INTRODUCTION

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

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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,

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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

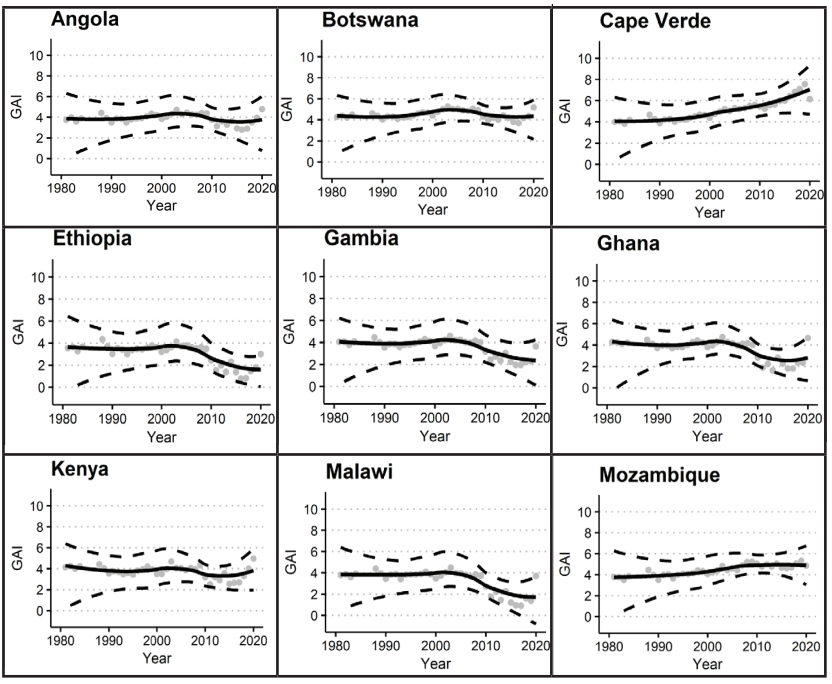
1981 to 2020' *Williams Institute of Law* (2021) https://williamsinstitute.law.ucla.edu/wp-content/uploads/Global-Acceptance-Index-LGBTI-Nov-2021.pdf (accessed 1 August 2022). In the analysis Flores draws among other on data from Pew, the World Value Survey, and Afrobarometer. See also RM Mathisen 'A 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).

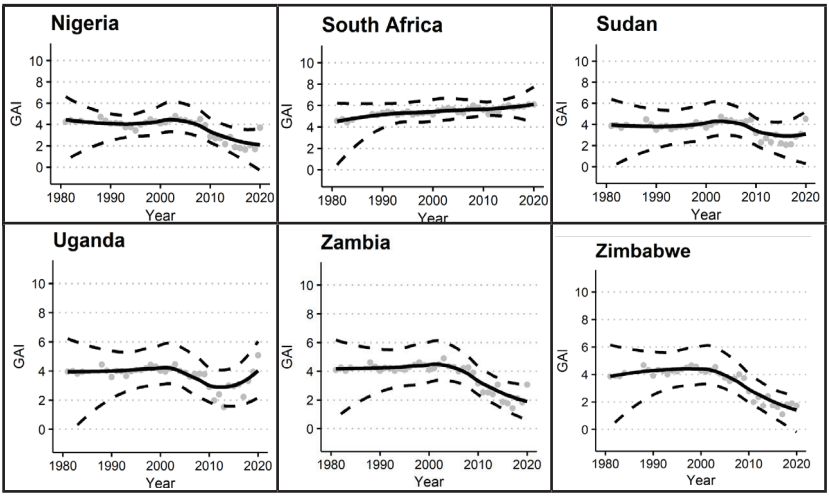
what extent the politicisation can be explained by pre-existing low LGBT acceptance, or if it is the other way around – that increasing politicisation has influenced attitudes and created more LGBT hostility.

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

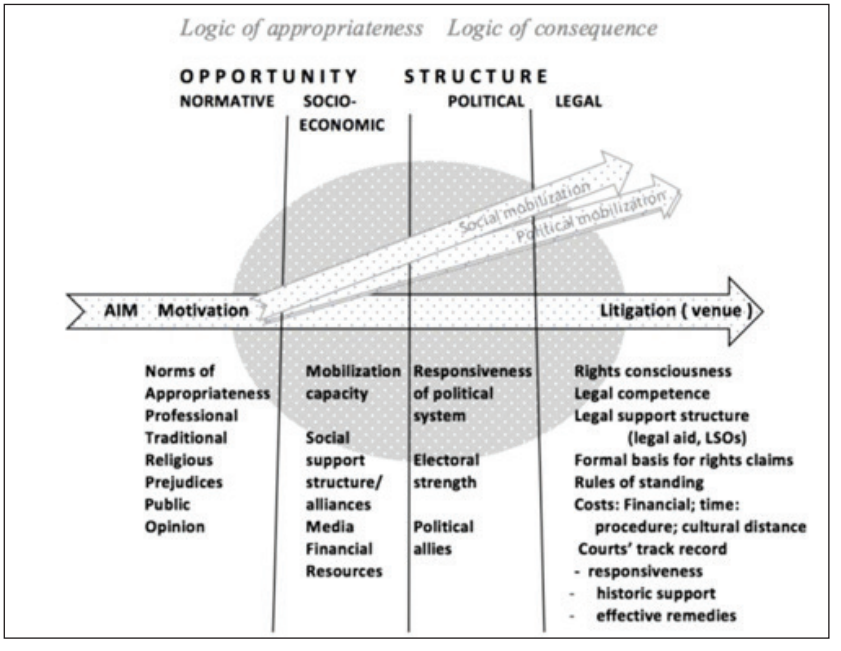
To sum up the discussion above: the chapters in this book analyse dynamics and driving forces of the legalised contestations over queer rights and lives that various actors pursue in different arenas, seeking to understand the consequences of this lawfare for queer lives. To do so, they use a combination 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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