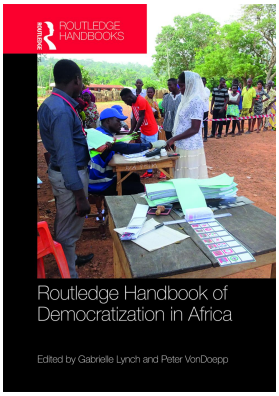

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31
SEXUAL MINORITY RIGHTS

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During his Kenyan tour in 2015, US President Barack Obama brought up the topic of sexual minority rights. Drawing comparison with the civil rights struggle of African-Americans in the United States, he insisted that governments should step in to prevent the mistreatment of groups in society on the basis of prejudice. In response, President Uhuru Kenyatta countered that protecting the rights of lesbians, gays, bisexuals, trans persons, intersex, and other individuals on the gender/sexuality diversity spectrum and their allies (LGBTs hereon) was not a priority in Kenya as the greater population was more concerned with other issues including health, education, and infrastructure (Dovere 2015). Similarly, in November 2017, during an interview with Al-Jazeera, Ghanaian President Nana Akufo-Addo asserted that sexual minority rights were not on the agenda for Ghana because the majority of the population was not pushing for these rights. Akufo-Addo, however, described it as something that was "bound to happen" and he claimed to foresee a future where there would be such strong activism on behalf of Ghanaian sexual minorities that there would be a push to change the law (*Daily Graphic* 2017).

Kenyatta's and Akufo-Addo's statements represent a subtle departure from the political rhetoric of their predecessors—such as Yahya Jammeh, Robert Mugabe, Yoweri Museveni, and John Atta Mills—who all made moral judgments on the issue of homosexuality. They regularly asserted that homosexuality was morally incompatible with "African values" and Christian/Muslim standards and was therefore unacceptable in society. In contrast, neither Kenyatta nor Akufo-Addo specified their moral stance in this matter in their key statements mentioned above. Instead, they asserted that most people in their countries are against sexual minority rights and the decriminalization of homosexuality, and would thus not occupy themselves with the topic.

Both Kenyatta and Akufo-Addo were correct in stating that the majority of their citizens are opposed to homosexuality. A study by the Pew Research Center (2014) indicated that 90 percent of Kenyans and 96 percent of Ghanaians believe that society should not accept sexual diversity. It is, however, their assertion that sexual/gender diversity will not be decriminalized that is worrying and problematic. Like Zimbabwe's president, Emmerson Mnangagwa, the shift in rhetoric belies a continuity in policy, hamstrung as they are by their ostensible respect for the people. In his first interview with Western media in 2018, Mnangagwa expressed his willingness to change his country's constitution on the issue if the public demanded, which it is unlikely to do in the foreseeable future (*CNN* 2018).

It has become more common for countries in the West to hold referenda to decide issues of sexual minority rights. In this regard, several countries have taken to the ballot box to thrash out the debate on same-sex marriage. For example, both Australia (2017) and Ireland (2015) conducted referenda that empowered government to embrace marriage equality. This strategy clearly will not work in Africa for the foreseeable future. Rather, in several African countries, discriminatory colonial-era laws have been overturned through the legislative process without significant public debate. Parliaments in Lesotho, São Tomé and Príncipe, Mozambique, and Seychelles have since 2012 decriminalized same-sex acts, while others have banned various forms of discrimination on the basis of sexual orientation (Botswana, Mauritius, Cape Verde, for example). Angola became the latest success story for LGBT rights activists in Africa when its parliament scrapped the law banning "vices against nature" in January 2019 (Reid 2019).

Yet what happens when democratic elections over the rights of minorities have unpleasant and unexpected results for these vulnerable populations? Would American schools have been desegregated in 1954 if this matter had been decided through the ballot box rather than before the Supreme Court in *Brown v. Board of Education*? The public outcry that followed this case in the southern states and the defiance of federal desegregation by political leaders like Governor Orval Faubus (Applebome 1994) indicate that segregation would likely have been maintained without judicial intervention.

In a democratic society, can the majority be trusted to safeguard the rights of vulnerable minorities? To put that another way, are the success stories of progressive change through the legislature noted above anomalous? This chapter argues that contrary to popular rhetoric among many human rights activists and supporters, an enhanced democracy does not necessarily lead to the protection of the rights of all minorities. In fact, as Mnangagwa and others exemplify, democracy can be utilized as an effective tool by a majority in order to deny the freedoms of historically oppressed populations. Not only can free and fair elections be used to usher in policies and politicians that will oppress minority groups, but tools that foster democracy—such as a free press—can be used to circulate discriminatory opinions, creating a hostile environment for minorities.

In addition to expounding upon this argument, this chapter will assess the experiences of sexual minorities in Ghana in order to provide a much-needed case study of LGBT rights across the African continent. This chapter proposes that courts of law, both domestic and international, can act as alternative options for the advancement and enforcement of sexual minority rights in instances where the majority of citizens in a democratic state are opposed to these rights.

Sexual minorities: past and present

Across much of Africa, the supposition that identity may be (primarily?) based on one's sexual orientation is a novel concept, just as it was in nineteenth-century Western societies when words like "homosexual" and "heterosexual" were first used to categorize sexualities (Foucault 1978).[1] However, Africans who did not conform to heteronormative sexuality have, of course, always existed on the continent and several societies had cultural practices and norms that acknowledged or even affirmed sexual and gender diversity, albeit mostly within a cloak of silence or ritual meanings (Tamale 2011; Andam 2019). For example, there exists documentation about how the practice of labia minora elongation, common among diverse societies in Eastern and Southern Africa, created an environment in which women could engage in self-pleasure and have intimate relations with other women (Pérez, Bagnol, and Aznar 2014).

Certain social customs expressly included sexual acts between persons of the same sex. For example, among the Azandes of Central Africa, male warriors took young men as "boy wives"

after asking for their hands in marriage with a spear—similar to the marriage procedure in opposite sex marriages (Larken 1926, 24). These boy wives shared matrimonial beds with their warriors and played marital roles typically associated with women in Zande society, including fetching water for their warriors and carrying firewood (Evans-Pritchard 1970). Similarly, among the Hausas and Wolof, sex workers who rendered sexual services to persons of the same sex were common. Both the *yan daudu* (feminine men) of the Hausas (West Africa) and the *gor-digen* (men-women) of the Wolof (West Africa) crossed boundaries related to the role of the sexes and sustained a living from engaging in sexual acts with persons of the same sex (Murray and Roscoe 1998; Gaudio 2009; Mbaye 2018).

As will be explained in the sub-section on Ghana below, colonialism initiated the introduction of laws against same-sex intimacy as well as the development of mores and beliefs that classified homosexuality as aberrant and an abomination. For example, in most British colonies the rules of the common law were introduced, along with homophobic edicts. Following independence, countries tended to leave these colonial-era laws on their statutes in the form of "unnatural carnal knowledge" laws that criminalized same sex intercourse between two males (Cowell 2010). In a few cases where the colonialists had not explicitly criminalized homosexual acts (as was the case in Francophone Africa), new laws were introduced postindependence (Cameroon, for example, in 1972).

There was also a steep change in attitudes towards homosexuality both during and after the colonial period due to factors examined in the sections below. This trend—towards intolerance—has evidently escalated in many African countries since the 1990s. Records from Amnesty International (2013) indicate that homophobic attacks in Africa have since become more visible. Human Rights Watch has similarly published several documents issuing warnings about increasing homophobia on the continent, with the most recent article of this nature focusing on Ghana (Isaack 2018). The murders of leading sexual minority rights activists such as David Kato (Uganda), Eric Lembembe (Cameroon), and FannyAnn Eddy (Sierra Leone) have served as stark reminders of the reality encountered by many African sexual minorities daily.

In keeping with the growing prominence of homophobia across the continent, new draconian laws are frequently being passed to criminalize sexual minorities. Thus, in 2014 alone, The Gambia, Nigeria, and Uganda all passed new laws banning homosexuality—pejoratively nicknamed as "Jail-the-Gay" and "Kill-the-Gay" laws—although Uganda's law was subsequently ruled unconstitutional by the country's Constitutional Court.

Factors driving homophobia

How do we account for the expressions of homophobia that currently manifest across the continent? One theory is that since diverse sexualities existed within a culture of silence across Africa, accompanied by the tacit endorsement of society, the hyper-visibility of the LGBT community in the late 1990s and 2000s led to a backlash steeped in "anxious masculinities" (Msibi 2011, 55). Per this explanation, the liberation of women and existence of sexual diversity threatens patriarchal expressions of masculinity. Hence, strict laws are passed to simultaneously restrict women's rights as well as the rights of LGBTs. This would account for Uganda's "Kill the Gays Law" (Anti-Homosexuality Act, 2014), which was legislated in December 2013—the same month that the "Mini-Skirt Law" (Anti-Pornography Act, 2014), which legitimized and encouraged violence against women perceived to be indecently attired, was also legislated (Vorhölter 2017).

A second perspective contends that current narratives around homosexuality in Africa posit it as a white man's disease—a moral corruption that was imported from the West. Fighting against homosexuality is thus framed as a form of modern-day independence struggle against

neocolonialism (Epprecht 2014, 203–4). These narratives of a "pure" Africa date back to the early days of the independence struggle when some formally educated Africans contested colonial attitudes of Africans as "primitive savages" with counter-narratives of a morally superior Africa (Hoad 2007). Robert Mugabe is a notable example of the generation of "freedom fighters" who characterized homosexuality as an imposition from the West. Neocolonialism is real, and painfully manifest in the various forms of structural adjustment and neoliberal disciplining that Africa has been subjected to for several decades. The irony, however, is that scapegoating sexual minorities as an avatar of neocolonialism masks African leaders' own complicity in ushering neoliberalism into place.

Religion is another factor said to be driving homophobia in Africa. Christian, Muslim, and traditional faith leaders in Africa have all publicly condemned homosexuality and backed laws to criminalize same-sex relations. For example, Peter Akinola, the former Anglican archbishop of the Church of Nigeria, was a vocal supporter of legislation, such as the Nigeria's Same-Sex (Prohibition) Act (2013), which criminalized both public displays of affection between persons of the same sex and participation in LGBT organizations under penalty of a ten-year incarceration sentence (Kaye 2011). Mob attacks on LGBT individuals increased during the Ebola crisis in Liberia in 2014 as religious leaders blamed sexual minorities for invoking the wrath of God, which some claimed had caused the crisis (Hussain and Caspani 2014). Indeed, the role of religious leaders in promulgating homophobia across Africa has been so prominent that Leo Igwe, the founder of Nigeria's Humanist Movement, described Nigerian and African homophobia as principally emanating from religion (Ireland 2013, 53).

Western evangelicals were also linked with spreading homophobia in Nigeria and encouraging legislators to pass laws criminalizing homosexuality. Christian groups, particularly in North America, who feel that they have lost the cultural wars on sexual minority rights in their own societies, have looked towards Africa as a place where they can influence political actions and suppress sexual minority rights. For example, Kaoma (2012) has documented how conservative Christians from the US encouraged Ugandan politicians to pass laws to criminalize sexual minorities. Beyond this, as he maintains, the "Christian right has been involved in legislative or constitutional efforts to crack down on the LGBT populations of Kenya, Liberia, Namibia, Nigeria, Malawi, Rwanda, Zambia, and Zimbabwe" (Kaoma 2012, 45).

Fundamentalist faith traditions are especially antagonistic to sexual and gender diversity (Epprecht 2014, 203–4). This is particularly relevant given that many Africans have embraced such faith traditions in the decades following independence, in large part due to socioeconomic instabilities that have undercut faith in the capitalist progress/development narrative (see Patterson, this volume). Increasingly fundamentalist practices of Islam in places such as northern Nigeria have also led to greater hostility to homosexuality. This includes persecution of the *yan daudu*, who had hitherto been tolerated for at least a century (Mark 2013). In 2014, for example, a mob attempted to stone persons on trial for homosexual conduct in a Sharia court in Bauchi, Nigeria, asserting that God had instructed them to punish the individuals (Mark 2014). Furthermore, Grossman's (2015) research indicates that the "salience" of LGBT-related issues increases with the size of the population embracing "Renewalist" Christianity, which encompasses Charismatic, Evangelical, and Pentecostal faith traditions. Moreover, the impact of religion in terms of hostility to LGBT persons may be accentuated in certain democratic contexts. Grossman (2015) asserts that African churches maintain a unique influence on citizens and are therefore able to steer their supporters towards issues the churches deem important. Having the blessing of the church is necessary for consolidating political power and this allows churches to have a strong voice in national issues. Furthermore, since churches are among the few non-governmental institutions in African countries to wield resources and an ability to mobilize the populace, Grossman contends

that politicians may find it advantageous to engage in morality politics in which they scapegoat vulnerable groups, such as sexual minorities. In turn, as his research confirms, the impact of Renewalist Christianity is especially heightened in settings where politicians must compete for political support and hence have an interest in appealing to morality issues.

The case of Ghana

Democracy has been vigorously promoted as the solution to Africa's human rights problems. And yet, across Africa, enhanced democracy has not necessarily led to the safeguarding of human rights, including the rights of sexual minorities—indeed, the exact opposite has often happened. For example, following the death of Nigeria's military leader, Sani Abacha, in 1998, the country moved closer to democracy. However, it simultaneously steered further away from protecting its LGBT community and passed even more stringent laws prohibiting same-sex conduct. This offers an illustration of Grossman's (2015) claim that competitive political climates—a key attribute of democratic regimes—are linked to a high probability for African politicians to turn to morality politics in a bid to win support from deeply religious constituents (Grossman 2015).

Ghana presents a useful case study on this matter, especially as it highlights issues that could arise for sexual minorities in other African democracies. Ghana is often held up as an example of a stable democracy in Africa, having transitioned from a period of intermittent coups following independence in 1957 into an enduring democracy. President Obama once famously described Ghana as the "model of democracy" in Africa and as a success story due to the country's economic growth and multiple, peaceful transfers of power (Karimi 2012). Despite these strides in democracy, however, conditions have deteriorated for sexual minorities. In an Amnesty International study published in 2013, Ghana was one of the countries found to have experienced visibly increased levels of homophobia. The oppression of sexual minorities is often used to score points in the highly competitive Ghanaian political sphere. In this regard, any time a politician appears to take a stance that is even minutely supportive of LGBTs, opposing parties capitalize on this inclusive stance to label that politician as morally bankrupt. For example, ever since it was revealed that the openly gay writer Andrew Solomon was an acquaintance of President John Mahama of the New Democratic Congress (NDC) (Solomon 2013), several conspiratorial rumors have emerged. These include an assertion by the regional vice-chairman of the opposing New Patriotic Party (NPP) that Solomon was funding Mahama's campaign in exchange for legalizing same-sex marriage in Ghana (Kaku 2018). Conversely, several months after his electoral victory in January 2017, President Akufo-Addo of the NPP stated that same-sex marriage would eventually happen in Ghana (*Daily Graphic* 2017), to which the General Secretary of the NDC mockingly told a crowd in Ghana, "[President] Addo says men will marry men, and women will marry women" (Kaku 2018).

Despite these regular and often mocking references to sexual minority rights, Ghana's LGBT rights trajectory remains comparatively stable. While some countries on the continent, such as Nigeria, The Gambia, and Uganda, have taken steps to worsen the plight of sexual minorities by legislating stringent laws with severe penalties, Ghana has taken no such steps. However, neither has it pushed for gains in their rights, like, for example, South Africa. Consequently, it is arguable that Ghana could serve as an instructive case study precisely because of its lack of legislative progression vis-à-vis LGBT rights—a situation that remains the norm across the continent, despite the aforementioned outliers.

As is the case in much of Africa, there are several accounts of the presence of sexual minorities in Ghana in precolonial times and many Ghanaian societies engaged in cultural

practices that affirmed same-sex intimacy. For example, *Agɔnwole agyalɛ* (friendship marriage) was a same-sex marriage tradition observed by the Nzema ethnic group. Friends of the same sex could get married if they were physically attracted to each other and harbored mutual love for each other. Marriage ceremonies for this type of relationship were similar to those for opposite-sex couples, including payment of a bride price and sharing a matrimonial bed (Signorini 1973, 226). Similarly, among the Akwamus and the Ashantis, male royals were said to take the men they were attracted to as consorts and shower them with love and affection (Reindorf 1895).

However, colonial political and economic structures, the introduction of Christianity and Islam, and cultural mores against public discussions of sex caused many of these traditions to disappear (Tamale 2011; Epprecht 2008). In their place, a myth was widely circulated that there were no African sexual minorities before Europeans traveled to the continent. For example, the A*gɔnwole agyalɛ* practice had become obsolete by the time Grottanelli (1988) conducted research in Ghana in the 1960s; and, a decade later, a researcher was astounded to interview several Ghanaian men who admitted to having sexual intercourse with men but denied the existence of sexual minorities in Africa (Ajen 1998, 129). Similarly, market women in erotic relationships with women deny they are lesbian (or the local derogatory term *supi)*, while aspiring to be "relationally men" and masculine in comportment (Dankwa 2013).

At the time of publication, Ghana's Criminal Code outlaws same-sex intercourse between men and makes it a misdemeanor punishable by imprisonment for up to three years. This law originated from Victorian-era "anti-sodomy" British laws, which Ghana adopted in its Courts Ordinance of 1935 that in effect transferred all the laws of England that were in effect on July 24, 1874. Some of these laws have since been repealed but many, including the laws against sodomy, have been incorporated into Ghana's current laws. Ghana's Criminal Code thus outlaws "unnatural carnal knowledge" and Ghanaian courts have maintained the common law interpretation of unnatural carnal knowledge as penile penetration of body orifices apart from the vagina. This automatically criminalizes anal sex and fellatio between both same-sex and heterosexual couples, but, to date, only same-sex couples have been targeted under this law. As female sexual minorities do not have penises, they cannot be penalized under this law. However, this does not preclude them from harassment and abuse at the hands of members of their communities. Ghanaian sexual minorities of all types are physically assaulted, raped, subjected to extortion, thrown out of schools and/or their homes, denied medical services, and subjected to diverse forms of discrimination at their places of work. The police either tacitly support these atrocities or refuse to address them when they occur (Isaack 2018).

As discussed above, political leaders in the country have had little interest in safeguarding the rights of sexual minorities. Many of these leaders have perceived that they would gain public support, enhanced popularity, and political capital by denouncing LGBTs. As such, it is common for homophobia to be used for political expediency both immediately before election periods and soon thereafter as the new government settles into office. As has been the case in other African countries (Hoad 2007), homophobia is also used to forge a national identity, assert independence from the West, and proclaim one's status as a true African/Ghanaian. After Prime Minister David Cameron of the UK threatened to withhold aid to countries that refused to protect the human rights of its citizens—including LGBTs—President Mills famously stated that Ghana would never defend the rights of sexual minorities and accused the UK of bullying Ghana into accepting its values (Kretz 2013, 214).

How then can sexual minority rights be safeguarded? What options exist for enforcing LGBT rights in democratic societies like Ghana where the majority of the populace are anti-LGBT? Evidence from across Africa and beyond suggests that the law courts could provide an

option for enforcing sexual minority rights in a democratic climate where most citizens support the abuse of sexual minorities.

Using the law courts as a safeguarding strategy

Following independence, as African countries experienced periods of political turmoil including numerous coups, it was routine for certain institutions of the government, such as legislatures, to be dismantled or substantially enfeebled (see Opalo, this volume). However, in some states like Ghana, the judiciary, as an institution, was not completely dismantled despite facing several serious challenges, including the massacre of three high court judges by members of the military government in 1982 (Gocking 2005).

When judicial independence is not completely eroded, it can still play a critical role in enforcing civil liberties, and this role can be crucial in young states that are still working towards building solid democracies (see Ellett, this volume). In the early 1990s, for example, as Ghana transitioned from a military regime to a democracy, Ghana's Supreme Court occasionally ruled against the government to safeguard the human rights of its citizens. For instance, in *New Patriotic Party v. Attorney-General* (1993–94) Ghana's Supreme Court barred the government from celebrating the anniversary of the coup that catapulted the president into power in 1981, on the grounds that a military takeover was inherently counter to democratic norms. For this reason, the courts present a potentially viable platform for the enforcement of minority rights, including LGBT rights; indeed this has been the case in several African countries within the past decade. One of the most well-known cases on this issue is *Oloka-Onyango and 9 Others v. Attorney General*, which was heard by Uganda's Constitutional Court in 2014. In its decision, the Constitutional Court struck down the Anti-Homosexuality Act enacted that year as unconstitutional because the legislature lacked quorum when the law was passed (Smith 2014). Similarly, there remains, at time of publication, a case pending before a High Court in Kenya seeking to repeal Kenya's version of the "unnatural carnal knowledge" law that Britain introduced into most of her colonies to penalize male sexual minorities (Duggan 2018).

Cases of this nature directly address the laws that are used as a basis to persecute LGBTs and provide legal basis for sexual minorities to enforce their rights. Court rulings nullifying such discriminatory laws do not automatically translate into less persecution for LGBTs in practice, as homophobia is often pervasive and institutionalized. Thus while they are often a first step towards LGBTs being able to organize against societal oppression, there are some potential setbacks to this approach. First, judges are products of their societies and may share many of their society's views. Proponents of the realist jurisprudential approach to law, like Justice Oliver Wendell Holmes, have theorized that in making decisions, judges are less influenced by objective rules than they are by their conceptions of fairness, public policy, and other personal values that they share with the ordinary citizen (Holmes 2005). If that is the case, then it might be extremely optimistic to expect judges in sexually conservative countries such as Ghana to deliver judgments in favor of sexual minority rights when they are products of societies that largely perceive homosexuality as unacceptable. In this regard, it must be noted that even in Uganda, the Constitutional Court did not rule the anti-gay law to be null and void because it abused the human rights of sexual minorities. On the contrary, the court's decision in the Oloka-Onyango case revolved around a lack of quorum in the legislature. Consequently, the decision that will be rendered in the Kenyan LGBT case currently pending before the courts of law will shed some light on the likelihood of judges delivering judgments to affirm the rights of sexual minorities despite the majority of the citizenry being vehemently opposed to such rights.

A second potential limit to this approach is the fact that, where the majority of the population holds bigoted opinions against the minority, they often proceed to abuse the rights of the minority even after discriminatory laws are abolished; institutionalized oppression may still be maintained despite the repeal of such laws. For example, although the aforementioned Brown case overturned racial segregation in American public schools in 1954, black, Latino, and Native American children in the US continue to encounter significant barriers to obtaining an education a full half-century later (Annie E. Casey Foundation 2014). In a similar vein, the 2014 Pew Research study shows that 61 percent of South Africans find homosexuality unacceptable despite the fact that South Africa was one of the first countries in the world to secure the rights of sexual minorities in its Constitution. Section 9(3) of the South African Constitution (1996) prohibits discrimination on the basis of sexual orientation, yet widespread homophobia has led to a spate of "corrective rape" against lesbians amid other atrocities committed against LGBT individuals in that country (Smith 2015; Pew Research Center 2014). When courts rule in favor of minorities contrary to popular opinion, they risk a backlash against the judicial system itself and against the minorities whose rights the judiciary seek to protect. Given that even progressive judges may be strategic in the rulings they make so as to limit the political backlash against them (see Ellett, this volume), an awareness of the public sensitivity to LGBT rights may also encourage judges to be more conservative in their dealings with such cases.

Given these realities, a second option is a more piecemeal approach to securing the rights of sexual minorities across Africa. Under this option, rather than petitioning to remove laws that criminalize homosexuality/same-sex acts, activists and LGBTs target other laws that indirectly discriminate against sexual minorities because of underlying heteronormative standards woven into such laws. Kenyan sexual minorities have experienced much success using this approach, with multiple court rulings affirming diverse aspects of sexual minority rights, including the outlaw of forced anal exams of suspected gay men (Michaelson 2018), ordering a name change on the certificate of a trans woman (Migiro 2014), and ruling that an intersex child was entitled to be issued a birth certificate (Mwendia 2014).

The disadvantage of these approaches stem from the fact that they do not address the overarching law that criminalizes LGBTs. In a hostile climate that makes the very existence of sexual minorities a crime, it is an uphill struggle to litigate for them to enjoy diverse aspects of their rights without dismantling the law that criminalizes them. Moreover, even where there are victories under this approach, they may be minimal, limited to the individual LGBTs whose rights were abused, and temporary so far as laws that classify their sexualities and gender identities remain in place. Nevertheless, the advantage of this incremental strategy is that it is less likely to encounter widespread opposition, as these kinds of cases do not deal specifically with ethical debates on sexual orientation and/or gender identity, but rather focus on all the diverse barriers that LGBTs face within their societies. Consequently, these cases may be easier for activists and sexual minorities to win. And, ultimately, decriminalizing homosexuality may be an easier task in a society where LGBTs have won multiple piecemeal victories over the years.

In discussing alternatives for enforcing the civil rights of blacks in a majority white society, Malcolm X advocated the use of international solutions (Asad 2000). He believed that the US would never provide blacks with complete equality. However, in international fora such as the United Nations, blacks could find allies in Africans and other people of color. As discussed earlier, judges in countries like Ghana, where an overwhelming majority of the country is opposed to LGBT rights, may not be ready to deliver judgments safeguarding LGBTs from persecution. In such situations, African sexual minorities may experience greater successes in international courts than they would in their home countries.

Although international courts provide a platform for the enforcement of African LGBT rights, it is important to note that this platform is severely limited by the fact that there are few international courts that prosecute human rights issues and even fewer courts that permit individuals, as opposed to states, to file claims before them. The African Court on Human and Peoples' Rights is an avenue where African sexual minorities could seek redress for the state sanctioned abuses they encounter. In this regard, there are several clauses of the African Charter on Human and Peoples Rights that African LGBTs can stand on in petitioning for their rights to be enforced. Article 2 prohibits discrimination against individuals and provides examples of categorizations that could be used to discriminate against persons. This provision does not specifically mention "sexual orientation" as a category. However, in discussing possible grounds for discrimination, it uses the words "such as," indicating that the list provided is not exhaustive. There is also the possibility of reading the word "sex" in this section of the Charter to include sexual orientation and gender identity. Other useful provisions include Article 3, which provides equal protection under the law, Article 5, which endows individuals with a right to dignity, and Article 6, which provides a right to liberty and security of person.

However, the Charter is also riddled with various broad claw-back provisions that could serve as stumbling blocks to sexual minority rights. For example, Article 17 charges states to promote morals and traditional values, while Article 18 states that the family is the natural basis of society and that the state should assist the family in its duty as the custodian of morals and traditional values. It is easy to see how these could be interpreted as an endorsement of heteronormative values or homophobia disguised as "traditional" values and morality due to the entrenched perception that homosexuality threatens national values (Johnson 2013, 273). Similarly, Article 27 states that individuals have duties towards their families and societies and that the rights of individuals should be exercised with regard to the rights of others, collective security, morality, and common interests. This provision could be used by states to justify their persecution of sexual minorities on the basis of popular opinion and morality.

Finally, regional courts of international organizations typically depend on state members for enforcement, and the African Court on Human and Peoples' Rights is no exception (Cole 2010, 24). There are thus several potential stumbling blocks to the enforcement of any future decisions that could be in favor of sexual minorities including perceived national interests, a desire to defend state sovereignty, and the power imbalance between the parties to the dispute—namely the oppressed minorities versus the state.

A second international platform that is available for African sexual minorities are domestic courts in other lands. The active role that foreign missionaries play in inciting hatred towards African sexual minorities has been discussed above. However, it may be that the laws of the country from which the missionary originated makes these activities illegal. Consequently, the courts in these states could be petitioned to restrain such missionaries from inciting homophobia or to hold them responsible for such actions. In 2017, for example, a US court declined jurisdiction in a case brought before the court by Sexual Minorities Uganda (SMUG) against Scott Lively, an American pastor who incited Ugandans to persecute LGBTs. However, in a ruling that SMUG considered a victory, the court admitted that SMUG's evidence showed that Lively had incited hatred against Ugandan sexual minorities and campaigned against their human rights (Center for Constitutional Rights 2017).

Conclusion

Democracy often leads to enhanced human rights protections for citizens because this system of governance espouses principles that support diversity of opinions and liberty to express the

same. However, because democracy in practice revolves around the enforcement of majority perspectives, and because political candidates frequently court the support of undecided voters, democracy itself can encourage the oppression of minorities when prejudice and intolerance are widespread and abetted by socioeconomic stresses.

Consequently, in advocating for democracy, governments, human rights organizations, stakeholders, civil society, and activists must be realistic about its potential drawbacks for marginalized persons and institute checks and balances to ensure that democracy does not become synonymous with hegemony and oppression. The limitations of democratic institutions and democracy make courts one of the most viable paths for the protection of sexual minority rights. With this in mind, future research might explore the challenges encountered when the courts of law are used to safeguard minority rights, best practices to safeguard the judiciary's independence so that they can deliver opinions that may not be palatable to a majority of the public, and the ethical issues raised when courts of law pass judgments that are against the will of the public, including arguments against "judicial lawmaking."

Note

1 See Chiang (2019) for a global overview of this history, and for a rich documentation of African evidence that supports the points made in this chapter.

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