Queer Movements and Disciplinary Laws in Africa

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I. Introduction

Across the African continent colonial era laws that criminalize same-sex relationships are increasingly being challenged by queer organisations and activists. Laws that legislate against "carnal knowledge against the order of nature" exist across most jurisdictions in Africa. More than 80 countries around the world still criminalize consensual homosexual conduct between adult men, and often between adult women.[1] More than half of the countries that have these laws are former British colonies such as Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe. France decriminalized consensual homosexual conduct in 1791 but imposed sodomy laws on some French colonies, these survive in Benin, Cameroon, and Senegal.[2] There has been some success in overturning these laws. On 11 June 2019, the Botswana High Court repealed a legal provision that imposed up to seven years in prison.[3] This decision followed a move on 23 January 2019 in the Angolan parliament to adopt a new penal code,

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1 AMNESTY INTERNATIONAL UK, Mapping Anti-Gay Laws in Africa, 2018. Internet: https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon (last accessed 9 October 2020).

2 AMNESTY INTERNATIONAL UK (footnote 1).

3 BRITISH BROADCASTING CORPORATION (BBC), Botswana decriminalises homosexuality in landmark ruling, 11.06.2019. Internet: https://www.bbc.co.uk/news/world-africa-48594162 (last accessed 9 October 2020).

removing similar provisions that had remained unchanged since independence from Portugal in 1975.[4]

A lot has been written about the legacy of these laws across the formerly colonized world[5] which I will not rehearse here except to note that the purpose of these laws was to simultaneously racialize, sexualize and gender the population. These laws naturalize heterosexuality by criminalizing non-procreative sex, whilst setting the contexts where these laws are introduced as "uncivilized" and in need of saving in the post-flag independence period.[6] Criminalization in this instance functions as a technology of control, and much like other technologies of control becomes an important site for the production and reproduction of state power.[7] Policing the sexual (stigmatizing and outlawing several kinds of non-procreative sex, particularly lesbian and gay sex and prostitution) is about sex but is also about cordoning off sexuality that promotes citizenship. Alexander aptly notes that as the state moves to reconfigure the nation it simultaneously resuscitates the nation as heterosexual.[8]

In this chapter I examine how these colonial legislative legacies are being challenged by queer movements who draw on normative human rights language to question the commitment of governments to the safety and security of citizens. I am interested in the productive tension between living in contexts that are hostile to queer rights and the possibilities of overtly resisting the forces that criminalize and generate violence against queer lives.

I recognise existing critiques of the human rights framework as a homogenizing architecture that silences the barriers to equality before the law, which are based on gendered, racialized and class-based categories.[9] However, this chapter proceeds from an

4 FRANS VILJOEN, Abolition of Angola's anti-gay laws may pave the way for regional reform, The Conversation, 2019. Internet: https://theconversation.com/abolition-of-angolas-anti-gay-laws-may-pave-the-way-for-regional-reform-111432 (last accessed 9 October 2020).

5 JACQUI M. ALEXANDER, Not Just (Any) Body Can Be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas, Feminist Review, 48, 1994, 5-23; MARC EPPRECHT/S.N. NYECK (eds.), Sexual Diversity in Africa: Politics, Theory, Citizenship, Montreal 2013.

6 RAHUL RAO, The Locations of Homophobia, London Review of International Law, 2(2), 2014, 169-199.

7 GERALDINE HENG/JANADAS DEVAN, State fatherhood: The politics of nationalism, sexuality and race in Singapore, in: A. Ong and M. G. Peletz (eds.), Bewitching Women, Pious Men: Gender and Body Politics in Southeast Asia, Berkeley, Los Angeles, London 1995, 195-215.

8 See ALEXANDER (footnote 5).

9 See ERIC POSNER, The case against human rights, the Guardian 04.12.2014. Internet: https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights (last accessed 9 October 2020).

understanding that queer movements deploy rights language strategically to hold governments accountable to international and continental commitments to which they have submitted themselves. In taking a strategic approach, queer movements recognize that the human rights framework will not resolve structural inequalities, but they see it as an important route to prising the door open for broader societal debates about freedom and justice

This chapter will illustrate how movements resisting the disciplinary forces found in the law do so through growing cross-movement and transnational work across Africa. Specifically, I look at the adoption of strategic litigation as a mechanism to hold governments and regional policy institutions accountable to continental norms on "equality" and "rights". Strategic litigation is intended to set precedence and not always about winning the case.[10] This means that strategic litigation cases are as concerned with the effects that they will have on larger populations and governments as they are with the result of the cases themselves. Through strategic litigation, queer movements use the legal terrain to advance new readings of gender and challenge selective interpretations of criminal law.

Secondly, I argue that these efforts aimed at making governments accountable can be read as counter-identification. Counter-identification as developed by José Muñoz refers to strategies by queer people to resist and reject the images and identificatory sites offered by dominant ideology by rebelling.[11] These are strategic moves that I argue are evident in the efforts below to challenge existing systems by engaging them and not seeking assimilation within them. In essence, the objective of legal advocacy is to challenge the very principles that shape the existence of legal and policy institutions. The presence of queer people and queer discourses becomes a source of disruption. I argue that rather than dismiss counter-identification as it occurs through policy and legal advocacy, they remain an important way to understand the evolution of queer activism and the possibilities of queer futures that do not rely on the disciplinary forces of the law.

II. Tracing Movements

In the last decade there has been significant growth in overt queer organizing across the African continent. I use overt to signal that historically Lesbian, Gay, Bisexual, Trans,

[10] See INSTITUTE FOR STRATEGIC LITIGATION. Internet: https://www.the-isla.org/about-us-2/ (last accessed 9 October 2020).

[11] See JOSÉ ESTEBAN MUÑOZ, Disidentifications. Queers of Color and the Performance of Politics, Minneapolis 1999, Introduction.

Queer and Intersex (LGBTQI) organizing was based on personal connections and safety networks rather than politically organized groups seeking to transform societal attitudes against non-heteronormative lives.[12] There are different trajectories to queer organizing across Africa, but five major patterns can be identified. The first pattern to organizing across most parts of Africa has occurred through conversations on men who have sex with men (MSM) work, which was largely associated with HIV/AIDS resources. As Armisen notes, the risks associated with this type of work is evident in the links made between LGBTQI lives and disease and danger.[13] The result is a pathologizing of non-heterosexual sexualities by reading them through the vector of risk and "key populations" to be targeted by medical programmatic interventions.

The second pattern which emerges as a ripple effect from the starting point above is that the political mobilization that develops is often driven by donor priorities. This means that the local realities and needs of queer movements are negotiated away or subsumed under a set of short-term projects framed by funding requirements. The consequence of donor-driven agendas is the cementing NGOs as the primary route to social justice organizing. NGOs thus become perceived as the only vehicle through which meaningful local mobilization can occur. De-politicized political struggles are intrinsically woven into NGO-ization because organizing is framed by a quest for organizational survival and donor legitimacy and less about shifting structural inequalities.

The third pattern is an approach to organizing that renders lesbian, transgender and intersex organizing invisible. It is worth noting that this pattern to organising is also informed by the donor emphasis on funding MSM groups based on their categorisation as a risk and/or target group. Consequently, given the privileging of health as an entry point to engaging queerness, Lesbian, Transgender and Intersex groups are erased. Implicit in this disconnect is the underpinning homonormativity that characterizes gay organizing. Patriarchal ideals are therefore reproduced in the rearticulation of gender and sexuality binaries in their movement building.[14] In addition, the absence of strong organizing links across LGBTQI groups transnationally results in limited political and resource synergies. The Coalition of African Lesbians (CAL) that I discuss later on in this chapter is a political and ideological response to this pattern. CAL is a political project designed to coalesce greater continental organising amongst Lesbians as noted below:

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12 MARIAM ARMISEN, We Exist: Mapping LGBTQ Organizing in West Africa, 2014. Internet: https://www.isdao.org/wp-content/uploads/2016/12/We-Exist.pdf (last accessed 9 October 2020); THE OTHER FOUNDATION, Canaries in the Coal Mines: An Analysis of Spaces for LGBTI Activism in Southern Africa, Johannesburg 2016.

13 ARMISEN (footnote 12).

14 See ARMISEN (footnote 12).

> *We were concerned, from the outset, about the fact that as women and lesbian women in particular, we were often marginalized from decision making and leadership processes and our voices were seldom heard and respected. This was both within social movements and within policy spaces*[15].

CAL as noted on its website draws on a foundational feminist argument about how patriarchy works against women by emphasizing "the importance of raising consciousness and strengthening the activism and leadership of Lesbian women given the ways in which patriarchy manifests across our societies".[16]

The fourth pattern can be subsumed into a homonationalist framework in which the pursuit for equality before the law is specifically sought through the right to marriage.[17] While this approach has largely been a feature of organising in South Africa, the only African country that recognises civil unions, it bears discursive relevance to other parts of Africa.[18] The argument against marriage equality has been deployed by queerphobic movements and actors whenever public debates on homosexuality occur. The protection of "the institution of marriage" is invoked even when the "right to marriage" is not the driver of queer organising. This was seen in a Kenyan judge's argument regarding Repeal 162 that I will discuss later on[19]. It is important to note that the recognition of civil unions in South Africa is the result of a longer history of anti-apartheid organising that centred equity in its fullest form given the role of queer organisers in the liberation struggle. Marriage equality is a form of homonationalist discourse and praxis because of the investment in erasing broader inequalities that stake out some queer lives as worth including within a neo-liberal state. The focus on marriage sets aside broader material concerns that affect LGBTQI communities such as access to socio-economic rights in environments. The fight for marriage equality is therefore a fight of the privileged to access an institution that feminists have argued is oppressive[20]. The limitations of this approach and broader understanding of queer freedom is evident in a South Africa that

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15 See Coalition of African Lesbians (CAL), About Us, Internet: https://www.cal.org.za/about-us/why-we-exist/ (last accessed 22 January 2021).

16 See CAL (footnote 15)

17 JASBIR PUAR, Terrorist Assemblages: Homonationalism in Queer Times, Durham 2007.

18 MELANIE JUDGE/ANTHONY MANION/SHAUN DE WAAL (eds.), To Have and to Hold: The Making of Same-Sex Marriage in South Africa, Johannesburg 2008.

19 BRITISH BROADCASTING CORPORATION (BBC), Kenya upholds law criminalising gay sex. 24.05.2019. Internet: https://www.bbc.co.uk/news/world-africa-48399814 (last accessed 6 December 2020)

20 See CLARE CHAMBERS, Against Marriage: An Egalitarian Defence of the Marriage-Free State, Oxford 2017.

recognises civil unions while also confronting hate crimes through targeted murders of Black lesbians.[21]

The fifth and final pattern is shaped by the impact of religious fundamentalisms on queer lives due to the violence catalyzed by fundamentalist evangelists. Religious fundamentalism manifest in different ways across Africa. Of relevance to this chapter is the deployment of religious discourses to reinscribe heteronormativity. As argued by Ayesha Imam, the signals of rising religious fundamentalism are seen in the control of women's bodies, dress codes, their sexual and reproductive autonomy, along with the policing of a strict gender binary and gender roles, the valorization of the heterosexual family, the imposition of heterosexual 'normalcy' and the regulation of marriage.[22] The Uganda case discussed below makes visible the impact of religious fundamentalism on gender and sexuality debates in Africa. The cases below also demonstrate how specific moments create an opportunity to challenge the parallel tracks to organizing that I mapped above. I will now outline three case studies that illustrate the role of strategic litigation to making queer lives more legible and conclude with three lessons that I observe from the tactical choices made by queer activists.

III. Strategic Litigation Pathways

A. Uganda

In March 2009, American evangelist Scott Lively, travelled to Uganda for a series of talks against the "gay agenda", urging the government to crack down on gay people and characterizing the LGBTQI community as rapists and paedophiles. David Bahati a Ugandan member of parliament attended one of these talks. On 14 October 2009 David Bahati introduced Bill No. 18 into parliament. The Anti-Homosexuality Bill had the objective of

> *"establishing a comprehensive consolidated legislation to protect the traditional family by prohibiting (i) any form of sexual*

[21] See MELANIE JUDGE, Blackwashing Homophobia: Violence and the Politics of Sexuality, Gender and Race, London 2018; LETHABO MAILULA, Queer Blackwomxn on the periphery of the rainbow, Agenda, 34(2), 2020, 56-61.

[22] AYESHA IMAM/ SHAREEN GOKAL/ISABEL MARLER, The Devil is in the Details: At the Nexus of Development, Women's Rights and Religious Fundamentalisms, Toronto 2016.

relations between persons of the same sex; and (ii) the promotion or recognition of such sexual relations"[23]

On 14 March 2012, Sexual Minorities Uganda (SMUG) in partnership with the Centre for Constitutional Rights filed a federal lawsuit against American evangelist Scott Lively. The lawsuit accused Lively of violating international criminal law by conspiring to persecute the Ugandan LGBTQI community. This first-of-its-kind, the lawsuit alleged that Lively's actions over the past decade, in collaboration with some Ugandan government officials and Ugandan religious leaders, were responsible for depriving LGBTQI Ugandans of their fundamental human rights based solely on their identity; the lawsuit alleged that this fell under the definition of persecution under international law and was a crime against humanity. There were also non-legal interventions, such as cross-sectoral mobilisation by human rights organizations whose work on health and reproductive rights were at risk.[24] In effect, what was witnessed was greater solidarity across movements thus challenging the myth that homophobic discourses do not have an impact on those who believe they are doing "clean" gender and sexuality work.

In addition, funding organisations based on the continent such as UHAI EASHRI (East African Sexual Health and Rights Initiative) challenged Northern allies who wanted to set up emergency funds to move LGBTQI people out of Uganda.[25] UHAI argued that this was an unsustainable strategy that would serve to elevate a few people as worthy of protection and safety whilst leaving the majority to deal with state instigated violence. Instead, they argued that financial resources should be made available to challenge the legality of the Bahati bill locally, thus making the country safe for everyone. Finally, there was also a push back against funding conditionalities pursued by the UK Government. The core argument by activists was that such conditionalities do not impact on the government, they impact on people, and so therefore a counter-intuitive strategy reproducing old power hierarchies.

As these actions developed, the bill was signed into law by President Museveni on 24 February 2014 with the death penalty replaced by a life sentence. However, on 1 August

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23 See SOLOME NAKAWEESI-KIMBUGWE/FRANK MUGISHA, Bahati's bill: A convenient distraction for Uganda's government, Pambazuka News 16.10.2009. Internet: https://www.pambazuka.org/governance/bahati's-bill-convenient-distraction-ugandas-government (last accessed 9 October 2020).

24 See SYLVIA TAMALE, Human rights impact assessment of Uganda's anti-homosexuality bill, Pambazuka News 14.01.2010. Internet: https://www.pambazuka.org/governance/human-rights-impact-assessment-Uganda's-anti-homosexuality-bill (last accessed 9 October 2020).

25 Awino Okech conversation with Wanja Muguongo, former director UHAI-EASHRI, November 2015.

2014, the Constitutional Court of Uganda ruled the Act invalid on procedural grounds - it had been passed by Parliament without a proper quorum.[26]

B. Kenya

On 24 May 2019, the High Court of Kenya dismissed two petitions 150 and 234 of 2016 brought before it by Eric Gitari and the Gay and Lesbian Coalition of Kenya, Kenya Human Rights Commission and Nyanza, Rift Valley and Western Kenya network (NYARWEK) among others respectively. These petitions contested sections 162 (a) and (c) and 165 of the Penal Code that outlawed "carnal knowledge against the order of nature and indecent acts between males whether in public or private" punishable with up to 14 years' imprisonment. Sodomy is a felony under section 162 of the Kenyan Penal Code, punishable by 14 years' imprisonment, and any sexual practices between males (termed "gross indecency") are a felony under section 165 of the same statute, punishable by 5 years' imprisonment. Section 162 (a) and (c) states that any person who has "carnal knowledge against the order of nature" or permits a person to have "carnal knowledge against the order of nature" against them has committed a crime.[27]

The petitioners sought to have these sections declared unconstitutional because they "violate various constitutional rights, including the right to privacy, the right to freedom of expression, the right to health, the right to human dignity and the right to freedom from non-discrimination".[28] Underpinning this petition was the recognition that even though it is not illegal to be queer in Kenya, colonial laws of this nature in effect penalise queer sex. In their ruling, the three-judge bench held that the sections in the Penal Code covered anyone who engaged in an "unnatural act".[29]

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26 BRITISH BROADCASTING CORPORATION (BBC), Uganda court annuls anti-homosexuality law, 1.8.2014. Internet: https://www.bbc.com/news/av/world-africa-28613927 (last accessed 6 December 2020).

27 See Eric Gitari and 7 others versus Attorney General, Petition 150 of 2016; DKM and 9 others v. Attorney General, Petition 234 of 2016. Internet: http://kenyalaw.org/caselaw/cases/view/122862; http://kenyalaw.org/caselaw/cases/view/173946/ (last accessed 22 January 2021).

28 See Petitions 150 and 234 of 2016 (footnote 27).

29 See judgment on the consolidated petitions 150 and 234 of 2016. Internet: http://kenyalaw.org/caselaw/cases/view/173946 (last accessed 22 January 2021).

C. Coalition of African Lesbians

The Coalition of African Lesbians (CAL) is a South African based continental organization which works towards freedom, autonomy, dignity and equality for lesbians across Africa. CAL sees part of its work as influencing and shaping gender and sexual identity discourses within the African Commission on Human and Peoples' Rights (ACHPR). The ACHPR was inaugurated on 2 November 1987 with its secretariat in Banjul, the Gambia charged with three major functions: the protection of human and peoples' rights, the promotion of human and peoples' rights and the interpretation of the African Charter on Human and Peoples' Rights.[30]

On 25 April 2015, CAL was granted observer status at the ACHPR. Independent Commissioners from five countries voted in support of CAL's application – Benin, Mali, South Africa, Democratic Republic of Congo and Burundi. Commissioners from Rwanda, Tunisia and Algeria voted no. The Commissioner from Uganda abstained. This decision came after a seven-year process that resulted in an initial rejection in 2008 because "the activities of the said organisation do not promote and protect any of the rights enshrined in the African Charter". An Africa-wide campaign calling for the African Commission to reconsider the decision followed from the October 2010 session of the African Commission to the present. In August 2018, a decision by the African Union (AU) Executive Council led the ACHPR to withdraw CAL's observer status following the AU Executive Council's comments on the need to consider "African values" in granting observer status.

Working with the Institute for Strategic Litigation, CAL asked for an interpretation of the decision by ACHPR that was based on a directive from the AU Executive Council. In asking for this legal interpretation, they sought to highlight that the decision called into question ACHPR's independence and impartiality. The implicit message to human rights organizations was that this should be a cause for concern for them and that the CAL ruling should not be viewed as an exception. It is worth noting that many human rights organizations issued statements challenging the move against CAL.[31]

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30 See FEMNET, Civil Society Joint Declaration on Responding to the Attacks on the Independence of the African Commission on Human and Peoples' Rights (ACHPR) in Banjul, the Gambia, 2018. Internet: https://femnet.org/2018/12/civil-society-joint-declaration-on-responding-to-the-attacks-on-the-independence-of-the-african-commission-on-human-and-peoples-rights-achpr-in-banjul-the-gambia (last accessed 9 October 2020).

31 See FEMNET (footnote 30).

IV. Closing Observations

I now turn to the lessons that emerged from and for movements rather than what the strategic litigation process did in relation to jurisprudence. I also point to how these lessons illustrate the counter-identification potential of these actions. The first lesson speaks to the discursive move offered by how the activists in the three case studies argue their cases. Through strategic litigation we see the discourse on the state's responsibility to protect citizens. In the Kenyan case this occurs by mobilizing the homogenizing aspects of human rights to argue for the protection of LGBTQI lives. It is in the State's responsibility to protect all citizens rather than the peculiarities of queerness that the arguments are made by noting that the exclusions generated by the penal code set queer people as citizens aside as targets of violence by state and non-state actors. In Uganda, international criminal law is mobilized to situate religious fundamentalisms as constituting criminal acts designed to harm specific populations. The sphere of operation moves from the national to the international and the harm framed as a strategy involving a transnational network of actors. In this move, SMUG and the Centre for Constitutional Rights return to a key principle of international criminal law that governs the treatment a state can legally accord its citizens and others under its jurisdiction by subjecting states to international scrutiny, condemnation, and criminal prosecutions[32].

Through this move Sexual Minorities Uganda (SMUG) and the Centre for Constitutional Rights refuse to reproduce the "uncivilised African legislator" who needs to be saved but locates Bahati's actions within a transnational network of criminal actors emanating from the global North. Finally, CAL's arguments against the ACHPR ruling return to a strict reading of institutional commitments to the homogenising principles of rights and equality by foregrounding the risks posed to the independence of these bodies if they fail to exercise their commitment to the law rather than acquiescing to cultural arguments. All of these cases de-centre sexuality as the site of contestation. Instead they turn the gaze to states' constitutional responsibilities and the utility of commitments to international human rights instruments to those regulated by the state through citizenship. By de-centring sexuality and by using human rights arguments, the work of centring how heteronormative logics function to discipline society makes heteronormativity legible as a framework that does not only cause a threat and harm to those set aside as "deviant' but to all.

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[32] BETH VAN SCHAACK/RON SLYE, A Concise History of International Criminal Law, 2007 7-47 Internet: http://digitalcommons.law.scu.edu/facpubs/626 (last accessed 6 December 2020).

The second lesson concerns the productive tension that is evident in living in contexts that appear to be hostile to queer lives while at the same time overtly resisting the forces that criminalize and generate violence against queer lives. Both the Kenyan and Ugandan cases point to what is often perceived as a paradox through the global North's projection of African countries as hostile and unsafe for queer people. The cases described in this chapter point to activists and activism that rejects assimilation by rebelling against punitive heteronormative logics. CAL's pursuit of observer status at the ACHPR illustrates the unexpected relevance of formalist arguments in case law which serve to extend the parameters for cross-movement mobilization and solidarity for queer organizing. In addition, the activism generated by and through these strategic litigation measures serve as counter-identification measures.[33] CAL's pursuit of observer status with the ACHPR was underpinned by its interest in shadowing and disrupting how these institutions understood and enacted their mandate of protecting and securing African citizens irrespective of gender or sexuality. SMUG and the Centre for Constitutional Rights through International Criminal Law reject normative approaches to addressing queerphobia through "civilising" tropes and disrupt how international legal systems understand the international networks that sustain queerphobia and the structural basis that sustains it. Even though the case was unsuccessful, it pointed to the importance of addressing and making visible the transnational nature of homophobic discourses and the need to view these actions as criminal in nature rather than a function of cultural specificity.

The third and final lesson points to the nature of feminist, queer, transnational connections across the globe. I am interested in the fact that these cases show that it is not only about a set of concrete strategies but also about how to navigate ethical dilemmas and the opportunities for transnational solidarity. The SMUG case study illustrates the possibilities of global solidarity that does not reproduce the disciplinary forces found in the law through discursive regimes that paint Africans as homophobic and uncivilized and queer Africans as requiring salvation and safety in the "West". It effectively disrupts the power hierarchies that inform North/South dichotomies but placing the West as the site of struggle and the place where containment strategies need to be enacted. Secondly, the mobilisation across likeminded "human rights and women's rights" organisations to support CAL's continental campaign against the ACHPR ruling points to the opportunities for solidarity when the threats posed by heteronormativity become the focus of activism rather than a reverse focus on the preservation of heterosexuality as an organizing principle of societies. I suggest that the opportunities that appear for women's rights and queer solidarity in Uganda and through CAL point to a counter-identification

[33] See MUÑOZ (footnote 11).

move by women's rights organisations that have historically been framed as hostile to seeing queer and sex worker organising as an African feminist agenda.[34]The rebellion enacted in forging alliances with queer organisations is a strategy aimed at rejecting patriarchy which frames structural violence against women as it does against queer people.

[34] CHI MGBAKO/LAURA SMITH, Sex Work and Human Rights in Africa, Fordham International Law Journal, 33(4), 2010, 1178-1220.