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## AGAINST ‘THE ORDER OF NATURE’: TOWARDS THE GROWTH OF QUEER LAWFARE IN NIGERIA

*Ayodele Sogunro\**

### 1 Introduction

If we think of queer lawfare as ‘legalised contestations over the rights of lesbian, gay, bisexual, and transgender (LGBT+) people on the African continent through court cases, constitutional amendments, legal changes, and “rights talk”, then Nigerian jurisprudence remains very rudimentary. Certainly, the Nigerian legal system has never shied away from producing diverse laws criminalising or prohibiting non-heteronormative sexual conduct and gender identity. Yet, in comparison to the plethora of legislation, queer lawfare is very minimal and it is only recent that activists have started to use the rights, the law, and courts as part of their strategy towards preventing LGBT+ discrimination and advancing inclusion in Nigeria.

Historically, Nigeria’s legal system derives its regulation of sexual orientation and gender identity and expression from received English law.<sup>1</sup> Accordingly, Nigeria’s legal legacy is based on a colonial legacy that conceives non-heteronormative sexuality and identity as ‘perversion’, often depicted in the language: ‘against the order of nature’.<sup>2</sup> More recently, this has come to be domesticated under ‘home-grown’ laws such as the Same Sex Marriage (Prohibition) Act, 2013 (SSMPA). As will be discussed in this chapter, the SSMPA is the outcome of legislative lobby by a powerful Christian elite in Nigeria, mostly in response to popular agitation for and ultimate legalisation of same-sex marriage in the United

\* Postdoctoral Fellow & Project Manager (Sexual Orientation, Gender Identity and Expression and Sex Characteristics Unit), Centre for Human Rights, Faculty of Law, University of Pretoria. The author wishes to acknowledge the contributions of Omolara Oriye and David Nnana Ikpo to an unpublished paper that was first developed while working on this chapter.

1 This consists of the common law of England, principles of equity, and English ‘statutes of general application’ enacted before 1900. AEW Park *The sources of Nigeria law* (1963); AO Obilade *The Nigerian legal system* (1979).

2 See, for example, Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004 (Criminal Code) sec 214.

States and the United Kingdom, rather than in response to any pro or anti-queer agitations at home. This lobby has purported to be the safeguard for religious and cultural values and, as the provisions of the SSMPA indicate, their goals are to seek out and punish actual or perceived homosexual orientation. In the same period, a similarly powerful Muslim elite in Nigeria's northern states had introduced Sharia criminal and 'morality' laws – including prescribing capital punishment for same-sex acts between men – to reinforce Islamic hegemony and consolidate their political power.

In essence, the criminalising laws in Nigeria were an outcome of calculated political strategies by the political elite, rather than popular agitation, and so precluded public debate on these laws. From the earliest colonial laws to the most recent laws, criminalising legislation on sexuality is often slipped into the statute books without the knowledge, involvement, or awareness of much of the public. At most, the public were only engaged through brief media coverage. As a political strategy, criminalising legislation also serves as a religious gift that reduces the need for political accountability on more topical issues, such as security and the economy. As such, even from the perspective of anti-queer activism, political strategy – rather than contestation over rights – has dominated the field. Within such a highly politicised environment where law and the meaning of rights takes second place to political power, the legal terrain is, arguably, full of uncertainties.

However, this does not mean there are no developments in queer lawfare. Despite the rudimentary legal situation, there is still an opportunity to increase the use of lawfare through strategic litigation and legal advocacy. Since 2016, a few activists and organisations in Nigeria have started to turn towards the use of lawfare to contest issues of sexual orientation and gender identity.

In this chapter, I discuss the broader political dynamics in Nigeria, both from a historical and legal perspective, and the extent to which these dynamics have influenced the use of lawfare in Nigeria and how queer activists have started navigating existing limitations to create, at least, an elementary queer lawfare process.

The rest of this chapter is divided into five sections. In the next section (section 2), I set the stage by reviewing the existing legal situation in Nigeria with an overview of the principal criminalising laws and their historical contexts. In section 3, I provide an in-depth picture of Nigeria's political developments over time in relation to queer lawfare, before proceeding to discuss the context of queer activism and its opposition in section 4. In section 5, I contemplate the various emergent themes from the preceding

sections and in section 6, I discuss the effect of political dynamics on queer lawfare, before concluding the chapter.

## 2 The legal situation in Nigeria

Nigeria currently criminalises same-sex relations under a medley of federal and state laws either inherited from colonial times or enacted after Nigeria's independence in 1960 by domestic legislatures.<sup>3</sup> The most pertinent federal laws are the Criminal Code Act (enacted in 1916); the Penal Code (Northern States) Federal Provisions Act (enacted in 1960); the Armed Forces Act (enacted in 1993); and the Same Sex Marriage (Prohibition) Act (SSMPA) (enacted in 2014). At the state level, some of the better-known laws are the Sharia Penal Code Law (adopted in twelve predominantly Muslim states in the North); the Same Sex Marriage (Prohibition) Law of Lagos State; the Prostitution and Immoral Acts (Prohibition) Law of Kano State; and the Prostitution, Lesbianism, Homosexuality, Operation of Brothels and Other Sexual Immoralities (Prohibition) Law of Borno State.

These laws offer a variety of prohibitions with a focus on same-sex relationships, especially relationships between men. For instance, the federal Criminal Code Act – the oldest of the laws – provides that a person who is found guilty of having ‘carnal knowledge of any person against the order of nature; or ... permits a male person to have carnal knowledge of him or her against the order of nature’ is liable to 14 years’ imprisonment.<sup>4</sup> The Criminal Code also penalises ‘any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him’.<sup>5</sup>

The SSMPA – the most recent and the most severe attempt at criminalisation of sexual orientation, gender identity and related issues – contains, inter alia, the following provisions:

- (1) A person who enters into a same sex marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years’ imprisonment.
- (2) A person who registers, operates or participates in gay clubs, societies and organization, or directly or indirectly makes public show of same

3 A Sogunro & D Fatunla *Bad laws: Compendium of laws discriminating against persons based on sexual orientation and gender identity expression in Nigeria* (2017).

4 Section 214 of the Criminal Code.

5 Section 217 of the Criminal Code.

sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years' imprisonment.

- (3) A person or group of persons who administers, witnesses, abets or aids the solemnization of a same sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years' imprisonment.

The state laws, even though they have less territorial application, are equally if not more hostile to the rights of LGBT+ persons. For example, the Prostitution, Lesbianism, Homosexuality, Operation of Brothels and Other Sexual Immoralities (Prohibition) Law of Borno State, enacted in 2000, has the following provisions:

3. Any person who engages in prostitution, lesbianism, homosexual acts or pimping in the State commits an offence.
7. Any person who engages in sexual intercourse with another person of the same gender shall upon conviction be punished with death.
10. Any person who screens, conceals, harbours or accommodates a prostitute, lesbian or homosexual person commits an offence and shall on conviction be liable to imprisonment for a term of one year or twenty-five thousand naira (N25,000.00) fine or to both such fine and imprisonment.

These federal and state laws, nevertheless, exist within the purported context of a liberal human rights framework, guaranteed under a Constitutional Bill of Rights, which came into force in 1999. This 1999 Constitution provides for, among other rights, the rights to privacy, assembly and association, expression, and freedom of conscience.<sup>6</sup> Nigeria has also ratified the major international human rights laws including the African Charter on Human and Peoples' Rights (African Charter),<sup>7</sup> which has also been domesticated as Nigerian law, the International Covenant on Civil and Political Rights,<sup>8</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>9</sup>

Clearly, there is a conflict between the constitutional rights and the invasive nature of the homophobic laws. Still, there has been no high-level

6 Constitution of the Federal Republic of Nigeria, 1999 (Nigerian Constitution) secs 37-40.

7 OAU African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

8 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999, p 171.

9 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993, p 3.

judicial interpretation of what the criminalising laws mean in relation to the constitutional rights and the overall objectives of the Nigerian society. Many of the cases reported in the media and non-governmental organisations (NGO) reports often involve trial level decisions solely based on the wording of the criminalising laws, with no mention or interrogation of the constitutional validity of these laws. Only in one notorious case: *Magaji v Nigerian Army*<sup>10</sup> – discussed later in this chapter – did the Supreme Court have an opportunity to engage the issues from a constitutional perspective but this was not brought before the court.

In the last five years, at least three legal challenges have been mounted against the SSMPA but none of these have advanced through the judicial system sufficiently to generate critical jurisprudence for queer lawfare.

### 3 Developments over time from a legal perspective

#### 3.1 The colonial legacy

The earliest legal provisions on sexual minorities for all of what is now known as Nigeria is traceable to the consolidated Criminal Code enacted by the British colonial government in 1916. The Criminal Code had been adapted from Australia's Queensland Criminal Code (as a form of codified English criminal law) and introduced to Nigeria via the colony of Lagos.<sup>11</sup> As noted in the previous section, the Criminal Code penalises same-sex relationships, using terms such as 'against the order of nature'.<sup>12</sup> Other provisions in the law<sup>13</sup> along the same lines were principally directed at discriminating against certain types of sexual acts as well as targeting male same-sex relationships. This was not unusual for Victorian era morality, particularly the discrimination in legal consequences flowing from male-and-male sex acts and male-and-female sex acts.<sup>14</sup> Between 1958 and 1959, 'sodomy' provisions were enacted by the regional government of the predominantly Muslim Northern Nigerian region under a Penal Code<sup>15</sup>

10 *Major Bello Magaji v The Nigerian Army* (2008) 8 Nigerian Weekly Law Reports (Pt1089) 338.

11 HF Morris 'How Nigeria got its criminal code' (1970) 14 *Journal of African Law* 137.

12 Section 214 of the Criminal Code.

13 Sections 215 & 217 of the Criminal Code.

14 There is an argument to be made that colonial law's concern with, and attribution of legal consequences to, sexual acts between men stems from a sexist ideal that places a higher social value – and consequent legal expectations – on males. However, considering the legislature's reluctance to pass a Gender Equality Bill, advocacy on gender equality in Nigeria has not necessarily fared better than that on sexual orientation and gender identity.

15 Morris (n 11) 153; Penal Code (Northern States) Federal Provisions Act Cap P3 Laws

derived from the colonial Indian Penal Code, although the Criminal Code continued to operate in the Southern region. After independence (and to date), the states that succeeded these two regions continue to use variations of the two Codes as the basis of their criminal laws.

Although these criminal law provisions reflected prevalent British morality rather than the moralities of Nigeria's pre-colonial states and societies,<sup>16</sup> the independent Nigeria state did not make any attempt to abolish these laws. This was ironic, considering that at the same time Nigeria was striving towards its independence from colonial rule, the British government was receiving the 1957 'Wolfenden Report' by the Committee on Homosexual Offences and Prostitution.<sup>17</sup> The recommendations of the 'Wolfenden Report' ultimately led to the decriminalisation of homosexual acts in England and Wales in 1967.<sup>18</sup> However, what the independent Nigerian government did do was adopt a Republican Constitution in 1963 that set out fundamental rights protection clauses, including freedom from discrimination based on 'sex',<sup>19</sup> although it had no specific provisions on LGBT+ related issues.

### 3.2 Military rule

Although there were no legal protections for LGBT+ persons in the country in the 1960s, there was recognition of a homosexual subculture, contrary to arguments that homosexuality has only recently been imported into Nigeria. For example, in January 1966 when the first military coup in Nigeria was executed, the coup leader, Major Nzeogwu stated in his coup announcement speech:<sup>20</sup>

You are hereby warned that looting, arson, homosexuality, rape, embezzlement, bribery or corruption, obstruction of the revolution, sabotage,

of the Federation of Nigeria 2004 (Penal Code) secs 284 & 405(2)(e).

16 Morris (n 11).

17 British Parliament 'Report of the Committee on Homosexual Offences and Prostitution' (1957) <https://www.bl.uk/collection-items/wolfenden-report-conclusion> (accessed 14 May 2022).

18 Sexual Offences Act 60 of 1967, sec 1.

19 Constitution of the Federation of Nigeria, 1963, sec 28.

20 'Radio broadcast by Major Chukwuma Kaduna Nzeogwu – announcing Nigeria's first military coup on Radio Nigeria, Kaduna on January 15, 1966' *Vanguard* 30 September 2010 <http://www.vanguardngr.com/2010/09/radio-broadcast-by-major-chukwuma-kaduna-nzeogwu-%E2%80%93-announcing-nigeria%E2%80%99s-first-military-coup-on-radio-nigeria-kaduna-on-january-15-1966/> (accessed 15 February 2022).

subversion, false alarms and assistance to foreign invaders, are all offences punishable by death sentence.

The coup was unsuccessful, but the civilian government was replaced by surviving top members of the armed forces. Fortunately for LGBT+ persons in Nigeria at the time, there was no more mention of the death sentence enactment for 'homosexuality'.

In 1979, Nigeria returned to civilian rule under a presidential style constitutional democracy. At face value, the push for democratic rule seems to suggest popular disapproval of authoritarian policies and a leaning towards human rights and, therefore, more tolerance towards sexual diversity and orientation. Thus, the 1979 Constitution, compared to the 1963 iteration, spelled out more elaborate fundamental rights and social policy objectives, including the previously recognised freedom from discrimination based on 'sex'.<sup>21</sup> But the possibility of an opportunity to test the discriminatory provisions of the Criminal Code and Penal Code against the newly established constitutional rights was terminated when Nigeria came under military rule again in 1984. The new government, led by Muhammadu Buhari, claimed to focus on eradicating 'indiscipline' from the country but it was replaced in a countercoup in just over a year. During this period, a wave of American-style Pentecostal evangelism surfaced in the country. Economic recession motivated more people to turn to religious institutions to fill the gaps in governance, and religious organisations increased in number and relevance.<sup>22</sup>

Nevertheless, the existence of a homosexual subculture did not go unremarked. For example, in some similarity to Nzeogwu's 1966 speech, the leader of an attempted coup in 1990 stated in his speech:<sup>23</sup>

I, Major Gideon Orkar, wish to happily inform you of the successful ousting of the dictatorial, corrupt, drug baronish, evil man, deceitful, homosexually-

21 Sections 15(2), 17(3) & 39(1) of the Constitution of the Federal Republic of Nigeria, 1979.

22 BCD Diara & NG Onah 'The phenomenal growth of Pentecostalism in the contemporary Nigerian society: A challenge to mainline churches' (2014) 5 *Mediterranean Journal of Social Sciences* 395 at 398 <http://www.mcser.org/journal/index.php/mjss/article/view/2432> (accessed 15 February 2022).

23 'April 1990 coup d'état speech' <https://dawodu.com/orkar.htm> (accessed 15 February 2022).

centred, prodigalistic, un-patriotic administration of General Ibrahim Badamosi Babangida.

This coup was also unsuccessful, and the sponsors were arrested and executed. The 1990s in Nigeria demonstrated what Jjuuko describes as ‘the third wave of homophobia’.<sup>24</sup> A process to return to civil rule in 1993 was frustrated by the military government. General Sani Abacha assumed power and subsequently imprisoned the president-elect, Moshood Abiola. The political tensions reflected on the Nigerian economy, which deteriorated and further worsened public educational, health, and other social services. Evangelical Christianity became more prevalent, accompanied by faith healing and rising public confidence in religious authority and their often-homophobic statements.<sup>25</sup>

It is noteworthy that the same-sex discriminatory provisions of the Criminal Code would later find another home under the Armed Forces Decree of 1993.<sup>26</sup> Section 81(l)(a) of that Decree prescribes a term of imprisonment of up to 7 years for anyone who ‘has carnal knowledge of a person against the order of nature’. The decree is still in force. In 1997, Major Bello Magaji of the Nigerian Army was arraigned before a General Court Martial on a charge of sodomy contrary to the Armed Forces Decree. The accused was found guilty by the General Court Martial and sentenced to 7 years in prison. The accused appealed to the Court of Appeal and then to the Supreme Court. The Supreme Court gave its judgment in 2008, reported in *Magaji v Nigerian Army*.<sup>27</sup>

Meanwhile, between 1998 and 1999, a democratic transition in Nigeria was triggered, following the sudden deaths of both General Abacha and Moshood Abiola in 1998. Civilian rule was restored in May 1999 under a Constitution similar to the truncated 1979 version. Amongst other rights embedded in the currently governing Constitution of the Federal Republic of Nigeria 1999 (Nigerian Constitution) are the rights

24 A Jjuuko ‘The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges’ in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 264.

25 MS Umar ‘The politics of ethno-religious balancing and the struggle for power in Nigeria’ in JG Cooke & R Downie (eds) *Religious authority and the state in Africa: A report of the CSIS Africa program* (2015) 75-79.

26 Armed Forces Act Cap A20 Laws of the Federation of Nigeria, 2004, sec 81. Although enacted as a military decree, transitional provisions under the Constitution of the Federal Republic of Nigeria, 1999 (Nigerian Constitution) automatically converted federal decrees into Acts as though they had been enacted by the National Assembly.

27 N 10. The appeal was dismissed and the court affirmed the sentence of the Court Martial.

to privacy, expression and freedom from discrimination on the basis of 'sex'.<sup>28</sup> The provisional military government hurried the drafting of the Nigerian Constitution through to meet the one-year transition deadline they had set and there were no public debates on its provisions.<sup>29</sup>

### 3.3 Civilian rule since 1999

It is hard to say that the democratic transition in 1999 was more tolerant of human rights. Almost immediately, in late 1999, politicians in the Northern states began to promise to enact and implement Sharia law as their state laws.<sup>30</sup> These promises were made despite the constitutional prohibition against the adoption of a state religion.<sup>31</sup> There was a brief period of national public debate on the constitutionality of adopting Sharia law but the northern politicians won the day and Sharia law was first domesticated in the Penal Code of Zamfara State. Under this law, sodomy was enacted as a capital offence, but that particular provision did not receive public attention. Instead, the public debates were focused on provisions criminalising adultery and its consequence of capital punishment.<sup>32</sup> Ultimately, 12 of the 36 Nigerian states adopted similar Sharia law provisions. In these states, 'sodomy' is punishable by stoning to death, while lesbianism is punishable with 50 lashes and up to six months' imprisonment.<sup>33</sup>

The merger of political interests and religious interests in Nigeria on issues of sexual orientation is further demonstrated by the series of events that followed the consecration of Gene Robinson – an openly gay priest – as a bishop of the Episcopal Church in the United States of America (USA). The consecration prompted the Anglican Church in Nigeria to declare itself in 'impaired communion' with the Episcopal Church in

28 Sections 15(2), 17(3) & 42(1) of the Nigerian Constitution.

29 E Teniola 'The 1999 corrigenda' *PremiumTimesng.com* 7 November 2013 <https://www.premiumtimesng.com/opinion/149240-1999-corrigenda-eric-teniola.html> (accessed 15 February 2022).

30 HRW "'Political Shari'a'? Human Rights and Islamic Law in Northern Nigeria' (21 September 2004) <https://www.hrw.org/report/2004/09/21/political-sharia/human-rights-and-islamic-law-northern-nigeria> (accessed 5 July 2022).

31 Section 10 of the Nigerian Constitution.

32 'Convicted adulterer is the first man in Nigeria sentenced to death by stoning' *The Irish Times* 28 June 2002 <https://www.irishtimes.com/news/convicted-adulterer-is-the-first-man-in-nigeria-sentenced-to-death-by-stoning-1.1062171> (accessed 15 February 2022).

33 Chapter VIII (*Hudud* and *Hudud*-related offences) of the Sharia penal codes in the relevant Northern Nigerian states, secs 129, 130, 133 and 134.

the United States in 2003.<sup>34</sup> Political rhetoric in Nigeria supported the position of the Anglican Church in Nigeria and, in the year that followed, President Olusegun Obasanjo described homosexuality as ‘unbiblical, unnatural and definitely unAfrican’.<sup>35</sup> Obasanjo’s attitude reflected either public unawareness of the history of sexual minorities in Nigeria (and Africa) or a deliberate attempt to restyle Victorian England mores as ‘African’ values. Unsurprisingly, many African leaders have used this same argument of ‘not African’ to push policies that discriminate against sexual minorities.<sup>36</sup> Arguably, it is easier to promote oppressive policies in the guise of safeguarding African independence from foreign influence.

More encouragingly, the attempt to impose a false narrative on sexual minorities in Nigeria prompted the rise of activism by sexual minorities in Nigeria as well as elsewhere in Africa.<sup>37</sup> In October 2004, a gay-rights activist, Bisi Alimi, made his sexual orientation known publicly (perhaps the first Nigerian to do this) on a popular live TV breakfast show, ‘New Dawn with Funmi Iyanda’. This attempt to show the public evidence of an ‘African’ gay man was not received well by the authorities: the show’s live-television format was cancelled soon after.<sup>38</sup> Nevertheless, the issue of sexual minorities had become part of public debate. In January 2006, the Same Gender (Marriage) Prohibition Bill was proposed in the federal legislature.<sup>39</sup> The Bill intended to prohibit same-sex marriages, homosexual identity and any advocacy regarding same-sex relationships in Nigeria and punish these with up to five years’ imprisonment. The Bill was unsuccessful. It would later be amended and tabled again in 2008, and again in 2011 before receiving widespread media coverage to, arguably mixed public opinion and, eventually, legislative approval.

34 J Nunley ‘Anglican provinces declare “impaired” or “broken” relationship with ECUSA’ *Anglicannews.org* 9 December 2003 <http://www.anglicannews.org/news/2003/12/anglican-provinces-declare-impaired-or-broken-relationship-with-ecusa.aspx> (accessed 15 February 2022).

35 ‘Obasanjo backs bishops over gays’ *BBC News* 27 October 2004 <http://news.bbc.co.uk/2/hi/africa/3955145.stm> (accessed 15 February 2022).

36 ST Ebobrah ‘Africanising human rights in the 21st century: Gay rights, African values and the dilemma of the African legislator’ (2012) 1 *International Human Rights Law Review* 110 at 113.

37 Jjuuko (n 24 above) 265.

38 H Ahmed ‘Funmi Iyanda gave me opportunity to disclose I’m gay – Bisi Alimi’ *Qed.ng* 6 October 2016 <https://www.qed.ng/funmi-iyanda-gave-opportunity-disclose-im-gay-bisi-alimi/> (accessed 15 February 2022).

39 HRW ‘Nigeria: Obasanjo must withdraw bill to criminalize gay rights’ (23 March 2006) <https://www.hrw.org/news/2006/03/23/nigeria-obasanjo-must-withdraw-bill-criminalize-gay-rights> (accessed 15 February 2022).

Although that Bill was unsuccessful at the federal legislature, a related bill found approval in the Lagos legislature. In 2007, Lagos State enacted the Same Sex Marriage (Prohibition) Law. The law prohibited and criminalised same-sex marriage with up to 10 years' imprisonment, although it did not specifically criminalise sexual orientation or non-marital same-sex relationships. It is significant that this law was introduced in the most cosmopolitan and arguably the most socially liberal state in Nigeria. The lesson here is that liberal social values will not necessarily outweigh a combination of conservative political and religious forces.<sup>40</sup> Yet, Lagos State is a typical example of Nigeria's tensions between its colonial-religious heritage and its aim for constitutional democracy.<sup>41</sup> For example, Lagos State enacted the Criminal Law of Lagos State 2011, which repealed the Criminal Code and removed the colonial provisions on sodomy and 'offences against the order of nature'. Instead, these were replaced by a prohibition against 'indecent' acts and practices.<sup>42</sup>

At the federal level, political expediency reignited the debate on sexual minorities. Between 2012 and 2014, the Goodluck Jonathan administration was under attack due to growing concerns on public corruption and the Boko Haram terrorism in the country's North East. Perhaps as a populist measure in view of pending general elections in 2015, the dormant Same Sex Marriage (Prohibition) Bill was revisited by the legislature and eventually passed. Although originally sponsored by the opposition Action Congress of Nigeria (ACN), the ruling party – People's Democratic Party – adopted the Bill and passed it into law. In January 2014, President Jonathan signed the Bill into law spiking public debates on LGBT+ issues with public opinion being widely in support of the law.<sup>43</sup>

40 At this time, Lagos state was under the control of the (then) opposition party (Action Congress of Nigeria (ACN), later merged with other opposition parties into the currently ruling All Progressives Congress (APC)).

41 A Sogunro 'One more nation bound in freedom' (2014) 114 *Transition: An International Review* 47 at 54-57.

42 Criminal Law of Lagos State 2011, secs 134 & 136. The broad usage of the word 'indecent' still opens these provisions to abuse, especially since the advent of the SSMPLA.

43 'Anti-gay law: Lawyers urge FG not to succumb to foreign pressure' *Vanguard* 16 January 2014 <https://www.vanguardngr.com/2014/01/anti-gay-law-lawyers-urge-fg-succumb-foreign-pressure/> (accessed 15 February 2022).

### 3.4 The Same Sex Marriage (Prohibition) Act and its aftermath

Various authors and reports have discussed the provisions of Nigeria's SSMPA.<sup>44</sup> Comments on the SSMPA have ranged from 'draconian' to 'inconsistent with Nigeria's international legal obligations'.<sup>45</sup> The SSMPA prohibits same-sex cohabitation, same-sex marriage, public or private displays of any same-sex relationship, and advocacy or support for same-sex relationships.<sup>46</sup> These are punishable by prison sentences of between 10 and 14 years. Since the enactment of the SSMPA, there has been a recorded increase in arbitrary arrests of actual or suspected gay men in Nigeria including several cases of mass arrests.<sup>47</sup> None of these arrests have sparked significant religious or political disapproval. Meanwhile, public education in Nigeria on sexual minorities continues to be noticeably poor.<sup>48</sup> Media reports feature gay and lesbians being publicly shamed, assaulted or even killed with little or no outcry. It was without much public disbelief that the vice-president of the Nigeria Football Federation made a statement that 'lesbianism is killing women's soccer'.<sup>49</sup>

Prior to leaving office, the Jonathan administration enacted the Violence Against Persons (Prohibition) Act, 2015. This law prohibits discrimination and violence against all Nigerians and, amongst others, makes it a criminal offence to cause or attempt to cause 'physical, sexual, psychological, verbal, emotional or economic harm'. However, the legislation applies only to the federal capital, Abuja. It is curious that Nigeria's National Assembly enacted the SSMPA, a discriminatory

44 See VO Ayeni 'Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same Sex Marriage (Prohibition) Act' in Namwase & Jjuuko (n 24) 203; Human Rights Watch "'Tell me where I can be safe" The impact of Nigeria's Same Sex Marriage (Prohibition) Act' (2016) [https://www.hrw.org/sites/default/files/report\\_pdf/nigeria1016\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/nigeria1016_web.pdf) (accessed 15 February 2022); PEN America Center 'Silenced voices, threatened lives: The impact of Nigeria's anti-LGBT law on freedom of expression' (2015) 16 [https://pen.org/sites/default/files/nigeriareport\\_FINAL\\_highres.pdf](https://pen.org/sites/default/files/nigeriareport_FINAL_highres.pdf) (accessed 15 February 2022); Sogunro (n 41).

45 'Nigeria anti-gay laws: Fears over new legislation' *BBC News* 14 January 2014 <http://news.bbc.co.uk/2/hi/africa/3955145.stm> (accessed 15 February 2022).

46 Secs 4 & 5 of the SSMPA. This book chapter could well fall within the very broad prohibitions of the law against supporting 'the ... operation and sustenance of gay clubs, societies, organizations, processions or meetings'.

47 Human Rights Watch (n 44).

48 PEN America Center (n 44) 16.

49 K Guilbert 'Women's soccer "lesbianism" row reflects homophobia in Nigeria: activists' *Reuters* 15 June 2016 <https://www.reuters.com/article/us-soccer-nigeria-lgbt-idUSKCN0Z124M> (accessed 15 February 2022).

law, for the entire country but restrained itself from legislating a non-discriminatory law for the same area of territory, for no apparent reason but possibly due to an unwillingness to confront more conservative states. In 2015, the Jonathan administration lost the general election and the APC (original sponsors of the SSMPA) became the ruling party. During a state visit to the United States, then new President Muhammadu Buhari of the APC reiterated his party's position when he informed President Obama: 'Sodomy is against the law of the country and abhorrent to our culture'<sup>50</sup> thus ending any notion that the new administration would take a more liberal position on LGBT+ rights.

However, while President Buhari was reiterating the politically expedient position, the former President Jonathan, at a speech in London, dissociated himself from the SSMPA, stating that he merely signed it into law in line with the will of the people. He, however, hinted at a possibility of the law being later reformed:

In the light of deepening debates for all Nigerians and other citizens of the world to be treated equally and without discrimination, and with the clear knowledge that the issue of sexual orientation is still evolving, the nation may, at the appropriate time, revisit the law.<sup>51</sup>

A few weeks later, after the Orlando shooting in the USA, President Jonathan – seemingly to backtrack from his administration's hardline position on LGBT+ rights – posted his condolences via Facebook and Twitter, an action that was met with some public condemnation in Nigeria.<sup>52</sup>

Between 2016 and 2017, discussions on LGBT+ issues faded from national debate. Economic issues had become more prominent due to unstable foreign exchange rates, increased inflation, and a shrinking economy. It also seems that the enactment of the SSMPA has given closure to the Nigerian public on this issue. Nevertheless, violations of the rights of LGBT+ persons continue daily, mostly unreported in the news.

50 N Ibeh 'Buhari "pointblank" on gay rights, says "No" to US – Presidency' *Premium Times* 22 July 2015 <http://www.premiumtimesng.com/news/top-news/187104-buhari-pointblank-on-gay-rights-says-no-to-u-s-presidency.html> (accessed 15 February 2022).

51 M Sotubo 'Read full text of ex-president's speech at Bloomberg Studios' *Pulse.ng* 6 June 2016 <http://pulse.ng/local/goodluck-jonathan-read-full-text-of-ex-president-s-speech-at-bloomberg-studios-id5118396.html> (accessed 15 February 2022).

52 E Chidimma 'Nigerians blast ex-president Jonathan for supporting homosexuals' *Buzz Nigeria* 14 June 2016 <https://web.archive.org/web/20170216111802/https://buzznigeria.com/nigerians-blast-ex-president-jonathan/> (accessed 15 February 2022).

In 2015, according to a report released by The Initiative for Equal Rights, there were 172 documented cases of violations against 282 persons<sup>53</sup> and in 2016 there were 152 documented violations against 232 persons.<sup>54</sup> In July 2017, the government of Lagos State arrested and publicly arraigned 42 men alleged to have been engaging in homosexual conduct.<sup>55</sup>

In 2019, public debate on queer issues resurfaced when the Director-General (DG) of Nigeria's National Council for Arts and Culture started publicly criticising Bobrisky,<sup>56</sup> a Nigerian internet celebrity transvestite, or possibly transwoman.<sup>57</sup> These criticisms resulted in a police raid of Bobrisky's birthday party in Lagos, with up to 100 police officers deployed to arrest her.<sup>58</sup> Public opinion was opposed to this wasteful use of security resources and, eventually, the police quietly backed down. Meanwhile, Bobrisky continues to enjoy internet fame.

However, there are several LGBT+ focused NGOs across different regions of the country, with some trying to coordinate strategic litigation on the anti-gay law and engage society through the media. Many of these NGOs and a few civil society advocates work under health and women's rights and are promoting sexuality-related issues in the media and through trainings. The most recurrent themes are the protection of sexual minorities from acts of violence and degrading treatment, and the repeal or amendment of anti-gay laws.

53 The Initiative for Equal Rights '2015 Report on human rights violations based on real or perceived sexual orientation and gender identity in Nigeria' <http://www.theinitiativeforequalrights.org/resources/2015-Report-on-Human-Rights-Violations-Based-on-Real-or-Perceived-Sexual-Orientation-and-Gender-Identity-in-Nigeria-.pdf> (accessed 15 February 2022).

54 The Initiative for Equal Rights '2016 Report on human rights violations based on real or perceived sexual orientation and gender identity in Nigeria' <https://drive.google.com/file/d/0B3ZPtCiUOS85VGpIcGpwNnlWVnc/view> (accessed 15 February 2022).

55 'Lagos state govt arraigns 42 homosexuals' *Ynaija.com* 3 August 2017 <https://ynaija.com/lagos-state-govt-arraigns-42-homosexuals/> (accessed 15 February 2022).

56 L Opoola 'Bobrisky is not a cultural ambassador, Runsewe warns youths' *Daily Trust* 14 June 2019 <https://www.dailytrust.com.ng/bobrisky-is-not-a-cultural-ambassador-runsewe-warns-youths.html> (accessed 24 February 2022).

57 In an Instagram post, Bobrisky stated her preference for the feminine pronouns. See A Odunayo 'Don't call me bro, I am a baby girl – Bobrisky' *Legit* 8 May 2019 <https://www.legit.ng/1237437-dont-call-bro-i-a-baby-girl-bobrisky.html> (accessed 24 February 2022).

58 S Kenechi 'Lagos CP deploys 100 operatives to venues of Bobrisky's birthday' *The Cable* 31 August 2019 <https://lifestyle.thecable.ng/lagos-cp-orders-tight-security-ahead-of-bobriskys-birthday/> (accessed 24 February 2022).

Relatedly, in the context of the COVID-19 pandemic, organisations have also had increased roles in rallying around to protect their communities from disproportionate effects of the pandemic in the wake of government crackdown and abuse of lockdown emergency powers.<sup>59</sup> The pandemic triggered anxiety and fear within the LGBT+ community in Nigeria, particularly for those who worked low-income jobs and relied on NGOs for sexual and mental healthcare and other types of support.<sup>60</sup> Lockdown restrictions meant reduced opportunity for income and also difficulty in accessing support services. For younger members and more vulnerable people within the community, there were worries around being confined to homophobic environments with a potential for being outed and its attendant physical and psychological dangers. For organisations, the pandemic created more pressure on their resources from the community without corresponding increase in funding from donors. Meanwhile, persecution by state and non-state actors did not diminish with the pandemic. In one undocumented incident narrated to this author by Akudo Oguaghamba – Executive Director of Women’s Health and Equal Rights Initiative (WHER), an Abuja based organisation – in 2020 a WhatsApp group created during lockdown restrictions was infiltrated by military officers who then used their access to identify three members of the group and attempted to extort their families until WHER intervened. In another incident, the lockdown in 2020 resulted in the forced outing of a lesbian soldier by her male colleagues and a subsequent tracing, arrest and torture of over 80 real or perceived lesbian, bisexual and queer women, all of whom were soldiers, in a military zone in Abuja. The women were detained in military custody without charges or trial until WHER alerted the Nigerian Human Rights Commission to intervene and secure the release of the women. Beyond these specific interventions, the next section considers some of the wider work that has been done around legal and social change.

## **4 Overview of queer activism in Nigeria**

### **4.1 The main actors and the antagonists**

The discussion in the previous section shows how, despite the plethora of criminalising laws in Nigeria, there was only very minimal public debate for or against these laws in Nigeria. The earliest laws were a colonial

59 ‘Nigerian security forces killed 18 people during lockdowns: rights panel’ *Reuters* (16 April 2020) <https://www.reuters.com/article/us-health-coronavirus-nigeria-security-idUSKCN21Y272> (accessed 5 January 2022).

60 Author’s interview with Akudo Oguaghamba, Executive Director of Women’s Health and Equal Rights Initiative on 11 May 2022.

imposition, enacted with little or no recourse to the wishes of the local population.<sup>61</sup> The home-grown laws have followed a similar pattern: enacted by legislatures serving political or religious agendas rather than reflecting any popular agitation.

However, this is not to imply that the laws do not enjoy popular support. Findings from a series of biennial polls measuring public attitudes to the criminalising laws and LGBT persons have shown that up to 75 per cent of Nigerians continue to support the criminalisation of same-sex relationships.<sup>62</sup> These polls have also consistently found that relatively few Nigerians are knowledgeable on or aware of the content of the laws – or even know a queer person personally. As such, there is a high disconnect between public understanding of homophobic laws and public attitudes towards same-sex relationships. Interestingly, the polls also show that as time passes and more public debates emerge, public attitude is softening.

Meanwhile, the SSMPA does not only criminalise same-sex relationships, it also criminalises ‘the registration of gay clubs, societies and organisations’ as well as their ‘sustenance, processions and meetings’ with a 10-year term of imprisonment. The criminalisation also extends to anyone who ‘supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria’. In essence, these provisions attempt to anticipate and prevent queer activism by criminalising different elements of organised advocacy. This means that, under the law, organisations and individuals in Nigeria cannot claim to be queer activists without running the risk of prosecution under the SSMPA. It is not surprising, therefore, that a great number of organisations working on queer rights are registered as sexual and reproductive health organisations.<sup>63</sup>

61 A Gupta ‘This alien legacy: The origins of “sodomy” laws in British colonialism’ Human Rights Watch (2008) 4-8.

62 Polls commissioned by The Initiative for Equal Rights from 2013 to 2019 indicate popular but reducing support for the anti-gay laws: NOI Polls ‘About 9 in 10 Nigerians support the proposed Anti-Same-Sex Marriage Bill’ (2013) <https://theinitiativeforequalrights.org/wp-content/uploads/2019/04/2013-Social-Perception-Survey-NOI.pdf> (accessed 15 February 2022); NOI Polls ‘Gay rights: Perception of Nigerians on LGB rights’ (2015) <https://theinitiativeforequalrights.org/wp-content/uploads/2019/04/Perception-Survey-2015.pdf> (accessed 15 February 2022); NOI Polls ‘Social perception survey on lesbian, gay and bisexual rights’ (2017) <https://theinitiativeforequalrights.org/wp-content/uploads/2017/05/Social-Perception-Survey-On-LGB-Rights-Report-in-Nigeria3.pdf> (accessed 15 February 2022); NOI Polls ‘Social perception survey on lesbian, gay, bisexual and transgender person rights in Nigeria’ (2019) <https://theinitiativeforequalrights.org/wp-content/uploads/2019/08/2019-Social-Perception-Survey.pdf> (accessed 15 February 2022).

63 A Sogunro ‘Citizenship in the shadows: Insights on queer advocacy in Nigeria’ (2018) 45 *College Literature* 632.

A probable consequence of this is that organised queer activism in Nigeria has blossomed around the provision of social and health services to sexual and gender minorities<sup>64</sup> ensuring that initial policy-level lawfare was led by social workers rather than by legal practitioners. This activism focused less on human rights issues and instead emphasised the public health effects of the criminalising laws as an issue of concern not just for sexual and gender minorities, but for the government and society in general. With HIV/AIDS and public health as a focus, activists could strengthen their status in society. This was useful both to ensure societal receptiveness and to provide access to government officials. Organisations that focused on the goal of healthcare could contribute to the policies of public health institutions, such as the Ministries of Health and the National Agency for the Control of AIDS, who in turn relied on the work of the organisations to access or report on the use of foreign aid.<sup>65</sup> In some instances, the programme manuals, brochures and other documents used by activists bore the national coat of arms to indicate their partnership with the Nigerian government.<sup>66</sup> In essence, the professional arms of government would work quietly with activists on public health issues while the political arms of government denounced LGBT+ rights. It was often only in instances of arbitrary arrests would the activists call on lawyers to assist in police bail, criminal trial defence, and the general provision of legal aid to the queer community.

Only very recently did local queer organisations begin to probe into rights contestation spaces, for example, by documenting violations and reporting these to the National Human Rights Commission or law enforcement authorities. However, considering that the Nigerian legal environment continues to be hostile, much of the rights contestation work is being done at the regional level, before the African Commission on Human Peoples' Rights (ACHPR), where organisations can present statements on the situation of LGBT+ people in Nigeria and obtain a sympathetic hearing and possible intervention.<sup>67</sup> This kind of regional advocacy contributed to the concluding observations of the ACHPR

64 D Allman et al 'Challenges for the sexual health and social acceptance of men who have sex with men in Nigeria' (2007) 9 *Culture, Health, & Sexuality* 153; T McKay & N Angotti 'Ready rhetorics: Political homophobia and activist discourses in Malawi, Nigeria, and Uganda' (2016) 39 *Qualitative Sociology* 397.

65 Author interviews with various activists.

66 The author has seen several examples of these documents.

67 The author has attended several sessions of the African Commission on Human and Peoples' Rights (African Commission) involving such statements.

on Nigeria's state report urging the Nigerian government to repeal the SSMPA.<sup>68</sup>

The growth of organised queer activism in Nigeria has also led to some backlash, and the emergence of organised resistance. Unexpectedly, this backlash has not arisen from the political or religious hegemony in Nigeria, but from the global anti-queer movement. It seems that while the local political and religious interests in Nigeria have shifted their focus away from queer-related issues, global anti-queer interests are keen on pulling them back towards homophobia. In Nigeria, the most visible face of this backlash is the entity known as Citizen Go.

Citizen Go has been described as 'an anti-feminist, anti-queer organization with links to various US-based anti-choice organisations as well as the European far right'.<sup>69</sup> In 2017, Citizen Go hosted a petition to the ACHPR, and the presidents of Nigeria and Kenya expressing dissatisfaction with the ACHPR's 'embrace of LGBT Doctrine'.<sup>70</sup> The petition argued that terms such as 'sexual orientations' and 'gender identity', 'gender expression', 'intersex traits' and 'homophobia', used by the ACHPR have no 'universally-agreed-upon legal or scientific definition' and are not recognised by the United Nations (UN) or 'in any ratified international treaty'. The petition implies, incorrectly, the argument that international law can be found only in treaties, and exists independently of international bodies such as the ACHPR, when in fact, the decisions of bodies such as the ACHPR constitute a part of international law.<sup>71</sup> In the last couple of years, Citizen Go has increased its focus in Nigeria, using the language of rights and law to promote hate and diminish queer spaces. For instance, in May 2019, Citizen Go successfully launched a petition to close down a Marie Stopes clinic in Nigeria<sup>72</sup> and has since organised

68 African Commission 'Concluding observations and recommendations on the 5th periodic report of the Federal Republic of Nigeria on the implementation of the African Charter on Human and Peoples' Rights (2011-2014)' (2015) para 81.

69 OT Adegbeye 'Nigeria: Not left out of the global rollback of sexual and reproductive rights' *awid* 23 July 2019 <https://www.awid.org/news-and-analysis/nigeria-not-left-out-global-rollback-sexual-and-reproductive-rights> (accessed 15 February 2022).

70 'Say NO to African Commission on Human and Peoples' Rights embrace of LGBT Doctrine' Petition started by Citizen Go on 19 June 2017 <https://www.citizenngo.org/en/fm/71504-say-no-african-commission-human-and-peoples-rights-embrace-lgbt-doctrine> (accessed 15 February 2022).

71 F Viljoen *International human rights law in Africa* (2012) 301-305.

72 'Stop Marie Stopes abortion activities in Nigeria' Petition started by Citizen Go on 5 February 2019 <https://www.citizenngo.org/en-af/lf/170400-stop-marie-stopes-abortion-activities-nigeria> (accessed 15 February 2022).

conferences spreading its agenda.<sup>73</sup> While the Marie Stopes petition brought the issue of women's rights and abortion to the forefront of public debate (at least, on social media),<sup>74</sup> most of Citizen Go's activities on queer issues continue to be faceless and have not yet resulted in a visible forum for rights contestation. Still, the petition to the ACHPR gives an indication of what this conversation may look like.

## 4.2 Queer activism – The judicial attitude

The only existing judicial decision in Nigeria that gives a hint of jurisprudential thinking on queer issues is the case of *Magaji v Nigerian Army*.<sup>75</sup> Although the case itself has little to do with sexual orientation or gender identity, the reasoning of the Supreme Court decision in that case touched on these aspects from a legal standpoint. Briefly, the facts of the case before the Supreme Court were that, in 1997, Major Bello Magaji was arraigned before the Nigerian Army General Court Martial on a charge of sodomy contrary to the Armed Forces Decree, 1993. The particulars of the offence he was charged for were that, in 1996, the accused had carnal knowledge of four men 'against the order of nature' over a period of time. The accused pleaded not guilty to the charge. From the evidence provided in court, it appeared to be, in fact, a case of rape and sexual assault: the accused had used his military status to coerce young and poor civilian men, including a minor, into sexual acts.

The accused was found guilty by the General Court Martial and sentenced to 7 years in prison. The accused appealed to the Nigerian Court of Appeal unsuccessfully and then to the Supreme Court. The Supreme Court did not give judgment until 2008. When they gave their judgment, the reasoning of the judges in this case came straight out of the colonial playbook, with legal issues being interpreted through the lens of religious morality. Rather than focus on elements of rape and sexual assault presented by the case, the Court seemed to have been more horrified by the same-sex elements, insisting on categorising the offence as sodomy rather than an assault.

73 'NGOs, Catholic women partner to tackle the LGBT threat to African family values' *Sahara Reporters* 12 February 2019 <http://saharareporters.com/2019/02/12/ngos-catholic-women-partner-tackle-lgbt-threat-african-family-values> (accessed 15 February 2022).

74 'And these efforts to demonize and block access to these services are being funded in Nigeria by a spanish organisation called CitizenGO. CitizenGo is a partner to extremist SPLC designated hate group World Congress of Families. #EndWaronNigerianWomen' Tweet posted by @buky on 22 May 2019 <https://twitter.com/buky/status/1131131727643107328?s=20> (accessed 5 July 2022).

75 N 10.

The opening statement by Justice Niki Tobi, is a direct indicator into the judicial attitude towards homosexuality: ‘This appeal involves the beastly, barbaric and bizarre offence of sodomy; a more common place name is homosexual or homosexuality’.<sup>76</sup> Justice Tobi would then go on to give a comprehensive interpretation of the colonial terms ‘order of nature’ and how it relates to sexuality:

The order of nature is carnal knowledge with the female sex. Carnal knowledge with the male sex is against the order of nature and here, nature should mean God and not just the generic universe that exists independently of mankind or people. It is possible I am wrong in my superlative extension of the expression. As that will not spoil the merits of the judgment, I leave it at that. Where there is a hole or an opening, there will be the possibility of penetration; penetration being the ability to make a way or way into or through. While the common usage of the word means putting of the male organ into the female sex organ when having sex, it has a more notorious meaning and that is the meaning in section 81. The natural function of anus is the hole through which solid food waste leaves the bowels and not a penis penetration. That is against the order of nature, and again, that is what section 81 legislates against ... What the appellant decided to do was to dare nature in his craze for immoral amorphous satisfaction. By his conduct, the appellant re-ordered God’s creation. Has he got the power to do that? No. No human being, whether in the military or not, has the power to re-order God’s creation. After all, we are not talking of fighting a war. By his conduct, the appellant has brought shame to himself.

This legal framing of sexuality around Abrahamic religious concepts is problematic. Constitutionally, Nigeria is a secular state and legal terms should not be interpreted through religious ideals. However, this decision is the current position of Nigerian law on the subject and, until the Supreme Court overrules itself, lower courts are bound to follow this position.

The difficulty in reconciling constitutional rights with this religious morality may explain why litigation brought by queer activists before the courts in recent years has yielded little fruit. In all these cases, the courts have focused more on procedural aspects of the challenge and avoided entering the substantive arguments. For instance, in the early case of *Teriah Joseph Ebah v Nigeria*<sup>77</sup> filed in 2014, the High Court of Lagos State dismissed the suit, with the very tenuous explanation that:

76 *Magaji* case (n 10).

77 Suit No FHC/ABJ/CS/197/2014.

The applicant has no locus standi to bring this action on behalf of ‘Gay Community in Nigeria’ in any case there is nobody or organisation in Nigerian called lesbian, gay, bisexual and transgender (LGBT) community. Even the Applicant himself did not describe himself as a gay.<sup>78</sup>

In 2018, the strategic litigation case of *Pamela Adie v Corporate Affairs Commission*,<sup>79</sup> tested judicial attitudes towards the freedom of association and registration of queer organisations. In the suit, the plaintiff established that the Nigerian agency responsible for corporate registrations, the Corporate Affairs Commission (CAC), had refused to register the name ‘Lesbian Equality and Empowerment Initiatives’, applied for by the plaintiff. Consequently, the case was brought before the Federal High Court to establish the extent to which the rights to freedom of association and freedom of expression under the Nigerian Constitution and the domesticated African Charter were violated by the refusal to register.

In its decision, the Court agreed that ‘the applicant has the right to form or belong to any association of her choice as provided by Section 40 of the 1999’, to the extent that this right is limited by section 45 of the Nigerian Constitution. Section 45 of the Nigerian Constitution limits rights through ‘any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health’. However, the Court did not give a reasoned decision on what qualifies as a limitation that is ‘reasonably justifiable in a democratic society’ and neither did it explain what thresholds would qualify as ‘in the interest of defence, public safety, public order, public morality or public health’. Instead, the court simply decided that since there was a law – the SSMPA – which imposed a limitation on those rights, then the existence of the law itself was sufficient reason to deny the exercise of the rights. As such, the High Court avoided the responsibility of conducting a substantive judicial review of the SSMPA and accepted that the law was binding on the plaintiff simply by its existence. The case has currently gone on appeal.

A different approach to litigation, focusing on broad constitutional rights rather than discrimination on the basis of sexual orientation, was undertaken successfully in the 2014 case of *Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board*.<sup>80</sup> In this case, Ifeanyi, then the Executive Director of International Centre for Advocacy

78 As above.

79 Suit No FHC/ABJ/CS/827/2018. The author has been involved in this case at the appellate stage as an advisor to the counsel and litigant.

80 Suit No FHC/ABJ/CS/799/2014.

on the Rights to Health (ICARH), an organisation that focuses on the health of LGBT+ persons, was arrested at his office in Abuja by 15 police officers, armed with guns, allegedly on the orders of the Commissioner of Police. Throughout he was not informed of the reasons for his arrest. Meanwhile, the police searched and wrecked the office – without a warrant – and removed office equipment and advocacy materials. After the police officers unsuccessfully tried to extort him for money, he was then assaulted. He was released later on the same day and, within a few weeks, he initiated constitutional-rights litigation against the police. In 2016, the Court gave a judgment in favour of Ifeanyi and ordered the police to pay N1 000 000 in damages (approximately US\$3 400 at the time) and to issue him a public apology. While this type of litigation can guarantee success in court, its strategic impact has been limited as it cannot be said to be a victory for the community but merely a victory for the litigant.

## **5 Some pertinent issues for queer lawfare in Nigeria**

### **5.1 Repressive colonial laws versus modern constitutional rights**

Queer lawfare in Nigeria will have to engage the continuing tension between the co-existence of repressive colonial laws on issues of sexuality and more progressive provisions of the Nigerian Constitution that recognise freedom of expression, the right to privacy, freedom from discrimination and freedom of association.<sup>81</sup> On the one hand, the Nigerian state often attempts to portray itself as a constitutional democracy with deep concerns for the protection of human rights – as evidenced by its record of ratifying core human rights treaties both globally and regionally. On the other hand, much of the legal system is based on colonial and military heritages that are autocratic in principle and incompatible with the human rights culture. Queer lawfare in Nigeria will require the resolution of this conflict. This requires the development of a judicial culture that interprets constitutional provisions progressively and not militaristically. The South African transitional jurisprudence and its utilisation of dignity

81 Sogunro (n 41) 54.

and equality to re-orient the legal system from apartheid-era principles is a noteworthy example of such a resolution.<sup>82</sup>

## **5.2 Northern versus southern criminal law templates**

Despite the overarching jurisdiction of the SSMPA, Nigeria does not have a monolithic legal regime on queer issues. A developing queer lawfare environment will have to consider these geographical variations and the diversity of legal systems. For instance, most of Northern Nigeria has adopted the Sharia law provisions that stipulate punishments ranging from whipping to the death penalty depending on the gender and marital status of the parties involved. As such, Northern Nigeria utilises a criminal legal system that is derived from religious doctrine and thus more likely to generate resistance to court-ordered reform. In this case, lawfare will have to focus more on public engagement. Most of the southern Nigerian states continue to follow the colonial male sexuality focused colonial provisions stipulating punishment of three to fourteen years of imprisonment for different types of 'offences against morality'. Defining queer lawfare in Nigeria requires different approaches to these legal settings.

## **5.3 Federal versus state jurisdictions**

Criminal law in Nigeria is often regulated by state (provincial) legislatures and prosecuted in state high courts except in issues where federal law has exclusive or concurrent jurisdiction. Until the enactment of the SSMPA, state law regulated issues around sexuality. Thus, Lagos State could repeal the 'offences against morality' provisions of the colonial criminal code. It is interesting that although the SSMPA purports to regulate marriage, which (with the exception of customary and religious marriage) is within exclusive federal law-making powers,<sup>83</sup> its substantive provisions touch on and criminalise sexual identity, some types of advocacy, as well as religious marriage all of which should ordinarily be under state law law-making jurisdiction. Nevertheless, the distinction between federal and state law-making jurisdictions suggests the possibility of an incremental approach to queer lawfare. A state-by-state (or regional) advocacy may be more effective than an attempt to reform the entire national legal system in one dash. Also, a progressive state government may undertake to challenge the

82 *S v Makwanyane* 1995 (3) SA 391 (CC).

83 Item 61, Schedule 2, Part 1 of the Nigerian Constitution.

constitutional authority of the federal government to make criminal laws governing conduct on non-federal issues.

#### 5.4 Navigating politics, religion and culture

The debate on sexual orientation in the Nigerian political context has always been initiated and concluded by politicians and religious leaders whereas issues of the economy, public corruption and security are often the content of citizen protests and debates. Sexual orientation rarely forms content of public concern until political or religious influence triggers it as a distraction from more problematic areas. Public engagement on queer lawfare must engage this wider context by framing queer issues around wider social issues such as health education, healthcare for persons living with sexually transmitted infections, rape victims, and the provision of contraceptives. Lawfare can also navigate cultural arguments through an engagement with customary law issues. First, there is the understanding that Nigeria is a multi-ethnic society and no customary practice has precedence. Second, the question of what cultural practices have survived the ‘repugnancy test’ of colonialism is open to conversation.<sup>84</sup> For instance, as recently as 2017, a Nigerian court upheld a 1976 Supreme Court decision that ruled that an Igbo customary woman-to-woman marriage practice was ‘repugnant’.<sup>85</sup> Engaging customary laws by highlighting these problematic aspects of judicial filtering can serve as a valid counter-argument against the notion that laws tolerant towards homosexuality are not African.

### 6 The effect of socio-political dynamics on queer lawfare

The current state of law in Nigeria means that gender identities continue to be regarded as ‘universally’ either male or female, while sexual orientation

84 Under colonial legacy laws of evidence in Nigeria, customary laws are not considered ‘law’ but ‘facts’ to be proven by evidence. For a proven customary law to be applied by the court, it had to be compatible with the ‘Repugnancy Test’, that is, it must not be: (i) repugnant to ‘natural justice, equity and good conscience’, (ii) contrary to public policy; and (iii) incompatible directly or indirectly with any existing law in force. The standards were colonial norms and many traditional practices have been struck down in legal decisions that relied on the Repugnancy Test.

85 *Eugene Meribe v Joshua C Egwu* (1976) LCN/2358 (SC), where the court had observed that: ‘In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be the union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a ‘woman to woman’ marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant’.

is deemed as ‘universally’ heterosexual. There are no other recognised statuses. And, as noted previously, this legal position is derived from 19th century English legal perspectives that became domesticated within the Nigerian legal system. Any gender identity or sexual orientation outside this purview is, therefore, not just likely to be criminal but also imaginary and thereby ‘un-legal’.

Yet, despite the non-legal status of lesbian, gays, transgendered, questioning, or intersex persons, the Nigerian legal system has crudely – even if by prohibiting it – recognised the existence of a ‘gay’ sexuality within the confines of the SSMPA. For example, section 4(1) of that law states that: ‘The registration of gay clubs, societies and organizations, their sustenance, processions and meetings is prohibited’. Similar ‘gay club’ phrasing is used in other provisions of the law without any attempt to legally define what constitutes a ‘gay club’ or what being ‘gay’ presupposes (beyond, probably, the pedestrian understanding that it refers to men who have sex with men). But, of course, this is a simplistic usage of the word, reflecting popular imagination of ‘gay bars’ rather than implying any concise terminology, and so it can hardly be used as a solid argument in support of a *prima facie* legal acknowledgement of diverse sexual orientations in Nigeria. Still, from a ‘half-full’ perspective, the fact that Nigerian law has utilised the word ‘gay’ – as opposed to the colonial description of ‘carnal knowledge against the order of nature’ – is itself a type of legal development on sexual orientation.

While the ultimate nature and legal implications of a legal reference to ‘gay’ remains unknown, we can still contrast its usage in the SSMPA with the absence of other aspects of sexual orientation and gender identity. For example, there is no direct legal mention of lesbians, transgendered persons, questioning or intersex persons – not even in passing. Instead, these other expressions of sexuality and gender are swept into the broad range of ‘same sex amorous relationship’ irrespective of the practical reality of that description. In this way, both non-heteronormative gender identity (whether publicly or privately expressed) and non-heteronormative sexual orientation (whether actual or perceived) are legally lumped into the same categorisations and criminalised.

Ideally, all these legal quandaries would make for an interesting queer lawfare environment. However, the use of the courts and the contestation of rights has been diminished by the near surreptitious nature of the legislation process. As the series of polls since 2013<sup>86</sup> have shown, a majority of Nigerians are not aware of – or even interested in – the issues

86 NOI Polls (n 62) above.

generating these debates, and even where they support the law, they are not aware of the contents, relying simply on their religious notions of sexuality and popular political rhetoric. Queer lawfare in Nigeria may not make significant progress until public consciousness on the importance of safeguarding rights is increased, through a deliberate push by queer activists to raise public awareness on the importance of a broader human rights system. In recognition of this challenge, some queer activists and organisations have started to mainstream their work by intersecting with and engaging other issues including art and literature, women's rights and transparent and open government.

## **7 Conclusion**

This chapter paints a broad picture of the political and legal history of the criminalisation of same-sex relationships in Nigeria and the impact this has had on queer activism and queer lawfare. While it is clear that Nigeria continues to suffer from a dearth of legal engagement, it is equally clear that queer activists have not simply given up and, instead, are beginning to go against the unkind nature of the legal environment, finding ways to engage lawfare directly through strategic litigation and the court system and indirectly through a public contestation of the human rights space. Nevertheless, the situation remains uncertain, and the next few years may be more indicative of the direction in which things will move.

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