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Adam D. Dubin • Frida Lyonga
Rui Garrido
Editors

Queering African Law

Identity, Inclusion and Rights Protection
for LGBTQ+ People Across Africa

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Foreword

This volume, *Queering African Law: Identity, Inclusion and Rights Protection for LGBTQIA+ People Across Africa*, makes a timely and important contribution to the ongoing efforts to examine and transform legal systems from a queer and decolonial perspective. The contributions gathered here offer a rigorous and multidimensional interrogation of the ways in which law has been used both to marginalize and to protect sexual and gender minorities across the African continent.

The authors adopt a range of disciplinary and methodological approaches, offering regionally and nationally specific analyses alongside broader conceptual reflections. Their work is grounded in the realities of lived experience and anchored in a commitment to advancing dignity, equality, and non-discrimination—principles that are central to international human rights law and core to the mandate I hold as the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.

The thematic focus of the book—on queering African law—offers a critical lens through which to examine both the colonial origins of many legal frameworks and the ways in which those frameworks have been adapted, expanded, or contested in the postcolonial period. Sodomy laws, often cited as reflecting national traditions or values, are in fact colonial imports. While these laws have been repealed in several African countries, they continue to be retained and, in some cases, expanded and often repurposed to serve political ends.

Alongside the criminalization of consensual same-sex relations, we are witnessing a concerning trend in the proliferation of laws and policies that restrict freedom of expression, assembly, and association under the guise of protecting national values. These laws, including so-called “promotion of

homosexuality” provisions, currently under consideration or in force in several countries, not only suppress legitimate speech and advocacy but seek to curtail the expression of identity in the public sphere. These developments should be viewed not only as infringements on minority rights but also as threats to democratic governance, the rule of law, and pluralism.

At the regional level, the African Commission on Human and Peoples’ Rights has taken notable steps, including its 2014 resolution calling for an end to violence and discrimination based on sexual orientation and gender identity. Yet, the Commission’s subsequent decision to revoke observer status for the Coalition of African Lesbians underscores the contested nature of its mandate and the political pressures it faces. This tension is further compounded by institutional challenges at the African Court on Human and Peoples’ Rights, whose accessibility is partly contingent on the recognition of civil society organizations by the Commission.

The book also draws attention to the broader regional human rights architecture, including the ECOWAS Community Court of Justice and the East African Court of Justice. Both courts possess mandates that could, in principle, be engaged to challenge discriminatory laws and practices. However, neither has to date developed substantive jurisprudence on sexual orientation or gender identity. This absence is not merely procedural—it reflects deeper structural and political constraints, which several chapters in this volume interrogate. Strengthening the responsiveness of these institutions remains a critical frontier in the realization of equal rights across the continent.

Despite these limitations, the volume illustrates that progress is possible. It documents the role of civil society organizations, strategic litigation, constitutional reforms, and evolving jurisprudence in promoting equality. It highlights the growing body of legal precedent emerging from the global South, where courts are increasingly citing one another in efforts to dismantle discriminatory laws and affirm the rights of all, regardless of sexual orientation or gender identity.

Strategic litigation, often spearheaded by civil society organizations, has played a pivotal role in advancing legal protections based on sexual orientation and gender identity across the continent. Cases brought by national NGOs—such as the successful challenge to the refusal to register the National Gay and Lesbian Human Rights Commission in Kenya—demonstrate how domestic courts can serve as crucial arenas for contesting exclusion and affirming constitutional rights to association, dignity, and equality. These legal victories are not isolated. Since 1998, eleven countries in Africa have decriminalized consensual same-sex conduct, with four of these—South Africa, Botswana, Mauritius, and Namibia—achieving decriminalization

through judicial decisions. Such outcomes highlight the importance of persistent, locally grounded advocacy and the growing willingness of some courts to uphold rights even in politically sensitive contexts.

By centering African perspectives and challenging the narrative that sexual and gender diversity are foreign to the continent, this book makes a valuable contribution to legal scholarship and human rights practice. It affirms the importance of context-specific, locally informed approaches while connecting these to broader international standards and comparative developments.

It is my hope that this collection will serve as a resource for scholars, advocates, policymakers, and international actors alike. It provides both a sobering account of current challenges and a hopeful vision for what the law can become when it is rooted in equality, inclusion, and human dignity. I commend the editors and contributors for their efforts in advancing this essential work.

Graeme Reid UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Johannesburg, South Africa

Graeme Reid

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Introduction

In contemporary society, laws, in the sense of formal policies and legislation, play a central role in regulating social order. There are laws in almost every aspect of social life—from renting an apartment, to crossing a traffic light, traveling across borders, running a business, disposing waste or having sex. Laws prescribe the boundaries of permissibility; they define the sanctions or rewards associated with certain behaviors and actions. In doing so, they extol some values and norms over others, and are actively involved in shaping individual and collective identities. Laws are instruments of protection, but can also be instruments of oppression. Given this all-important power of laws over social life, legislation that criminalizes same-sex practices has been and remains the focus of attention in the contestations around rights for lesbian, gay, bisexual, transgender and queer people in Africa. Laws, however, do not exist in a vacuum; they are, in a reciprocal fashion, immensely influenced by contextual factors such as value systems, cultural beliefs and political discourse, as well as by historical context (Scott, 2013).

Existing scholarship on LGBTQ+ rights in Africa has robustly analyzed how different contextual factors galvanize support for criminalization laws and fan intolerance toward same-sex sexuality in African countries. For instance, Chitando and Van Klinken (2016) critically analyze how religion has significantly contributed to politicizing homosexuality and fueling homophobia in Africa; meanwhile, Peter Geschiere (2017) has shown how cultural beliefs, including the perception of homosexuality as occult, contribute to the “othering” of LGBTQ+ people. Similarly, Marc Epprecht’s (2013) essay on “Sexuality and Social Justice in Africa” provides an understanding of social and cultural patterns that sustain homophobic narratives across the continent. Several studies, including Tamale (2013), Ireland (2013), and

Msibi (2011), have also detailed the influence of colonialism and contemporary politics on the state of laws in Africa that foster the flawed construct of Africa as purely heteronormative. Neville Hoad (2007), for example, applies an anthropological lens to question the “Africanness” of homosexuality—an argument often used by political and religious leaders in Africa to deny the full citizenship of Africans who identify as LGBTQ+. In addition, other researchers have used queer theory to problematize the notion of a heteronormative Africa (Matebeni, 2014; Epprecht, 2008; Matebeni et al., 2018; Ngwenya, 2018) and to demonstrate the diversity of sexualities in different times and spaces across the continent (Murray & Roscoe, 1998; Hoad, 2007; Nyeck & Epprecht, 2013). Ngwenya (2018), for example, draws on the concept of transgressive sexualities to emphasize the need for recognition of other forms of sexualities in Africa and to avoid a narrow-minded essentialist perspective of sexuality that fosters heteronormativity.

Queer scholarship in Africa has not only revolutionized the struggle for LGBTQ+ rights by highlighting queer identities across the continent; it has also brought to the forefront African voices, such as that of Ugandan academic-in-exile, Stella Nyanzi’s (2014), who have contributed to the conceptualization of what queerness means. As Matebeni et al. (2018, p. 3) define it, “‘queer’ signals an active force that motivates and asserts identity within a heterosexual matrix. ‘Queer’ to a large extent frames not only sexuality but also calls into question the binary-gendered regimes that constitute identity.” Decolonial thought has, however, critiqued queer theory’s applicability in Africa, characterizing its use as a subtle form of imperialism because the theory originates from the global North (Pereira, 2019). With regard to this critique, Tamale (2011, p. 25) responds by acknowledging the importance of developing “home-grown theories of African sexualities” but also makes the convincing point that “if we were to totally jettison Western concepts and theoretical frameworks, we would spend considerable resources reinventing the wheel—an unnecessary enterprise” that research on LGBTQ+ rights should not engage in.

The above existing studies tend to adopt a more anthropological and sociological approach than a legal perspective. Arguably, academic writings on sexuality in Africa have always been intertwined with scholarly discussions on LGBTQ+ rights, but paradoxically, few studies exist that take an in-depth focus on laws across the continent, especially from a queer legal perspective. McNamara’s (2018) reflection on the cases of Uganda, South Africa, Zimbabwe, and Nigeria stands out as one of the few that focus on how the nature of laws, silent or explicit, influences the rights of and societal attitudes toward LGBTQ+ people. Otto’s (2017) book *Queering International Law* also

touches on commonwealth countries with harsh LGBTQ+ laws and discusses the pitfalls of some of the strategies the international community has employed in its attempt to push for decriminalization of same-sex sexuality in African countries (see Rao, 2017). Kerry O'Halloran (2019) maps important developments regarding the human rights of LGBTQ+ people in selected common law countries, but Africa is absent from this list. More recently, Jjuuko et al. (2022) have also examined laws across 13 African nations, reflecting on their diversities and possible factors that contribute to such differences. Drawing on the concept of “lawfare” and its association with the struggles of sexual minorities, they expound on the role and limits of activism in challenging harsh LGBTQ+ laws in African nations. Similarly, Ashley Currier (2012) analyzes social movements to advance LGBTQ+ rights in Southern Africa, focusing on the rise of activism and struggles for visibility of the movement in a post-apartheid context characterized by violence and hostility.

Queer legal theory is “a critical enterprise ... dedicated to reforming the law as a way of helping to liberate everyone, but especially the most oppressed, from the pervasive and traditionalist sex/gender restrictions” (Valdes, 1995, p. 342). Applying queer legal theory thus means examining LGBTQ+ legislation in a bold and critical manner, and with an unapologetic objective of problematizing heteronormative assumptions, arguments, or logic. In line with the concept of “queering,” which questions taken-for-granted categories of gender, sex, and sexual orientation, the book, *Queering African Law: Identity, Inclusion and Rights Protection for LGBTQ+ People across Africa*, questions African laws that pertain to issues of gender and sexuality at many levels, including analyzing their historical roots, their normative and cultural underpinnings, and relevant language in political discourses associated with these laws. The book builds on the research scholarship listed above by contributing a critical analysis of: (1) the underlying factors that sustain harsh LGBTQ+ laws in Africa, the shortfalls of LGBTQ+ laws in Africa, areas of progress and possible paths forward—which is a unique approach that goes beyond merely echoing how contextual factors influence laws; (2) the important role of activism in challenging anti LGBTQ+ laws, notably through litigation, their successes, challenges, and limitations; and finally (iii) the tensions between cultural, historical, and other factors that challenge progress, but which could also be avenues for advancing LGBTQ+ rights.

The book fills an important gap in literature as it gathers contributions from many African legal scholars and social scientists. The “conducting wire” of the book is the diversity of African laws, at national and regional levels, as well as customary laws, and their role in the inclusion or exclusion of LGBTQ+ people in African societies. Broadly speaking, the book showcases African

laws that are more positive toward sexual minority groups and by implication, highlights possible strategies that can be adopted to advance more inclusive policies. For example, in Botswana, the High Court declared that the sodomy law in the colonial criminal code was inconsistent with the constitution of the country. In Angola, the new 2021 Penal Code criminalizes hatred against citizens based on their sexual orientation (Garrido, 2019). In Southern Africa, several courts have decided in favor of transgender people being able to change the gender marker on their identification cards (Magashula, 2021). At the African Union level, the African Commission on Human and Peoples' Rights adopted, in 2014, its first resolution calling for the end of violence against people based on their real or imputed sexual orientation and gender identity, though implementation has been limited. These examples are further analyzed in this volume as they serve as important lessons against the commonly heard trope that LGBTQ+ rights are not African. In this regard, the book contributes toward filling an important gap in the legal scholarship related to LGBTQ+ studies.

Sections and Chapters

The book begins with a section titled: "Queering Africa Law" that puts into context the state of LGBTQ+ rights across Africa and discusses the discrepancy between African Union Law related to human rights and queer rights. The first chapter, by Frida Lyonga, revisits the debate of homosexuality as un-African through a semi-systematic review of existing studies on same-sex sexuality in Africa. The chapter discusses the North/South divide related to rights for LGBTQ+ people in Africa. It analyzes how the un-African claim serves to suppress other African voices that support tolerance and equality, hence creating a hostile and discriminatory environment for LGBTQ+ persons. The second chapter by Rui Garrido and Adam Dubin assesses how inclusive and protective African Union (AU) law is for queer people in Africa and focuses on the notions of inclusion and nondiscrimination enshrined in AU law to challenge the binary understanding of gender and marginalization of others. In the third chapter, Cristiano D'Orsi provides an analysis of the legal and socio-political realities facing the LGBTQ+ communities in Namibia. The chapter explores the persistent risks and discrimination faced by the LGBTQ+ community. More importantly, it highlights recent judicial victories for some members in the community, drawing on two specific cases, including: the case of a gay man, named Dausab, versus the minister of Justice, where the Namibian high court judged in Dausab's favor. In the second case, related to

same-sex marriage (Digashu's marital union with Seiler-Lilles), the Supreme Court also ruled in favor of recognizing their marriage that had been conducted abroad. Both cases demonstrate some level of advancement in the recognition of LGBTQ+ rights in Namibia, despite the current challenges. The fourth and final chapter in the section by Lwando Scott takes a critical reflection of the life of the queer activist, Simon Nkoli, drawing on a link between his sexuality struggles and the anti-Apartheid struggle. The chapter strongly leans on Nkoli's argument that racial discrimination and sexual discrimination are intertwined and his appeal for a more unified force in the struggle for greater LGBTQ+ rights in South Africa. Drawing on Nkoli's perspective, Lwando notes that the emancipation promised by the law in post-Apartheid South Africa could become more effective if both subjects of discrimination (racial and sexual discrimination) see their struggles as a unified struggle.

The second section of this book, titled "Un-Queer Legislation," weaves through different country experiences regarding LGBTQ+ rights and offers reflections and analysis of socio-political contexts and legislation. The section starts with a chapter by Zanele Nyoni-Wood on Uganda's Anti-Homosexuality Law. In this fifth chapter, Nyoni-Wood identifies the roots of the 2023 Anti-Homosexuality Act in Uganda and maps its development so far. She also analyzes how national identity and notions of family values in Uganda have been conceptualized in religious and sexual terms. The sixth chapter by Alfredo dos Santos turns to Lusophone Africa, specifically on the case of human rights progress through the principle of nondiscrimination of LGBTQ+ people in Angola. The chapter hails the historic milestone reached by Angola through the adoption of a new Penal Code that decriminalizes same-sex relations and explicitly prohibits discrimination based on sexual orientation. However, it also highlights some of the limitations of the penal code, such as its omission of specific reference to gender identity, which has led to less legal protection for trans and gender-diverse individuals in Angola. Expanding further on the situation in Angola, Robert Tanner Bivens, in the seventh chapter, discusses some of the limitations faced by the LGBTQ+ population despite successful LGBTQ+ laws. Bivens highlights negative attitudes as the principal setback as he points to the huge gap between positive LGBTQ+ laws in Angola and strong social resistance to tolerance that hinders a more conducive environment for LGBTQ+ people within the context. In chapter 8, Itumeleng Shale and Morapelo Ramoleko analyze the case of Lesotho, a country strongly influenced by South Africa and its legal system, but which has nevertheless remained different in its approach to LGBTQ+ rights. In this concluding chapter of the second section of the book, Shale and

Ramoleko discuss religious and cultural factors that hinder the advancement of LGBTQ+ rights in Lesotho.

The third section of the book, titled: “Persecution and Legal Responses in an African Context,” considers how some African countries have responded to discriminatory laws through judicial remedies. The first chapter in this section, by Ayo Sogunro, uses theories of political homophobia and queer intersectionality to explore the enforcement of laws against sexual minorities in Nigeria. The chapter discusses the power dynamics within the Nigerian legal system and illustrates how laws designed to validate popular religious and cultural norms are used to reinforce existing power structures. Sogunro then turns focus on strategic litigation and its use to challenge anti-sodomy laws, drawing on examples of both its successes and challenges. In chapter ten, Tshiamo Renato and Mukungekwa Muyunda Maswabi also analyze the use of strategic litigation to effectively strike down anti-sodomy laws in Botswana, noting how the courts have been effectively used to challenge these discriminatory laws. Contrary to Botswana’s success story, strategic litigation has not been a very successful approach in the case of Uganda, as Adrian Jjuuko notes in the next chapter, where he analyzes the potential of the Ugandan courts in trying to stop the Anti-Homosexuality Act in Uganda. Jjuuko provides an understanding as to why the efforts of strategic litigation have failed in Uganda and possible ways forward. The section concludes with an analysis of the effectiveness of strategic litigation in the case of Malawi by Thoko Kaime and Isabel Zundel. In their chapter, Kaime and Zundel analyze Malawi’s attempts through judicial and legislative efforts to challenge the criminalization of same-sex relations, which has also been unsuccessful. Despite the failure of strategic litigation in Malawi, just like in the case of Uganda, both authors maintain an optimistic view as they see the several failed attempts at decriminalization in Malawi as stepping stones toward future success. They hinge their optimism on the fact that African legal systems are plural and can therefore offer other avenues aside strategic litigation that can accelerate the decriminalization process of LGBTQ+ practices. Despite the failed attempts of strategic litigation in the cases of Uganda and Malawi, both cases represent positive steps toward the LGBTQ+ struggle in Africa on the grounds that they allow for the contestation of anti-LGBTQ laws when compared to some other African countries that silence avenues to table such a challenge in court.

The fourth and final section of the book, titled: “Cinematographic Reflections on Queerness in Africa and Responses to Discrimination,” explores film-based approaches to issues of sexual orientation and gender identity across the African continent. The section opens with a chapter by Isabel

Alonso, Adam Dubin, and Cecelia Villaseñor, which analyzes the Nigerian short film, titled *Ìfẹ́*. *Ìfẹ́* tells the story of two women who meet in the confines and protection of a home to live, albeit temporarily, as a couple during a weekend encounter. The chapter examines how the film powerfully portrays the oppressive nature of the public space in many African contexts, which compels LGBTQ+ individuals to retreat into the private sphere in order to avoid prejudice, discrimination, and violence faced outside the confines of the “closet.” The authors argue that the film asserts the existence and visibility of same-sex love within a cultural environment that often denies it. In the fourteenth and final chapter of the book, David Ikpo discusses how films can be used to re-curate public image around queerness. Ikpo concludes this volume by advocating for law schools to utilize filmmaking as part of a broader clinical approach to human rights protection of LGBTQ+ people. He argues for the inclusion of filmmaking within legal education, as he notes that creative storytelling can challenge dominant narratives and reshape the public understanding of queerness in Africa. Through these chapters, the book ultimately challenges the very notion that homosexuality and trans rights are un-African. It provides an important roadmap for rethinking how discriminatory laws can be challenged toward the advancement of equality, nondiscrimination, and inclusion, and offers important reflections on the need to queer African law across all corners of the continent.

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