history and current activities and future goals and aspirations. As there is a chronic lack of data on this politically sensitive and cultural and religious taboo topic, we rely heavily on this unique and original interview material. But we also include the few media reports that are available on the topic as well as material from the queer organisations themselves.

It is a considerable weakness that only queer voices from Khartoum with higher education from the middle class were reached. The sample was also skewed towards the main queer organisations in which an educated middle class in Khartoum is over-represented. As such other voices, especially from lower socio-economic and uneducated backgrounds outside the capital, were not represented in this piece. However, although the interview material can hardly represent the queer community in Sudan, it allows us to explore queer lawfare, or rather lack of lawfare, in a Sudanese context in which there is currently virtually no scholarly work.

8 Because of the volatile context these research assistants/queer activists cannot be named. One of them asked us to acknowledge him by his activist name Hamada and as the founder and leader of Shades of Ebony.

9 Mesahat Foundation covers both Sudan and Egypt, and the majority of postings on their websites are concerned with Egypt.

3 Queer rights in Sudan before and after the revolution

An overview of queer rights in Sudan, necessitates an introduction to the recent political changes and turmoil in the country. The COVID-19 pandemic has taken a backseat to politics. Within the space of the three years Sudan has gone from being ruled by the military-Islamist regime of Omar al-Bashir (1989-April 2019) to a transitional government (August 2019-October 2021), and lastly the military regime of Abdel Fattah al-Burhan (October 2021-present). It was after what is now known as the December revolution and during the short transitional period that legal reforms under the banner of 'freedom' were introduced.

After ruling Sudan with an iron first for three decades, the Islamist arm of the military regime of Omar al-Bashir was ousted by a popular uprising in April 2019 under the slogan 'freedom, peace and justice'. After eight months of street protests since December 2018, a hybrid solution was negotiated between the transitional military council (consisting of Bashir's old supporters) and the civilian coalition of forces of freedom and change. The National Congress Party, the ruling Islamist party during Bashir's era, was dissolved and banned and many leading figures, including the President himself, arrested.[10] A transitional and civilian government was appointed with Abdallah Hamdok acting as prime minister in August 2019. The acting head of state was, however, a Sovereign Council which included both military and civilian actors and was chaired by Abdel Fattah al-Burhan (the leader of the Sudan Armed Forces). This hybrid solution has been disputed as the military represent the old regime and are responsible for war crimes and crimes against humanity (especially related to the Darfur conflict). In addition, the security and military forces attacked a peaceful protest outside military headquarters in Khartoum on 3 June 2019, killing at least 127 people.[11] The military forces responsible for the massacre later became part of the of the transitional government and this caused popular outcry as 'justice' was one of the important slogans of the revolution.

The short-lived transitional period was guided by the Constitutional Declaration. This document was a negotiated result between the military and the civilian coalition of forces of freedom and change. The transitional

10 'Sudan dissolves National Congress Party, repeals Public Order Bill' *Radio Dabanga* 29 November 2019.

11 'They were shouting "kill them": Sudan's violent crackdown on protesters in Khartoum' *Human Rights Watch* (2019).

government was mandated, according to the Constitutional Declaration, to 'repeal laws and provisions that restrict freedoms or that discriminate between citizens on the basis of gender'.[12] Legal reforms were introduced whereby the death penalty for sodomy was removed and the notorious public order laws repealed.[13] Until that point in time, Sudan was one of six countries, including Iran, Saudi Arabia, Yemen, Nigeria, and Somalia, that imposed the death penalty for sodomy.

The military led by Abdel Fattah al-Burhan hijacked the transition in October 2021 at a time when there was increasing dissatisfaction with the progress made by the Hamdok government and furthermore fractionalisation within the civilian coalition. At first the ideological orientation of the coup makers was unclear, but now Islamists are re-entering the political landscape with full force, including in government posts.[14] This means that the supporters of the old Bashir regime are basically back in the driving seat. And as such, the legal changes introduced under the banner of freedom might be at risk as they contradict the Islamist gender ideology. Since their enactment, Islamists and religious leaders have deemed them in contradiction with Islamic law.[15] Seen as creating moral chaos and an attempt to secularise Sudan, the transitional government came under increased pressure. One of the main critiques against the laws has been that increasing personal freedoms will create *fitna* which is the Arabic word for moral chaos. The logic is as follows: If citizens sexuality, movement and dress are not controlled, it will lead to sexual temptation which inevitably will lead to immoral acts such as sodomy and *zina* (sexual relations before and outside of marriage). In addition, the reform process has been criticised as the legal changes were initiated before the National Assembly was appointed. Immediately after the military coup, a new wave of peaceful protests started. Six months later approaching summer 2022, protests are still on-going. This time the protestors demand a transition to a civil and democratic government without any presence of military actors.[16]

12 Constitutional Declaration of 2019, chap 2, sec 7(2).

13 K Hamad 'Sudan uprising: Sweeping reforms usher in justice and freedom' *Global Voices* 14 July 2020.

14 Bedayaa 'Needs assessment report: LGBTQI+ in Sudan' (2020) 9.

15 As above.

16 M Osman 'Sudan's military is brutally suppressing protests – Global action is needed' *The Guardian* 22 March 2022.

3.1 In the name of Islam: Criminalising queerness under the Al-Bashir regime

Before the Revolution and during the military-Islamist regime of Omar al-Bashir (1989-2019), Sudan's stance on queer rights had been made abundantly clear on the international arena. The Sudanese government in 2002 voted against the application by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) for consultative status with the United Nations Economic and Social Council. In 2008, Sudan did not endorse the UN Declaration on Sexual Orientation and Gender Identity. About 60 countries signed the declaration at the time, but others and especially countries associated with the Organisation of Islamic Cooperation objected to it because it contradicted 'Islamic family values'.[17] And in 2016, Sudan voted against the UN Human Rights Council Resolution for appointment of an independent expert to help protect queer individuals from discrimination and violence.[18]

The Al-Bashir regime came to power through a *coup d'état* in 1989 and in 1991 it codified a new Criminal Code as part of larger efforts to Islamise state and society, including the law.[19] *Hudud* (singular, *hadd*, meaning limit, restriction, or prohibition) form a central part of the 1991 Criminal Code. Criminal justice in Islamic law covers three main areas: *qisas*, *tazir*, and *hudud*. Qisas refers to retribution and covers offences such as bodily harm and homicide. *Tazir* refers to offences for which punishments are not stipulated in the Quran or Sunna and are therefore left to the discretion of judges. *Hudud* (singular, *hadd*, meaning limit, restriction, or prohibition) are regarded as the ordinances of Allah, and they have fixed punishments derived from the Islamic sources.

Sodomy is codified as a *hadd* crime and thereby considered a crime against God. In terms of direct references to sodomy or *liwat* in Arabic in the Qur'an, it is identified with the 'sin of Lot's people'. Lot was commissioned as a prophet to the cities of Sodom and Gomorrah. His story is used to demonstrate Islam's disapproval of homosexuality.[20] He was commanded by God to preach and to stop them from their lustful

17 R Blitt 'The Organization of Islamic Cooperation's (OIC) response to sexual orientation and gender identity rights: A challenge to equality and nondiscrimination under international law' (2018) *UTK Law Faculty Publications* 173.

18 Berkouwer, Sultan & Samar Yehia (n 3).

19 O Kondgen *The codification of Islamic criminal law in Sudan: Penal codes and supreme court case law under Numayrī and Bashīr* (2017).

20 The story of Lot is told or alluded to in at least 14 chapters or *suras* of the Qur'an. See for example Qur'an the heights 7:80-84, Qur'an Hud 11:77-83, and Qur'an the poets 26: 160-175.

and immoral acts. Article 148 of the 1991 Criminal Code under the *hudud* section, criminalises sodomy (*liwat*) and stipulates the following:

> (1) There shall be deemed to commit sodomy, every man who penetrates his glans, or the equivalent thereof, in the anus of ... another man's, or permits another man to penetrate his glans, or its equivalent, in his anus.
> (2)(a) whoever commits the offence of sodomy, shall be punished, with 100 lashes, and he may also be punished with imprisonment for a term, not exceeding five years;
> (b) where the offender is convicted for the second time, he shall be punished, with 100 lashes, and with imprisonment, for a term, not exceeding five years;
> (c) where the offender is convicted for the third time, he shall be punished, with death, or with life imprisonment.[21]

It is important to note that previous criminal codes in the country did not criminalise sodomy, but did criminalise 'unnatural' crimes or 'crimes against nature'. In the 1925 Penalty Code article 318, states that whoever has sex with another person in an *unnatural* way and without consent is subject to imprisonment for 14 years and a fine; the consent of any person, less than 16 years of age, would not be considered if the offender is a teacher or guardian. The penetration is evidence of the crime. The 1974 Penalty Code article 318, titled 'crimes against nature' stipulates that whoever has sex with another person in an *unnatural* way is subject to punishment of two years' imprisonment and a fine. If that is done without consent the punishment is 14 years and a fine. Any person under 18 years of age cannot be considered as consenting to the act. These laws were mainly a colonial import from Britain. Sudan until 1956 was under an Anglo-Egyptian condominium. These laws were replaced with Islamic law as part of a military regime with an Islamising political project.[22] President Omar al-Bashir and his circle of supporters instigated a process of comprehensive Islamisation based on the assumption that Islam represented the foundation of the country's national identity and should define its legal, political, cultural, and economic systems. The Islamists introduced what they called the 'civilization project' (*al-Mashru al-Hadari*). An intrinsic part of this project was the Islamisation of Sudanese law, with the *hudud* penalties incorporated in the Criminal Code.[23]

21 The Criminal Code of 1991.

22 Kondgen (n 19).

23 AA Ibrahim *Manichean delirium: Decolonizing the judiciary and Islamic renewal in the Sudan, 1898-1985* (2008) 392.

The gender ideology of the Al-Bashir regime builds on the idea that your biological gender is God-given and it determines what rights you are entitled to and what responsibilities you are expected to fulfil. Only sodomy is explicitly criminalised. The law remains silent on the status and protection of other sexual and gender minorities. However, the building block of an Islamic state is clearly the patriarchal heteronormative Muslim family where biologically defined men are expected to provide financial support and to be the guardians and decision-makers of the family and where biologically defined women are expected to reproduce and care for the children and the husband.[24] If you do not fulfil patriarchal heteronormative expectations, then you are not a proper Muslim. The religious discourse propagated has a rigid understanding of what is defined as proper Muslim masculinities and femininities. Anyone who does not fit the heteronormative mould is a potential threat to Islam and the state and may create moral chaos (*fitna*). In the words of queer activists, the Islamists have fortified the idea that being queer is against religion:[25]

> In an Islamic regime they follow the teachings of Islam where it gives men and women specific roles and forbid any of them to cross to the other side. Being part of the LGBT community is forbidden by Islam.

Based on the Islamic principle of 'prescribing the good and prohibiting the evil' *(amr bi al-maruf wa al-nahy an al-munkar*), the Al-Bashir regime introduced what is popularly known as public order laws which largely policed how citizens dress and behave in public spaces under the pretext of preventing *fitna*. In a Sudanese context, *fitna* is understood as moral chaos caused by sexual temptation. This chaos can manifest itself in the shape of prostitution, and unlawful sexual acts. The Islamist state, therefore, saw it as its mission to control sexuality and ensure public order in order to avoid such societal chaos. The foremost risk of prosecution for sexual orientation or gender identity was under the public order laws. In the words of one of our interlocutors: 'Mostly the law applied against us is the public order law and the arrests happen by the public order police'.[26] These laws were built on an entire infrastructure from specialised courts to a designated public order police force spread out across the country.[27] The laws were two-fold: there were state level public order laws and several

24 L Tønnessen 'The many faces of political Islam in Sudan: Muslim women's activism for and against the state' PhD thesis, University of Bergen, 2011.

25 Interview with queer activist, 24 years of age, Khartoum, July 2018.

26 Interview with queer activist, 26 years of age, Khartoum, April 2018.

27 SIHA Network 'Beyond Trousers: The Public Order Regime and the Human Rights of Women and Girls in Sudan' Submission to the 46th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia (12 November 2009).

articles within the Criminal Code under the title 'Honor, Reputation and Public Morality'.

In Khartoum, the Public Order Act of 1998 introduces several regulations aiming to reduce gender mixing in public spaces to avoid the 'moral chaos' which may arise when unrelated men and women get tempted to commit immoral acts. For example, the belief that dancing may create sexual temptation and should be avoided is codified in article 7(b) states that 'there shall be no dancing between men and women and women shall not dance in front of men'. Another example is the potential temptation that can be caused by unrelated women and men sitting next to each other in public transportation. The intentional or unintentional rubbing of legs in a crowded bus must therefore be avoided. Article 9(1)(a) and (b) stipulates that:

> Each vehicle used for public transportation within the state shall specify a door to be used by women and reserve ten seats for women … men may not sit in the seats reserved for women

In a similar vein, article 20 regulates how men and women should queue: 'every authority requiring citizens to queue must separate between men and women and the public must adhere to this provision'. Penalties are imprisonment not exceeding 5 years, a fine or whipping.

As part of the Criminal Code, there are various articles related to seduction,[28] gross indecency,[29] prostitution,[30] and indecent and immoral acts which constitute the articles defining 'public morality'. Article 152 on indecent and immoral acts has been widely enforced, especially in

28 Article 156: 'Whoever seduces any person by inducing, taking or assists in the taking or abduction of such a person, or hires him to commit the offence of adultery or sodomy or practicing prostitution or gross indecency or obscene acts or acts contrary to public morality, shall be punished with whipping not exceeding 100 lashes or with the imprisonment not exceeding five years'.

29 Article 151(1): 'There shall be deemed to commit the offence of gross indecency, whoever does any sexual act, with another person not amounting to adultery or sodomy, and he shall be punished, with whipping, not exceeding forty lashes, and he may also be punished, with imprisonment, for a term, not exceeding one year, or with fine.'

30 Article 154(1): 'There shall be deemed to commit the offence of practicing prostitution whoever is found in a place of prostitution so that it is likely that he may exercise sexual acts or earn therefrom, and shall be punished with whipping not exceeding 100 lashes or with imprisonment for a term not exceeding three years. (2) Place of prostitution means any place designated for the meeting of men or women and men and women between whom there is no marital relationship or kinship in circumstances in which the exercise of sexual acts is probable to occur.'

targeting women's dress. The stipulations in article 152 illustrate well how vaguely 'public morality' was defined:

> (1) Whoever commits, in a public place, an act, or conducts himself in an indecent manner, or a manner contrary to public morality, or wears an indecent, or immoral dress, which causes annoyance to public feelings, shall be punished, with whipping, not exceeding forty lashes, or with fine, or with both.

By vaguely defining what constitutes (in)decent and (im)moral behaviour, great discretionary power is given to the public order police. It facilitates the disciplining of gendered moral bodies by the state in a fashion that normalises and naturalises particular ways of being. There is thereby repression of those who do not subscribe to state-definitions of the norms of the idealised Muslim woman or man through various methods of control, marginalisation, silencing and abuse.[31] Although the public order police have been first and foremost notorious for targeting women, queer persons who act and dress outside of heteronormative social and political expectations have been similarly at risk. According to a queer activist:[32]

> There is always risk of harassment and arrest specifically for some persons within the LGBT community; for example, homosexual men who have a very feminine behavior in the way they dress or walk. They always face harassment from the public order police.

This risk is compounded by ethnicity and class, whereby women of African descent from lower socio-economic backgrounds are considered more vulnerable.[33] Although we do not have access to concrete numbers, The Equal Rights Trust estimated around 5 000 cases throughout the country in 2013 based on interviews with lawyers.[34] A range of women's groups have advocated against these laws since their codification, but there has not been a particular focus on how they have affected the queer community. The queer organisations believe that the number may be much higher as many cases go unreported because 'most victims were too afraid to speak up for fear of social marginalization and/or renewed security forces crackdown'.[35]

31 S Nugdalla 'The revolution continues: Sudanese women's activism' in A Okech (ed) *Gender, protests and political change in Africa* (2020) 81.

32 Interview with queer activist, 26 years of age, Khartoum, July 2018.

33 Hamada 'Blog from Sudan: The Sudanese Revolution: A fight for LGBTQI+ rights?' CMI Chr.Michelsen Institute (2019).

34 The Equal Rights Trust (n 5) 251.

35 The Arab Foundation for Freedoms and Equality (n 7) 31.

There have only been a handful of encounters that have spilled out into the mainstream media. A well-known incident took place in August 2010, when the Sudanese public order police, raided a private party celebrating the informal wedding of two homosexual men in Khartoum, where several attendees were reportedly cross-dressing. They were charged with breaking public morality (article 152) by wearing feminine clothes, applying makeup, and dancing 'in a womanly fashion'. Nineteen of the attendees were flogged publicly with 30 lashes and fined.[36] In 2013, Sudanese police arrested and beat up nine gay men who were accused of indecency and prostitution.[37]

3.2 Legal changes after the 2019 revolution

After the revolution, the transitional government under Prime Minister Abdallah Hamdok took a clear stance against Islamism. However, the government did not make any public statements with regards to LGBT+ rights. Nonetheless several legal changes which improve the rights and protection of queer persons were introduced.

One of the first acts of the Hamdok government was the repeal of the state level public order laws and the demobilisation of the specialised public order police. In July 2020, several amendments were made to the 1991 Criminal Code as part of the Miscellaneous Amendments Law of 2020 under the title 'Repeal or amend the provisions restricting freedoms'. The Minister of Justice, Nasredeen Abdulbari, stated that the reforms aimed to bring Sudanese laws 'in line with the principle of human rights and fundamental freedoms' which are seen as pillars of the 2019 revolution. Laws perceived by citizens specifically women and youth including queer to be particularly strict and prohibiting personal freedoms were reformed. As the death penalty and flogging were regarded as Islamic punishments, they were removed as part of the 2020 Miscellaneous Act. The death penalty for sodomy, apostasy and all crimes committed by minors, was removed, however, both sodomy and apostasy remained crimes under the law. Flogging as a punishment was removed for a number of crimes.[38] The following amendments were made for the sodomy article:[39]

36 'Sudan flogs 19 men in public for cross-dressing' *Sudan Tribune* 4 August 2010

37 The Arab Foundation for Freedoms and Equality (n 7) 32.

38 The new law does not change the penalty of flogging under the penal code for the crimes of drinking alcohol, adultery committed by an unmarried person, and falsely accusing another person of committing adultery.

39 Miscellaneous Amendments Law of 2020, amendment 24.

> In article 148, paragraph 2(a), the punishment of 100 lashes have been removed; paragraph (b) shall be deleted and replaced by the following paragraph: 'If the perpetrator is convicted for the second time, he/she shall be punished with imprisonment for a prison term not exceeding seven years'; in paragraph (c) the death penalty is deleted.

This means that sodomy remains a crime, but that the penalties of flogging and death were removed. Now the act is punished by imprisonment not exceeding five years upon first offence and seven years upon second offence, and life imprisonment upon third offence.

The punishment of flogging was removed throughout, including for most crimes under the heading 'Honor, Reputation and Public Morality' of the Criminal Code.[40] These punishments are seen as particularly strict and as Islamic forms of punishments.[41] Article 152 was repealed and replaced by the following new article on 'obscene acts':[42]

> Anyone who commits an act of a sexual nature in a public place or issues signals with sexual meanings that cause harassment of the public's feeling or public modesty, shall be punished with imprisonment for a period not exceeding six months, or with a fine or with both penalties.

In addition, a significant change was made to article 154 on prostitution. Specifically, the definition of place of prostitution was changed from any meeting place where men and women who were not married to each other interacted (which could be anywhere) to any place specifically intended to engage in prostitution.[43]

Article 152 on obscene acts has been critiqued as replacing vague definitions with new vague definitions of what constitutes public morality. This has been pointed out by civil society in a collective statement. The amended article is still wide open to interpretation, something which gives law enforcement discretionary powers to assess what contradicts public modesty, which allows for the continued interference in personal freedoms by policemen who have the right to assess the matter according

40 The new law does not change the penalty of flogging under the penal code for the crimes of drinking alcohol, adultery committed by an unmarried person, and falsely accusing another person of committing adultery.

41 'Sudan abolishes strict Islamic legislation' *Radio Dabanga* 13 July 2020.

42 Miscellaneous Amendments Law of 2020, amendment 27.

43 The Miscellaneous Amendments Law of 2020, amendment 29.

to what they deem to be a breach of modesty, without the protections of an objective standard.[44]

Although these are positive developments, they are quite modest steps towards the recognition of queer rights. Vague articles within the Criminal Code can still be interpreted in ways to suppress LGBT+ persons. Presently, queer individuals have no legal protection against gender-based violence and discrimination in a country with widespread homophobia.

4 A trajectory of queer activism in Sudan

The history of queer activism in Sudan is rather short as the first organisation, or rather social media forum, dates back to 2006. Queer activism and Sudanese civil society more generally were severely restricted under Al-Bashir's authoritarian regime. Legal requirements were put in place which mandated all NGOs to register under the Humanitarian Aid Commission (HAC); a condition to receive international funding.[45] HAC, which was led by a commissioner with security rather than civil society background, was given government excessive discretionary and regulatory powers over NGO work to curb what was perceived as any international or national threat to the Al-Bashir regime.[46] Many international NGOs were expelled from the country and several national NGOs closed down.[47] Particularly after anti-government demonstrations in 2011 in the wake of the Arab spring and again in 2013, any organisations perceived as threatening the regime and its Islamic base were severely clamped down on.[48] This made it difficult for queer organisations to work as they were unable to register, given the criminalisation of sodomy and the patriarchal and heteronormative gender ideology of the Bashir regime, and thereby receive funding from abroad.

44 'A collaborative civil society statement in response to the law of various amendments (abolishing and amending provisions restricting freedom) – Exposing "a wolf in sheep's clothing"' *SIHA Network*, (August 2020).

45 The Voluntary and Humanitarian Work Act of 2006.

46 L Tønnessen 'Enemies of the state: Curbing women activists advocating rape reform in Sudan' (2017) 18 *Journal of International Women's Studies* 151.

47 Among those closed down was Salmmah Women's Resource Centre, which was shut down after its leader, Fahima Hashim, appeared as a speaker at the Global Summit to End Sexual Violence in Conflict in London. Several other civil society organisations were closed by the HAC and a literary forum was closed by the Ministry of Culture and Media. These were Beit al Finoon, the Sudanese Studies Center, the African Center for Justice and Peace Studies, Arry Organization, The Narrative and Criticism Forum, the Khatim Adlan Center for Enlightenment and Human Development, and The Mahmoud Mohammed Taha Centre.

48 Tønnessen (n 46) 144.

Nonetheless, there have been several unregistered queer organisations operating although many of them are no longer active. In 2006 Freedom Sudan, the first queer social media forum (which is no longer active) was established to be 'a source of hope, courage and advice for LGBTs in Sudan'.[49] The initiator of this forum described the political space for queer activism as limited and their work as clandestine. In an interview in *Global Voices* in 2010 he said:

> Our status is illegal. Homosexual behavior is illegal in Sudan and homosexuals facing the death penalty. That's why our organization was formed in secret and all our activities are carried out in secret …[50]

In 2011, Rainbow Sudan, another queer social media forum, was established with similar aims. The leader of the group, which is no longer active, described the political and social context as not ready to openly discuss queer rights. He said in an interview that:

> In Sudan, we are just at the very first steps to start discussing about homosexuality. We move at the pace of a baby … Currently the country is not ready to open up to LGBTQI+ issues.[51]

In terms of organisations, there are only traces of three. Although they are not registered NGOs and do not have any physical presence (in terms of office space etc), they are not completely 'hidden' as they have some degree of online presence. These are Bedayaa (2010) and Mesahat Foundation for Sexual and Gender Diversity (2015) and Shades of Ebony (2017). Two of these, Bedayaa and Meshahat, have been operating both in Egypt and Sudan.[52] However, the Bedayaa organisation was never particularly active in Sudan due to the lack of funding and the overall security situation.[53] On their websites, only one project is listed, starting in 2020, which includes Sudan and in that project Shades of Ebony and Meshahat are listed as Sudanese partners.[54] Operating mainly in Khartoum, Shades of Ebony and Meshahat have focused largely on documenting the discrimination and

49 'Sudan votes: Quietly, Sudan's underground gay movement grows online' *Queer Muslims* 29 November 2011.

50 Hamad (n 13).

51 PC Notaro 'LGBT rights in Sudan: Someone fights for the rainbow' *Il Grande Colibrì* 13 January 2013.

52 These two organisations have websites, but the majority of publications and information are from Egypt.

53 Interview with queer activist, 30 years of age, Khartoum, August 2018.

54 'The Life for All project' aims to document the violations faced by members of the LGBTIQ community in Sudan. See more about the project at https://www.bedayaa.org/research-and-documentation (accessed 18 July 2022).

homophobic violence faced by the queer community in Sudan in tandem with creating safe spaces of the community. Such oral narratives have been published online for example in a report titled *LGBT voices from Sudan: Recording a past, building a future*.[55] The films titled *Queer Voices from Sudan* and *Art of Sin* have the same intent: to document stories of discrimination and homophobic violence highlighting not only the suppression of the Bashir regime, but also homophobic attitudes in society.[56] By naming these experiences as violence, it is the first step in countering internalised homophobia (which is widespread) and empowering the queer community from *within*. They are still at the start of a conversation, mostly in social media platforms such as in the Facebook group Rainbow Sudan which emerged after the revolution. In the words of a queer activist:[57]

> The society and its negative projections have effected LGBTQI+ matters, but there is a limited social tolerance on social media platforms and there is groups includes members who identify themselves as LGBTQI+ allies.

However, the visibility of queer individuals and organisations is actively debated.[58] Some visibility at the individual level is desired as it may open up space for dialogue and provides an understanding of societal norms and potential for change.[59] The viewing of the film *Art of Sin* in Khartoum in 2019 is seen against this backdrop. However, most of these conversations take place online and as such are not available to many Sudanese queer individuals especially outside of Khartoum due to Sudan's relatively low digital literacy. The online activism is also challenging for the queer activists as they are also facing backlash in those fora. For example when Rainbow Sudan promoted the trailer of the *Art of Sin* documentary featuring the Norwegian-Sudanese artist Ahmed Umar, it was according to the Arab Foundation report met with responses such as 'he should be slaughtered at the airport', and 'look how you destroyed Sudan's reputation'.[60]

The projects initiated by these queer organisations also reflect the hostile political and social environment. Without access to major international funding (except some embassies that creatively find way of

55 Mesahat Foundation (n 4).

56 The film is directed by Ibrahim Mursal Warsame and is a documentary about the Norwegian-Sudanese artist Ahmed Umar who is known for being Sudan's first openly gay man. The film was made in collaboration with Shades of Ebony. Mesahat Foundation (n 4).

57 Interview with a queer activist, 27 years of age, Khartoum, April 2020.

58 Hamada (n 33).

59 Bedayaa (n 14) 13.

60 The Arab Foundation for Freedoms and Equality (n 7) 134.

supporting them), it has been difficult to initiate much needed projects or programmes for the queer community. A recent survey as part of Bedayaa's 'The Life for All project' found that queer persons in Khartoum are in desperate need of psychosocial support, but also within other areas they face discrimination and homophobic violence.[61] The survey also noted that there was little awareness about organisations and agencies working on queer issues in the country.[62] The only national strategy that acknowledges the LGBT+ community has been programmes on HIV/AIDS prevention focusing on the health risk caused by men who have sex with men. Because of the unregistered status of queer organisations, they have not been involved as partners in this work.

Queerness is not only legally restricted, but also religiously rejected and culturally tabooed. Homophobia is widespread. Violence based on sexual orientation and/or gender identity is described as 'extreme' and put in the context of traditional gender roles and rigid perceptions of femininity and masculinity; 'Almost anyone who doesn't fit into these stereotyped perceptions [is] seen as a threat to the security and safety of the society as a whole'.[63] Queerness is largely seen as socially unacceptable to the point where it is regarded as an illness. It is associated with social stigma and shame and is seldom talked about in public.[64] It is also put in a religious context and as such queerness is seen as both a sinful and immoral act. In an oral testimony collected by Meshahat, a Sudanese gay man, put it like this:[65]

> Gay men are perceived as failed men. Homosexuality is rejected both culturally and religiously. From early age, I have been taught that being gay is wrong and shameful; It's against nature and God will since Quran says that homosexuality is a sin. I have learned that homosexuals are going to hell and they should be stoned to death.

Based on the prevailing information gathered by the queer organisations themselves, LGBT+ persons face discrimination and gendered violence especially from the family and community at large.[66] There are documented examples of religious conversion therapy, forced marriage,

61 Bedayaa (n 14) 18. In the 'Life for All Project' Bedayaa collaborates with Meshahat and Shades of Ebony.

62 According to a survey by Bedayaa, 75 per cent of a sample of 169 queer individuals did not know of any organisation or agency working on queer issues. Bedayaa (n 14) 20.

63 Mesahat Foundation (n 4).

64 Berkouwer, Sultan & Samar Yehia (n 3).

65 Mesahat Foundation (n 4).

66 See for example Mesahat Foundation (n 4).

forced heteronormative dress codes, discrimination in the workplace and health system and various forms of physical and mental violence and discrimination.[67] Among our interlocutors, one gay man was expelled from the family home,[68] another underwent conversion treatment by a religious sheikh.[69] A young lesbian woman was forced to marry and has two children;[70] another fled abroad as a result of family harassment but came back when her parents promised to accept her identity.[71] The case of Abu Hamad aptly illustrates the level of societal prejudice. A rumour spread in the mining town Abu Hamad in the River Nile State in 2020 that gay miners practiced sodomy and that a gay marriage was expected to be celebrated. A farewell party for one of the miners was mistaken for the expected gay marriage celebration and a mob appeared with sticks beating gay suspects; one of whom was beaten to death and later denied a burial in the town cemetery.[72] If families accept queerness, it is often under the condition that it is not publicly known as this would create stigma and dishonour.[73]

For these reasons, queer organisations are not only fearing political backlash, but even more so they fear social backlash. With reference to the experiences of Egypt and the Cairo 52 or the Queen Boat incident there is a fear among queer activists that it will cause more harm than good to the community as it may cause a more severe crackdown, including on their families. Cairo 52 refers to the number of Egyptian men arrested in May 2001 aboard a floating gay nightclub called the Queen Boat. The gay men's families in the *Queen Boat* case were subject to harassment and humiliation. For example, the press was allowed to take photographs of the men in detention. The names and workplace addresses of the accused were published in the media. Although many of those interviewed exposed cases of gendered violence within the family, they still wanted to protect their relatives from the stigma and shame. One queer activist interviewed says it like this:[74]

67 These are documented in the oral histories of queer persons collected by Meshahat, but also in more recent reports and surveys conducted by the Arab foundation and Bedayaa.

68 Interview with a queer activist, 45 years of age, Khartoum, August 2018.

69 Interview with a queer activist, 23 years of age, Khartoum, February 2018.

70 Interview with a queer activist, age not known, Khartoum, August 2018.

71 Interview with a queer activist, 28 years of age, Khartoum, August 2018.

72 MA Kabashi 'Gay practices in Abu Hamad' *Alintibaha* March 2020 (in Arabic).

73 Interview with a queer activist, 29 years of age, Khartoum, February 2020.

74 Interview with a queer activist, 31 years of age, Khartoum, July 2018.

> No, there are no voices in Sudan fighting for the LGBT community because there is fear of being known by the society. It is not only us that we are fearing to be harmed, but also our families.

The fear of a double backlash has made it difficult to be open about one's sexual and gender identify, even more so to collectively and openly mobilise for queer rights. In an interview with a queer activist, she put it like this:[75]

> [T]here are many challenges and risks like the threat of the safety of the activists and the social stigma. That is why we are taking small steps to ensure the safety of ourselves and movement.

The threat to the activists is real and may manifest in harassment, arrest and even torture. The leader of Sudan's first queer organisation, Freedom Sudan, was arrested, kept in solitary confinement and interrogated together with 11 of his friends (nine men and two women) in 2009. His narration of the experience was published on the organisation's website which was later closed. However, it remained in an article posted on Bedayaa's website. It said:[76]

> They stripped me naked and they started to interrogate me. They asked me about everything: if I'm a gay, friends, family, political and LGBT association activities. They started to hit me. Some one of them put a pistol to my head and said 'I wish I can kill you right now'. They dragged me by my legs and they tied me upside down, and they started hitting me with a metal stick all over my body, they grabbed my organ and hit me there too, and they sticked that stick in my ass and they were laughing out loud about it and asked me: 'Do you like it, do you want more?' I was screaming from pain and I was bleeding from everywhere, urine came out. They kept doing that until I lost my consciousness.

5 Activism from the closet

The queer community has been largely invisible in domestic political and public discourses. There have been few traces of politicisation, especially compared to the hotspots of politicised homophobia in Africa and beyond like Uganda, Nigeria, Tanzania and Poland. Politicisation is here understood as 'the process by which a social phenomenon becomes the basis of mobilisation by societal and political actors, who turn it into

75 Interview with a queer activist, 31 years of age, Khartoum, July 2018.

76 The Arab Foundation for Freedoms and Equality (n 7) 31.

an issue of major political significance'.[77] The extent to which queerness appears in the public discourse, which has been rare, is through the use of homosexuality and lesbianism as negative and derogatory terms to target political opponents of the regime. For example, with the aim of smearing women's rights activists' reputation they have been labelled lesbians indicating a weak moral character. For example, in the Human Rights Watch report, *Good girls do not protest*, a women's rights activist of Nuba decent told a story where national security officials contacted her family in early 2013 and told them that she was lesbian and accused her of apostasy.[78] As such, homophobia has been employed as arsenals in the fight to maintain power, but the examples have not been frequent and labelling women's rights activists as prostitutes is a much more common approach. To a large extent queerness is ignored in political discourses making the group invisible or hidden. In the words of Mesahat Foundation for Sexual and Gender Diversity:

> Given that most Sudanese do not accept homosexuality and transsexuality and deny its presence in Sudan, LGBTQ issues are not discussed in public or even private spaces, therefore LGBTQ people in Sudan remain invisible, and their voices are not heard.[79]

The legal reforms introduced by the Hamdok government did not come about because the movement engaged in lawfare as defined in this book; that is when actors on different sides of long-term battles over heated social and political issues, use rights, law and courts as part of their strategy to advance their goal. Instead, they have engaged in what El Menyawi has termed 'activism from the closet' by supporting women's groups particularly in their efforts to repeal the public order laws.[80] 'Activism from the closet' involves the strategy of not explicitly advocating for queer rights, but rather supporting efforts to enhance human rights more generally as it is seen as something that will also benefit queer persons. This approach provides a model where the safety against backlash is built in, because such activism does not involve being 'out'. Thus, rather than becoming a target of double backlash, the closet becomes a safe locus for collective strategising.[81] Instead of viewing the closet as a dominating symbol of oppression and suppression of one's true identity (and vice-versa

77 S Gloppen & L Rakner 'LGBT rights in Africa' in C Ashford & A Maine (eds) *Research handbook on gender, sexuality and the law* (2020) 194.

78 Human Rights Watch '"Good girls don't protest" Repression and abuse of women human rights defenders, activists, and protesters in Sudan' (2016) 30

79 Mesahat Foundation (n 4).

80 El-Menyawi (n 2) 28.

81 El-Menyawi (n 2) 44.

seeing coming out of the closet as the ultimate symbol of freedom and liberation), the closet is here seen as a protective space in an authoritarian and homophobic environment. This strategy did not change with the revolution, but the organisations had more online visibility than during the Al-Bashir era. However, there were no public calls for de-criminalising sodomy or for the enhancement of queer rights more generally during the transitional period. However, when the death penalty for sodomy, article 148 of the 1991 Criminal Code, was removed as part of a larger effort by the transitional government to conform Sudan's laws with the Constitutional Declaration, Meshahat posted on social media, with the hashtag #notenough.[82] However, this was the only public response to the legal reform from Sudanese queer organisations. Beyond social media platforms, queer organisations did not speak out. As these legal reforms became increasingly scrutinised, civil society issued a collective statement which queer organisations did not openly endorse.

5.1 Strategic alliance with the women's movement

As pointed out earlier, the public order laws, were identified as the legal instrument most oppressive to the queer community. However, these laws got the most international and national attention for their strategic use to control women's dress and movement against the backdrop of an Islamising state. Women's rights had served as a symbolic political signifier of the Islamist political project in Sudan.[83] During the revolution the public order law became the symbol of the Islamists' wrongful interpretation of Islam to justify the oppression of women. Even Al-Bashir himself described the implementation of Sudan's public order law as conflicting with the Sharia just before he was ousted from the presidential palace.[84] The long-term head of the security forces, Salah Gosh, stated (before he fled the country) that the demonstrations erupted because the government was too strict with the implementation of Sharia laws in Sudan.[85] The oppressive nature of the public order laws, therefore, fuelled the revolution, especially among young women as they chanted for 'freedom, peace and justice'.[86] Queer persons interviewed for this study explained they also participated in the revolution motivated by their opposition to these public order laws and the

82 You can access the Facebook post here تم الاعلان عن... - Mesahat for Sexual and Gender Diversity | Facebook.

83 S Al-Nagar & L Tønnessen 'Sudanese women's demands for freedom, peace, and justice in the 2019 Revolution' in L Affi, L Tønnessen & AM Tripp (eds) *Women and peacebuilding in Africa* (2021) 110.

84 As above.

85 As above.

86 As above.

heteronormative ideals which it built on. According to a gay revolutionary in Sudan:[87]

> I have been subject to discrimination and harassment because of my sexual orientation. Because I am gay, the public order police have repeatedly targeted me. The last incident happened at the start of the uprising in December 2018. I was beaten badly by the public order police and with blood on my clothes I went straight to join the protests. What motivated me was that we have no rights in this country. We are really suffering.

The very first acts of the transitional government, therefore, was to repeal the public order law.[88] This was presented by Abdallah Hamdok as a tribute to women and youth 'who have endured the atrocities that resulted from the implementation of this law'.[89] Many of the amendments of the Miscellaneous Amendments Law of 2020 catered to women's demands, including the criminalisation of female genital mutilation and the reform of article 152 which had been widely used to arrest women for indecent dress. Now any reference to dress was removed, which was a huge win for the women's movement. Women's (in)decent dress has been particularly politicised during the Al-Bashir regime and women's groups in the country have advocated against these laws for decades. Such laws were viewed by women's rights activists as un-Islamic, but also as a tool of oppression and contrary to women's dignity and the fundamental freedom to live their lives as they wish. Several cases of the arrest and flogging of women for indecent dress have prompted activism and received heightened attention by international media. The 'No to Women's Oppression' initiative was established in 2009, in the aftermath of an incident of public order police forces arresting Sudanese female journalist Lubna Hussein for wearing trousers and accusing her of violating article 152. Lubna Hussein called these laws un-Islamic: 'Show me what paragraph of the Qur'an, or quote me Prophet Muhammad saying it is the responsibility of the government to punish people in this way'. She stated further that:

> Islam does not say whether a woman can wear trousers or not. The clothes I was wearing when the police caught me – I pray in them. I pray to my God in them. And neither does Islam flog women because of what they wear. If any Muslim in the world says Islamic law or sharia law flogs women for their clothes, let them show me what the Qur'an or Prophet Muhammad said on

87 Interview with a queer activist, age not known, Khartoum, January 2020.

88 *Radio Dabanga* (n 10).

89 Quote from Abdallah Hamdok's twitter. The tweet can be accessed here Abdalla Hamdok on Twitter: 'I pay tribute to the women and youth of my country who have endured the atrocities that resulted from the implementation of this law.' / Twitter

> that issue. There is nothing. It is not about religion, it is about men treating women badly.[90]

Since then, other cases, including those of the 'YouTube girl' (flogged in public by public order police in 2010) and Amira Osman (arrested in 2013 for refusing to cover her hair) have prompted renewed calls for abolishing these laws. For example, the Salmmah Women's Resource Centre had a special focus on law reform efforts dealing with violence against women before it was shut down in 2014. In conjunction with its membership, SIHA has undertaken research, capacity-building, sub-granting, and advocacy on women's human rights, especially in gender-based violence and the threats faced by female defenders of human rights.[91] Among other things, SIHA submitted a call for urgent reform of Sudan's public order laws to the African Commission on Human and Peoples' Rights.[92]

Joining forces with these women's groups in their efforts became the main strategy to change the public order law; something which queer activists believed would ultimately benefit them as well. This support is not made public as the activists fear backlash, but also because they were afraid that it can stain the reputation of the women's movement. One queer activist, Hamada, put it like this:

> It is better to develop strong alliances with civil society organizations and political parties that can push to abolish the death penalty for homosexuality public order laws that target LGBTQI+ persons. Joining forces with for example the women's movement in demanding basic human rights could be a less risky approach in a society that is both socially, culturally, religiously and politically prejudiced against homosexuality. The women's movement share the same interest in eradicating the public order laws, and their cause is more easily acceptable for many Sudanese.[93]

Creating strategic alliances with women's groups to support human rights reforms is key, but also a strategy fraught with challenges. According to our interlocutors, many women's rights defenders in Sudan are very conservative when it comes to queer rights, and homophobic attitudes are widespread even within those groups. Especially lesbian and bisexual female interlocutors, who are also fully engaged as members of women's

90 'Lubna Hussein: "I'm not afraid of being flogged. It doesn't hurt. But it is insulting" *Guardian* 2 August 2009

91 Established in 1995, SIHA Network is a regional network that works in Sudan, South Sudan, Eritrea, Ethiopia, Uganda, Kenya, Somalia, Somaliland and Djibouti.

92 SIHA Network (n 27).

93 Hamada (n 33).

rights organisations, were concerned about homophobic attitudes within these organisations which meant that they could not necessarily be open about their 'authentic self' as one interlocutor put it. One queer activist says it like this:

> The individuals who are working in the women's NGOs are homophobic and very aggressive, and LGBTQ+ persons are looked upon with hate and denial of their basic existence and the question here will always be; why are you like this? … The movement for LGBTQ+ rights is completely marginalized on all levels, and that marginalization is deliberate …[94]

However, here there was a notable change with the 2019 revolution. Many new women's groups led by younger activists were established in the wake of the revolution. Although some of these organisations have publicly announced their support for queer rights, we are hesitant to mention them by name in this paper as the military coup has dramatically restricted the civic space and activists, including both women's rights activists and queer activists, are afraid. Some have fled the country. These organisations label themselves as feminist, which is a term often rejected in a Sudanese setting.[95] As part of the new conversations about feminism, intersectionality and sexual rights has become an important aspect.[96] In the words of one interlocutor, 'I am part of the young feminist movement which believes in intersectionality and supports minorities like LGBTQI+'.[97] This is perhaps one of the major changes after the revolution; that fact that queer organisations are openly supported by a new generation of young feminists.

Because of widespread homophobia, the support of the women's movement and even the transitional government has not been openly made. While the fear of double backlash is the main reason for the prevailing strategy of 'activism from the closet', an added element emerged in the wake of the revolution. Political space opened up for civil society generally and there was a potential window of opportunity for queer rights claims, considering that the Constitutional Declaration aimed to repeal discriminatory laws and provisions that restrict freedoms. However, queer activists feared that openly supporting the women's movement or advocating for queer rights specifically would create a bad

94 Interview with a queer activist, 28 years of age, Khartoum, June 2018.

95 L Tønnessen 'Feminist Interlegalities and Gender Justice in Sudan: The Debate on CEDAW and Islam' (2011) 6 *Religion & Human Rights* 25

96 L Tønnessen & S al-Nagar 'The politicization of abortion and hippocratic disobedience in Islamist Sudan' (2019) 21 *Health and Human Rights Journal* 16.

97 Interview with a feminist activist, Khartoum, March 2022.

reputation for the transitional government as it 'might be used so serve other political agendas' and thereby serve as 'an excuse against the goals of the revolution'.[98] The political forces that the interlocutor is speaking about are the Islamists trying to smear the transitional government as a coalition of infidels spreading immorality and sexual chaos (*fitna*) in Sudan.

6 One step forward, two steps back?

The legal reforms have had some impact in the lives of queer persons we interviewed in Khartoum, but according to a recent survey (169 queer individuals) have not felt a significant change.[99] Among our interlocutors the feeling of change largely depends on their class position. The interlocutor from the upper middle class residing in areas of Khartoum like Riyad and Amarat where new queer spaces emerged, noticed positive changes in their everyday lives. A gay man from one of these middle-class area of Khartoum says that 'there has been positive change with the dismantling of the public order laws. Before, I would get harassed a lot and even arrested for my hairstyle and dress'. [100]

Queer spaces emerged, such as cafes and restaurants, and there was a sense of newfound freedom in terms of dress and appearance. However, it seems that these changes were only felt among the upper middle class. Although our interview sample is small, it was a clear trend in the interview material. A lesbian woman from a socio-economic poorer neighbourhood in Omdurman, which is Sudan's most populated city and located within Khartoum state, says:

> I do not trust the transitional government. I cannot come out. I cannot dress the way I want. We are still policed. My friend was stopped yesterday. The arresting officers told him they were the public order police. But they are supposed to be dismantled. The public order mentality is still there, but there are differences according to class and which area you live in, between Riyad which is a middle-class area and Omdurman where I live[101]

The public order architecture is not easily dismantled.[102] According to Reem Abbas (2021) 'the public order was transformed into a mentality that

98 Interview with a queer activist, 32 years old, April 2020.

99 Bedayaa (n 14) 26.

100 Interview with a queer activist, age not known, January 2020.

101 Interview with a queer activist, 31 years of age, Khartoum, February 2020.

102 'Sudan Public Order Law still being implemented: SIHA network' *Radio Dabanga* 3 September 2021.

is widespread across the society'.[103] What is clear is that legal reform is not sufficient and the amendments to the Criminal Code of 1991 continue to give the police discretionary powers to assess what is (in)decent, although the formulations about dress have been completely removed.

Since its abolishment, there have been calls to bring these laws back. The freedom enjoyed by their abolishment, although primarily in middle class neighbourhoods, is used by Islamists and others actively working against the revolution in an attempt to stain its reputation. That the revolution will bring moral chaos to the country, including prostitution and homosexuality. This is noticed by our interlocutors. A transman explains:

> There is still public order harassment and violence, but from the community. When I wear trousers in public, even if I cover my hair which is expected since society sees me as a woman, the community calls me the 'civilian government' to indicate that the transitional government has caused moral chaos in our country.[104]

The legal reforms, and especially the 2020 Miscellaneous Act, have been critiqued from two different angles. The reform took place before the National Assembly was appointed and as such many felt that it was not legitimate as the transitional government bypassed democratic institutions. Although many welcomed the reforms, they were highly critical of the process; a process which also largely excluded civil society input.[105] The biggest objections, however, came from the Islamist movements and religious clerics in the country. The legal reform, under the banner of personal freedom, was perceived as contrary to Islam. This sparked several protests against the transitional government.[106] Following the announcement of the legal changes, the cleric Abdul Hai Youssef accused the minister of justice of apostasy. One twitter account with 75 000 followers, he denounced the reforms, calling them a 'war against virtue, and an [act of] aggression against the nation'.[107] The National Congress Party, Al-Bashir's former ruling party, urged Sudanese to come down to the streets to bring down the transitional government, warning

103 R Abbas 'Bring back the public order lashings?' Chr.Michelsen Institute Sudan Blog (2021).

104 Interview with a queer activist, age not known, Khartoum, February 2020.

105 And some people created hashtag #ضيوفت_الب_عيرشت_ال which means: 'No legislation without a mandate.'

106 'Sudan: Thousands protest repeal of Islamic restrictions' *Middle East Monitor* 17 July 2020.

107 Hamad (n 13).

that the 'battle now is between the secularists and Islam'.[108] Secularism is in this context seen as basically international, western liberal values. At the heart of this battle, is public order and morality. Although queerness or homosexuality are not always explicitly mentioned, it is implied as it is seen as a sinful and immoral act. But there are also instances where homosexuality is explicitly mentioned. Some social media groups, especially on Facebook were formed to express rejection for the so-called leniency of the new transition government towards homosexuality after lifting the death penalty in July 2020. One group was called 'fighting homosexuals and those who call for sex in Sudan on Facebook' emerged. The group encouraged users to report the online queer fora with the intent to shut them down.[109]

7 Conclusion

Although the transitional government ushered legal changes, albeit minor, with the potential to improve the situation for queer individuals in Sudan, it did not take a clear stance on LGBT+ rights. In the words of a queer activist, it was not 'courageous enough to tackle the conservative Sudanese society due to the fear of resistance and rejection'.[110] The lack of queer lawfare, therefore, continued to be a feature of queer activism going into the transitional period with 'activism from the closet' remaining the main strategy. However, the transitional period was short; perhaps too short and with time the movement might have strategised differently especially considering that the queer organisations have a new ally in feminist organisations. Although the fear of political backlash continued to be present, the fear of societal backlash in a country with widespread homophobia emerged as a prominent reason as to why queer organisations have not politicised LGBT+ rights after the 2019 revolution. In the words of a queer activist: 'It's the fear of the social backlash that is keeping us from claiming our rights'.[111] Another queer activist states:

> We were used to being afraid of the society, but mainly from the former Islamist regime. Now we know that the former regime had gained it legitimacy from the homophobia of society. Therefore there is no significant change to be mentioned.[112]

108 'Sudan drops Islamic social laws in historic move sparking joy and fury' *Middle East Monitor* 17 July 2020.

109 The Arab Foundation for Freedoms and Equality (n 7) 34.

110 Interview with a queer activist, 32 years of age, Khartoum, May 2020.

111 Interview with a queer activist, 24 years of age, Khartoum, May 2020.

112 Interview with a queer activist, 25 years of age, Khartoum, April 2020.

Although there is an important and growing discussion on LGBT+ rights mainly online among the educated middle class individuals on social media, queer organisations are still preparing the ground after decades of authoritarian and homophobic suppression. Still at the start of a conversation, the queer community in Sudan is now faced by a military coup which might jeopardise the few, yet significant, legal changes which materialised after the revolution. However, it is important to keep in mind that the benefits of these legal changes first and foremost seem to have benefitted queer individuals from certain class positions in Khartoum within which the queer organisations have their main support base.

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CONCLUSION

THE KALEIDOSCOPE OF QUEER LAWFARE IN AFRICA

Adrian Jjuuko, Frans Viljoen,** Siri Gloppen,*** & Alan Msosa*****

1 Introduction

This book shows the nature of queer lawfare and its outcomes within selected countries in Africa. These countries are: Botswana, Ethiopia, Ghana, Kenya, Malawi, Mozambique, Nigeria, Senegal, South Africa, Sudan, The Gambia, Uganda and Zambia. Even if the book does not generalise for all of Africa, countries that are similar in context to those covered in the book may well benefit from the lessons learned in the countries under discussion.

The book set out to answer the following questions:

- How does queer lawfare (lawfare by groups struggling to advance LGBTIQ+ rights) differ across the continent in terms of the strategies used and the arenas in which it is fought?
- Who are the main drivers in the different contexts and how are they influenced by the contexts in which they operate?
- What are the consequences of the queer lawfare? And particularly: (when) are lawfare strategies producing beneficial outcomes for the queer communities?
- Are there links between pro-queer lawfare and the anti-gay politicisation prevailing on the continent?

2 The state of queer lawfare in Africa

Queer lawfare in Africa is on the increase. In all the countries covered in this book, there is some level of queer lawfare going on – including in the countries where LGBTIQ+ activism is silenced.

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Using the law to fight back against laws criminalising consensual same-sex conduct and non-recognition of transgender persons in Africa started with South Africa in its anti-apartheid struggles.[1] These struggles led to inclusion of 'sexual orientation' as a ground of non-discrimination in the interim (1993) and the Final (1996) Constitution,[2] the first time this form of constitutional protection was provided for in any national constitution.[3] This landmark was followed by a raft of judicial and legislative developments that have so far made South Africa one of the leading countries in the world as regards LGBTIQ+ equality. Queer lawfare has subsequently been adopted by activists in different African countries, in stark contrast to the situation prior to the South African transition, where there was barely any queer lawfare on the continent. In countries like Kenya, Nigeria, Mozambique and Uganda, queer lawfare is taking centre stage, and even in more repressive countries like Ethiopia, Sudan and The Gambia, activists have found ways to engage in queer lawfare 'from the closet'.[4]

3 Strategies employed in queer lawfare in Africa

There are three main avenues of doing queer lawfare in Africa that are presented in the book: strategic litigation, legislative reform and policy/social advocacy.

Strategic litigation has been the most visible strategy, specifically for countries with the Common Law system. Activists in South Africa started this trend in 1997 with the first case on LGBT rights before a constitutional court in Africa – *National Coalition for Gay and Lesbian Equality v Minister of Justice* (*Sodomy* case) before the Constitutional Court of South Africa.[5] By 2019, South African activists had brought 12 cases on LGB issues before the Constitutional Court of South Africa, while Ugandan activists followed with eight, activists in Nigeria with four, and those in Botswana and Kenya with three each.[6] There has also been strategic litigation involving queer

1 Barnard-Naude & De Vos in Chapter 2.

2 Constitution of the Republic of South Africa, 1996.

3 Above, sec 9(3). In the interim 1993 Constitution, the provisions read: 'Equality - No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.'

4 H El Menyawi 'Activism from the closet: Gay rights strategising in Egypt' (2006) 7 *Melbourne Journal of International Law* 27 at 49-51

5 1999 (1) SA 6 (CC).

6 See A Jjuuko *Strategic litigation and the struggle for lesbian, gay and bisexual equality in Africa* (2020) 24-26.

issues in countries not covered in the book including Eswatini,[7] Malawi,[8] Mauritius[9] and Ghana.[10] This is in line with the conclusion from Jjuuko (2020), that the use of strategic litigation is a preferred strategy for LGBT activists and that queer lawfare is on the increase in Common Law countries in Africa.[11] This trend seems to continue with strategic litigation gaining more popularity. Many scholars are critical of the role of strategic litigation in ensuring social change for controversial issues such as LGBTIQ+ rights. This is based in part on the 'counter-majoritarian difficulty', which maintains that unelected judges do not have the legitimacy to decide on political issues.[12] In line with this reasoning, Stoddard argued that the US Supreme Court's decisions in LGBT cases are usually seen as 'illegitimate, high-handed, and undemocratic – another act of arrogance by the nine philosopher-kings sitting on the Court'.[13] Rosenberg, in another line of reasoning, famously questioned the ability of strategic litigation to create significant social change, including on LGBT rights.[14] Despite these restrictions, Jjuuko argues that if done correctly and in full consciousness of the specific conditions prevailing in a country, strategic litigation can deliver significant social change.[15] Indeed, South Africa despite a few legal hiccups as identified in the chapter by Barnard-Naude and de Vos, has been able to use strategic litigation to spur significant social change as regards LGBTIQ+ rights.

Legislative reform is another strategy that is gaining ground both among pro- and anti-queer activists in Africa, and has been the prevailing trend in countries that follow the Civil Law tradition that have so far managed to overturn these laws. Legislative reform was employed in

7 *Simelane v Minster for Commerce and Industry* (1897 of 2019) [2022] SZHC 66 (29 April 2022) on refusal to register an LGBT organisation.

8 *The State v Director of Public Prosecutions Ex parte Gift Trapence and Timothy Pagonachi Mtambo* Constitutional case 1 of 2017, which challenged the decision of the Director of Public Prosecutions (DPP) in Malawi to discontinue charges for inciting violence against politician Ken Msonda who had described gays as worse than dogs and called upon the public to kill them.

9 *Ex Parte: Najeeb Ahmad Fokeerbux* SCR 119044 (5A/243/19).

10 See 'LGBTI activists in Ghana sue over abusive arrest and detention' *Human Rights Watch* 22 June 2022 https://www.hrw.org/news/2022/06/22/lgbti-activists-ghana-sue-over-abusive-arrest-and-detention (accessed 13 August 2022). The case challenges the detention of 21 activists during an LGBT workshop.

11 Jjuuko (n 6).

12 For an elaboration of this, see AM Bickel *The least dangerous branch: The Supreme Court at the Bar of politics* (1962) 16-17.

13 TB Stoddard 'Bleeding heart: Reflections on using the law to make social change' (1997) 72 *New York Law Review* 967 at 977.

14 GN Rosenberg *The hollow hope: Courts and social reform* (1985).

15 Jjuuko (n 6).

Mozambique to repeal penal code provisions on criminalisation of same-sex relations.[16] The legislative route has also led to pro-queer legal changes in Cape Verde,[17] Lesotho,[18] Gabon,[19] and Angola.[20] Stoddard, writing within the context of the US political system favours a legislative approach as it is seen to have greater democratic legitimacy.[21] However, for many African countries, where representative democracy is yet to fully take root the question of whether changes through legislative reform represent the actual views of the people is open to debate. Legislatures are usually weak, and powerful (more or less fairly elected) executives can usually push through their agenda. Indeed, in their chapter on Mozambique, Rosario and Gianella note that there was little public engagement around same-sex relations prior to the 2015 reform of the colonial Penal Code. The reform, which decriminalised 'vices against nature' also legalised abortion, which was the main focus of the debate. Nevertheless, while many legislatures in Africa may be lacking in their democratic qualities, their formal democratic credentials are clearer than for the courts, and the power of using legislative reform should not be underestimated. If this could be replicated elsewhere, it would result in meaningful change for LGBTIQ+ persons.

The third strategy, advocacy, aims as at changing attitudes, policies, and the operational environment for LGBT persons. It can target a wide range of actors from policy makers and local leaders, via institutions involved in law enforcement, health personnel, teachers, to the general public. In the Uganda chapter, Jjuuko and Nyanzi provide an example of training of police officers, magistrates, and prosecutors on marginalisation as one way of creating attitudinal change. Vibe, writing on Senegal, reports that queer advocacy started out linked to HIV prevention policies, targeting men who have sex with men, because the health frame was seen as more acceptable. Also in Nigeria, activists are reported to resort more to advocacy on health including on COVID-19 than on legal reform.[22]

16 Rosario & Gianella in Chapter 3.

17 In 2004, parliament voted to remove article 71 of the 1886 penal code provided for 'security measures' for people who habitually practice 'vices against the nature'.

18 In 2012, Lesotho's Penal Code was amended to remove the common law offence of sodomy.

19 In 2020, Gabon's senate voted to decriminalise consensual same-sex relations, soon after criminalising the same in 2019.

20 In 2021, Angola's Penal Code, Law 38 was amended to removal among others, provisions criminalising consensual same-sex relations among adults.

21 Stoddard (n 13).

22 Sogunro in Chapter 7.

The state of democracy and rule of law in a country, and in particular the strength and independence of the courts also seems to have an influence on the breadth and nature of queer lawfare. More democratic countries generally exhibit higher levels of queer lawfare – legislative, court based, and in terms of advocacy. Since stronger rule of law and democracy enables participation and inclusion, also for stigmatised minorities, it allows for a broad range of activism to bring about legal and social change. Countries with more robust judiciaries – even when otherwise less democratic countries – see more court-centred queer lawfare, as marginalised groups are more likely to succeed in their litigation with more independent courts. However, whether court victories bring about social change for LGBTIQ+ people depends on the nature of the political regime and how judgments are followed up by activism in other arenas. Longer term, the state of democracy also impacts whether the courts are able to stay independent and responsive to queer litigation in a politicised context. This rhymes with Jjuuko's thesis that the more democratic a country, the more likely is it that strategic litigation will bring social change.[23] This partly explains why we see more pro-queer lawfare in Botswana, Kenya, Malawi, Nigeria, South Africa and Uganda, than in Ethiopia and Sudan, which are considerably more authoritarian. However, the difference might perhaps be more convincingly explained by the legal cultures of the former countries being more attuned to strategic litigation, and common-law judiciaries with experience and more responsiveness to such lawfare. However, this factor does not explain the lower levels of queer lawfare in Ghana and Zambia, which have similar levels of democracy and rule of law to the countries with higher levels of lawfare, although in Zambia – as in Uganda – the deterioration of democracy and the rule of law, may be a factor in the decrease of high profile lawfare. The book suggests that the lower levels of pro-queer lawfare in Ghana and Zambia may be due to a stronger identification with nationalistic feelings emphasising religion (Christianity) and reified African culture as guiding principles. Indeed, while these features are common across the region, Zambia stands out in priding itself on being a Christian nation, and included this in its Constitution in 1996,[24] while Ghana tends to pride itself as a country that follows African values.[25] Activists might thus tread more carefully to overcome these nationalistic feelings. On the other hand, is The Gambia, which is just recovering from a long period of dictatorship, but where LGBT strategic litigation is yet to pick up.[26] This shows a situation where people have been so much used to being silenced, that they do not dare to

23 Jjuuko (n 6).

24 Banda in Chapter 8.

25 Ako & Odoi in Chapter 9.

26 Nabaneh in Chapter 11.

actively mobilise even after the end of the dictatorship. This demonstrates how context is critical in influencing the different drivers of queer lawfare in Africa.

4 Consequences of queer lawfare

Where queer lawfare has been allowed to flourish, there have been more protections for queer persons. South African activists have actively engaged in queer lawfare – both in courts, advocacy and in constitution-making and legislative processes – since before the democratic transition and have been immensely successful.[27] As a result, South Africa has the highest levels of legal protection for LGBTIQ+ persons in Africa. They have used the courts of law to effect changes, including the decriminalisation of consensual same-sex relations;[28] allowing immigration for partners of same-sex persons;[29] adoption of children by unmarried persons;[30] equalising the age of consent for same-sex and heterosexual sexual relations;[31] affirming inheritance in case a same-sex partner dies intestate;[32] and ensuring same-sex marriages.[33] Queer activists successfully engaged in the constitution-making processes to ensure a foundation for equality for LGBTIQ+ persons – for the first time including a constitutional prohibition on discrimination based on sexual orientation. The legislature was however slow to follow the lead of the courts, but over time court decisions have led to the legislature having limited options but to pass or amend a wide range of legislation that reflects the constitutional position. They have for example provided for equality in employment through the Employment Equity Act[34] and the Labour Relations Act.[35]

27 Barnard-Naude & De Vos in Chapter 1.

28 The *Sodomy* case (n 5).

29 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) on migration of partners of same-sex couples. In 2002, the Immigration Act replaced the Aliens Control Act and removed the discriminatory aspects.

30 *Du Toit v Minister for Welfare and Population Development* 2003 (2) SA 198 (CC) concerning adoption of children by same-sex couples. In June 2006, the Child Care Act 74 of 1983 and the Guardianship Act 192 of 1993, were replaced by the Children's Act which provided for adoption by same-sex partners.

31 This was in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 as a result of the comments made about the inequality in the *Sodomy* case. The case of *Geldenhuys v National Director of Public Prosecutions* 2009 (2) SA 310 (CC) did away with convictions that arose due to the inequality in the earlier laws.

32 *Gory v Kolver NO* 2007 (4) SA 97 (CC).

33 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC). The decision led to the Civil Unions Act 17 of 2006, which introduced civil unions for both same-sex couples and heterosexual couples, which are akin to marriage.

34 55 of 1998.

35 66 of 1995.

LGBTIQ+ persons' information is protected through sections 1, 34 and 64 of the Promotion of Access to Information Act.[36] LGBTIQ+ persons' ownership of communal property is protected through section 9(1)(b)(i) of the Communal Property Associations Act.[37] Persons in permanent same-sex relationships are protected under section 1 of the Revenue Laws Amendment Act,[38] while section 4(1) of the Rental Housing Act[39] prohibits discrimination in advertising or letting rental housing on the basis of, among other grounds, sexual orientation. Persecution of refugees based on gender or sexual orientation is prohibited under section 2(a) of the Refugees Act.[40] In political processes, section 11(b) of the Promotion of National Unity and Reconciliation Act[41] and section 16(1)(c)(i) of the Electoral Commission Act,[42] require non-discrimination in political and electoral processes. In terms of social services, section 11 of the Education Laws Amendment Act[43] includes discrimination on among other grounds, gender, sex, or sexual orientation by an educator as an act of misconduct. Section 24(2)(e) of the Medical Schemes Act[44] requires that no medical scheme shall be registered if it discriminates on the basis of, among others, gender and sexual orientation, while section 2(1)(e)(iv) and (x) of the Housing Act 107 of 1997 impose an obligation on the state to ensure that they promote measures to prohibit unfair discrimination on the basis of gender and other forms of discrimination in housing. LGBT persons are also protected from domestic violence under section 1(vii)(b) of the Domestic Violence Act[45] and are allowed to join and participate in the army,[46] as well as donating blood.[47] While out-of-court queer lawfare – through lobbying and advocacy – has played a role in these legislative

36 2 of 2000.

37 28 of 1996.

38 50 of 2000.

39 50 of 1999.

40 130 of 1998. Such groups are protected from being persecuted on the grounds of belonging to such social group (section 2(a)). Also, a well-founded fear of persecution based on membership to such a social group is a ground on the basis of which a person can be granted refugee status (section 3(a)).

41 34 of 1995.

42 51 of 1996.

43 53 of 2000.

44 131 of 1998.

45 116 of 1998.

46 A Belkin & M Canaday 'Assessing the integration of gays and lesbians into the South African National Defence Force' (2010) 38 *Scientia Militaria: South African Journal of Military Studies* 1.

47 L DeBarros 'SA finally ends gay blood donation ban' *Mamba Online* 20 May 2014 www.mambaonline.com/2014/05/20/sas-gay-blood-donation-ban-finally-ends/(accessed 3 March 2018).

developments, it is noteworthy the extent to which strategic litigation has been responsible for most of these changes, as the political elite are largely indifferent or sometimes even outrightly hostile to protection of the rights of LGBTIQ+ persons.[48] Indeed, Barnard-Naude and De Vos show that the Constitutional Court's decision in the *Fourie* case was not followed to the letter by politicians when passing the Civil Unions Act, leading to the creation of a situation of 'separate but equal' status.

Although not to the same level of success as has been achieved in South Africa, other countries that engage in active queer lawfare have also seen a number of successes. For example, Orago, Gloppen and Gichohi shows how queer lawfare by Kenyan activists led the courts to declare that LGBT organisations can be registered,[49] that anal examinations are unconstitutional, and that transgender persons are allowed to have their preferred gender markers on their official documents.[50]

In Botswana, as Tabengwa and Oluoch show in their chapter, LGBT activists pushed for the decriminalisation of consensual same-sex relations and the registration of LGBT organisations through a litigation campaign. Litigation also led to a declaration that gender markers on official identity documents for transgender persons can be changed.[51] Express protection against discrimination based on sexual orientation in section 23(d) of the Employment (Amendment) Act, 2010,[52] was provided through the legislature.

In Uganda, as Jjuuko and Nyanzi show in their chapter, queer rights activists succeeded in nullifying the repressive Anti-Homosexuality Act, 2014 through court action;[53] ensured access to the Equal Opportunities

48 See for example the South African government's chequered track record at the UN as regards LGBTIQ+ protections as discussed in E Jordaan 'Foreign policy without the policy? South Africa and activism on sexual orientation at the United Nations' (2017) 24 *South African Journal of International Affairs* 79.

49 Chapter 4 in this book. This was in the *Eric Gitari v Attorney General & another* Petition 440 of 2013 [2015] eKLR in which the Court ordered that the National Gay and Lesbian Human Rights Commission be registered as an organisation, and in *Republic v Non-Governmental Organizations Co-ordination Board: Ex-parte Transgender Education and Advocacy* [2014] eKLR (which allowed Transgender Education and Advocacy to be registered as a non-governmental organisation).

50 This was in *Republic v Kenya National Examinations Council: Ex-Parte Audrey Mbugua Ithibu* [2014] eKLR (which concerned refusal to change gender markers on a trans woman's academic documents).

51 *Attorney General v Thuto Rammoge* (2014) CACGB-128-14 (CA) **(***LEGABIBO Registration* case).

52 Employment (Amendment) Act 10 of 2010.

53 *Prof. Oloka-Onyango v Attorney General* Constitutional Petition 008 of 2014.

Commission;[54] and had the High Court make declarations against a newspaper that published private details of alleged LGBTIQ+ persons.[55] The Court also declared that forcefully entering the house of an LGBTIQ+ person and fondling persons found therein amounted to a violation of the right to privacy and the right to freedom from inhuman and degrading treatment.[56]

In Mozambique, Rosario and Gianella show that advocacy led to removal of the provisions criminalising consensual same-sex relations in a general Penal Code reform by the legislature. And in his chapter on Nigeria, Sogunro shows that strategic litigation led to the court awarding damages to an LGBT activist whose office had been raided by the police.[57]

Even in countries where queer lawfare is yet to result in actual legal changes, LGBT persons have made gains. In the Zambian context of democratic decline and religious nationalism, Banda in his chapter shows that activists have won criminal charges pressed against them for LGBT activism.[58] In Malawi, Msosa and Sibande in their chapter show that a moratorium on prosecutions of persons for consensual same-sex relations was declared by the President after much international and local attention resulting out of the arrest of two persons, although this was later declared unconstitutional through court action.[59] In Ghana, there is an active campaign against the proposed Bill to further criminalise homosexual relations and advocacy, as well as a continuing discussion on the place of such restrictions in a democratic society.[60] In Senegal, as Vibe's chapter shows, HIV policies contain protections for LGBTIQ+ persons despite the general stance against queer organising in the country.

Even in contexts where overt queer activism is impossible, some gains have been made through 'lawfare from the closet'. In Sudan, as Tønnessen, al-Nagar and Khalaf Allah shows in their chapter, queer activists quietly joined forces with women's rights groups during the 2019 revolution, which saw a removal of the death penalty for homosexual sex. In Ethiopia, activists have not engaged in queer lawfare in ways aiming

54 *Adrian Jjuuko v Attorney General* Constitutional Petition 1 of 2009.

55 *Kasha Jacqueline, David Kato Kisuule & Pepe Julian Onziema v The Rollingstone Newspaper* Miscellaneous Cause 163 of 2010 (*Rollingstone* case).

56 *Victor Mukasa & Yvonne Oyoo v Attorney-General* (2008) AHRLR 248.

57 *Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board* FHC/ABJ/CS/799/2014.

58 *The People v Paul Kasonkoomona* [2015] HPA/53/2014.

59 *R v Minister of Justice & Constitutional Affairs: Ex-parte Kammasamba* [2016] MWHC 503.

60 Ako & Odoi in Chapter 9.

for legal change. However, as Tadele and Amde show in their chapter, they have to some extent created a queer community – even if closeted – through internet forums, and to some extent kindled rights consciousness. This is a support for LGBTIQ+ persons, some of whom have found ways of dealing with the police – sometimes by owning up to their sexual orientation and attracting sympathy or by taking more stringent security precautions even when online. In The Gambia, where queer activists have not yet actively taken on the state machinery, little or no changes have been seen so far.[61]

In other words, where queer lawfare has been allowed to thrive, real and meaningful legal and legislative changes have resulted. And even where conditions are less welcoming, activists have been able to gain some ground through court actions and low profile activism. But where the space for queer lawfare is stifled, no real changes have been registered. This speaks to the power of queer lawfare – that it actually works.

5 Links between pro-queer lawfare and anti-gay politicisation

As pro-queer lawfare has proliferated across Africa, so has counter-mobilisation resulting in backlash. The book establishes a correlation between queer lawfare and politicisation, and points to politicisation of LGBTIQ+ issues as a main driver of queer lawfare. Increased politicisation leads to increased lawfare – and the other way around, court victories for queer rights have often been followed by counter-mobilisation by anti-queer actors. This has in turn resulted in increased persecution and ostracism of LGBTIQ+ persons and sometimes new legislation further criminalising same-sex conduct.

In countries like South Africa where queer activists took the first steps and challenged existing laws, counter-mobilisation emerged, curtailing their gains. While South Africa has not seen significant anti-queer mobilisation in the political elite, and surveys show increasing tolerance in the general population, murder and rapes of lesbian and queer women in South Africa have increased over the years, despite all the gains on the legal front. In Uganda, the oppressive Anti-Homosexuality Bill was introduced in 2009, shortly after the first LGBTIQ+ court victory in the case of *Victor Mukasa & Yvonne Oyoo v Attorney General (Victor Mukasa* case)[62] in 2008.[63] Interestingly, the main reaction to political resistance has

61 Nabaneh in Chapter 11.

62 N 56.

63 The Anti-Homosexuality Bill 18 of 2009, Bills Supplement to the Uganda Gazette 47

been more lawfare – activists take to the courts whenever there is political backlash against their actions. In Uganda, seven more cases were filed in a space of about 12 years after the *Victor Mukasa* case.[64] This indicates that in contexts where the political opportunities for pro-queer activism are meagre, courts may nevertheless provide a more promising arena for advancing the cause – even though there may be risks involved. In Ghana, the introduction of the Promotion of Proper Human Rights and Family Values Bill in 2021, came not long after the opening of an LGBT resource centre in Accra.[65] In Senegal, Vibe shows that backlash came after a period of successfully including LGBT persons in the HIV response.

However, even when there is proximity in time between pro-queer lawfare, increased LGBTIQ+ visibility in a country, and political backlash, this does not prove causation. Firstly, mobilisation against queer rights might be fuelled by other political considerations – such as voter mobilisation at election time, or distraction from political scandals. Secondly, it may come in response to developments in other countries, in the region and globally rather than domestic lawfare. For example, as argued by Jjuuko,[66] the constitutional prohibition of same-sex marriages in Uganda in 2005 was influenced by the legalisation of same-sex marriages in South Africa, through the 2005 case of *Minister of Home Affairs v Fourie; and Lesbian and Gay Equality Project v Minister of Home Affairs.*[67] Similarly, the ordination of openly gay Bishop Gene Robinson by the Anglican church in the US led many African churches to strongly preach against homosexuality and even to boycott the 2008 decennial Lambeth conference.[68]

Counter-mobilisation strategies also diffuse across borders, as demonstrated by the striking similarities in political rhetoric around election times, and in proposed legislation and constitutional amendments. Sometimes foreign activists are directly involved, collaborating with domestic religious and political norm-entrepreneurs. This is most clearly documented in relation to the Ugandan 2009 Anti-Homosexuality Bill, where anti-queer activists from the United States were active, including

Volume CII, 25 September 2009.

64 Jjuuko & Nyanzi in Chapter 6.

65 Ako & Odoi in Chapter 9.

66 A Jjuuko 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in Common Law Africa' LLD Thesis, Centre for Human Rights, University of Pretoria, 2018 https://repository.up.ac.za/handle/2263/68335 (accessed 17 July 2022).

67 N 33.

68 K Ward 'The role of the Anglican and Catholic Churches in Uganda in public discourse on homosexuality and ethics' (2015) 9 *Journal of Eastern African Studies* 127 at 136.

the notorious Scott Lively, who has been a fervent anti-gay activist in the US since the 1990s and later also in Eastern Europe, and who was sued for fuelling anti-gay hatred in Uganda.[69]

Hence, while backlash may seem autochthonous when analysed from the perspective of the individual country, and domestic contexts undoubtedly are important as demonstrated by the chapters in this volume, comparative analysis of the broader patterns show strong transnational dynamics. Domestic queer activists engaging in lawfare should thus not take too much responsibility for anti-queer politicisation, which might have happened regardless of domestic activism as the situation in Ethiopia, The Gambia and Sudan shows.

6 Conclusion

Queer lawfare is on the increase in Africa, partly driven by regional and global trends – but different country contexts shape the form it takes. In countries that are more democratic with Common Law legal systems and more robust courts, activists seem to be more actively engaged in court-centred queer lawfare with positive outcomes for LGBTIQ+ equality, while countries with civil law systems are more likely to see pro-queer changes though legal reform. Activists in countries that are less democratic and where the courts are weaker seem to engage in less lawfare overall. However, the social context in each country matters, perhaps even more than the state of democracy and the rule of law. Countries where anti-queer sentiments are more closely linked to national identity, anchored in religion (Zambia) or reified African culture (Ghana) seem less open to queer lawfare. Where the state engages in anti-queer politicisation, the more likely outcome is for queer activists to also take up the struggle, which in turn may lead to backlash but also inspire more lawfare.

A more promising development in terms of politicisation and backlash dynamics is pro- LGBTIQ+ reform through the legislative process, as was done in Mozambique, and for a large part in South Africa, as well as in other Civil Law countries including Angola and Gabon. If more countries follow suit, this could be an important route to improvement for queer rights and the quality of life for LGBTIQ+ lives in Africa. Nevertheless, for

69 The case against Lively was ruled inadmissible since the actions took place entirely in a foreign territory, but the judge said Lively aided 'a vicious and frightening campaign of repression against LGBTI people in Uganda'. See G Reid 'US Court dismisses Uganda LGBTI case, but affirms rights' *Human Rights Watch* https://www.hrw.org/news/2017/06/07/us-court-dismisses-uganda-lgbti-case-affirms-rights (accessed 3 August 2022); and S Byrdum 'Scott Lively will be tried for fueling antigay persecution in Uganda' *The Advocate* 15 August 2013.

the foreseeable future Africa is likely to continue to be an important space for queer lawfare – from litigation through legislative reform to various forms of advocacy, including 'from the closet' – with positive outcomes for the protections for LGBTIQ+ persons at the grassroots. This provides hope. Even where LGBTIQ+ voices are silenced by the government or society, rather than sit and watch as their rights are violated, queer activists find different ways to express themselves and engage in lawfare by other means.

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