CONCLUSION

THE KALEIDOSCOPE OF QUEER LAWFARE IN AFRICA

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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

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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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