
COMPENDIUM OF LAWS



DISCRIMINATING AGAINST PERSONS BASED ON
**SEXUAL ORIENTATION
& GENDER IDENTITY
EXPRESSION IN
NIGERIA**



BAD LAWS

A compendium on laws discriminating against persons in
Nigeria based on sexual orientation and gender
identity/expression

This report was principally authored by
Ayodele Sogunro with research and editorial support from
Dele Fatunla, Omolara Oriye and **Olumide Makanjuola**.

The project was conceived and funded by
The Initiative for Equal Rights.

© Copyright
TIERs

Contact: info@initiative4equality.org,

Website: www.initiative4equality.org

CONTENTS

LIST OF ABBREVIATIONS

i

1.	INTRODUCTION: HOW BAD LAWS ARE BORN	01
1.1	The pre-colonial context	01
1.2	No sex please, we're British	02
1.3	From church to state	04
1.4	Constitutional and international law framework	04
1.5	Some terminologies	06
2.	ANALYSIS OF DISCRIMINATORY LAWS	06
2.1	Criminal Code Act	06
2.2	Penal Code (Northern States) Federal Provisions Act	08
2.3	Armed Forces Act	10
2.4	Same Sex Marriage (Prohibition) Act	11
2.5	Sharia Penal Code Laws	13
2.6	Same Sex Marriage (Prohibition) Law of Lagos State	15
2.7	Prostitution and Immoral Acts (Prohibition) Law of Kano State	15
2.8	Prostitution, Lesbianism, Homosexuality, Operation of Brothels and Other Sexual Immoralities (Prohibition) Law of Borno State	16
2.9	Discrimination by omission	17
2.9.1	Violence Against Persons (Prohibition) Act	17
2.9.2	Transgender discriminations	17
3.	THE IMPACT OF DISCRIMINATORY LAWS	18
3.1	Violations of Nigeria's international law obligations	18
3.2	Negative perception of Nigeria	18
3.3	Reduced social cohesion and harmony	19
3.4	Impact on social health and wellbeing of Nigerians	19
3.5	Reduced economic and human resources	20
4.	RECOMMENDATIONS	21
5.	BIBLIOGRAPHY	23

LIST OF ABBREVIATIONS

CAN	Christian Association of Nigeria
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights LGBT Lesbian Gay Bisexual and Transpersons
SSMPA	Same Sex Marriage Prohibition Act 2013
SSMPL	Same Sex Marriage Prohibition Law 2007
TIERS	The Initiative for Equal Rights
UDHR	Universal Declaration of Human Rights
VAPP	Violence against Persons (Prohibition) Act 2015

1. INTRODUCTION: HOW BAD LAWS ARE BORN

1.1 The Pre-colonial Context

Since the colonial era, and during the subsequent post-colonial period, a body of laws have existed or been introduced onto the statute books in Nigeria that explicitly discriminate against a significant population of Nigerians on the basis of their sexuality. These discriminatory laws, surviving into Nigeria's independence, have recently been joined by new legislation introduced during Nigeria's post-1999 democratic era. Despite the seemingly long existence of these laws, they are not a true representation of pre-colonial African history and culture.

Copious studies and researchers have demonstrated that Nigeria's laws proscribing homosexual acts and discriminating against homosexual persons represent a rupture in the traditional socio-legal African relationship to, and regulation of, sexuality (Tamale, 2013). A large body of scholarship indicates that African societies and cultures had a wide and varied response to same-sex attraction, and non-conforming gender identities, long before Europeans set foot on the continent. Indeed, as Epprecht (2013) illustrates, the concept that same-sex identities did not exist in Africa was a belief advanced by Europeans, and was grounded in racist perspectives that saw Africans as less human, and less civilized than Europeans – in contrast to what Africans might have had to say on the issue.

Tamale (2013) describes African cultures as having had sophisticated and humane ways of dealing with people who did not conform to heterosexual ideals. For example, among the Shona of southern Africa, homosexuals (who were believed to be unstable or bewitched) were largely left alone for fear that the avenging spirit (ngozi) of a punished homosexual would return and cause havoc. Among the Langi of northern Uganda, the mudoko dako, or effeminate males, were treated as women and could marry men (Driberg, 1923). In the powerful kingdom of Buganda it was an open secret that Kabaka (king) Mwanga was gay (Faupel, 1962).

In addition to these examples, there is evidence, as Tamale (2013) illustrates, that homosexuality played a social role in African societies for a variety of purposes such as spiritual rearmament, ritual activities to ensure agricultural and social prosperity, woman to woman marriages for economic, reproductive or diplomatic reasons. In addition to this flexible and widely tolerant approach to same-sex attraction, African societies, and Nigerian societies recognized a wide variety of forms of marriage, in addition to single pairings of members of the opposite sex. Bakare-Yusuf and Pereira (2015) in a study on engaging civil society on gender and sexuality in Nigeria identify seven different forms of marriage that were culturally practised in a variety of pre-colonial Nigerian societies. From these examples, there is clear indication that tolerating and managing same-sex attraction and relationships were an active part of social regulation in pre-colonial African societies, many of which possessed cultures which had profoundly different, and often more positive relationships to sex and the body than that of the colonial forces that reshaped the sexual norms of the continent in the 19th and 20th centuries.

1.2 No Sex Please, We're British

The arrival of colonialism and colonialists in the 19th century shifted the shape and contours of African sexualities – particularly in its more formal aspects. (Tamale, 2013) In Nigeria, the advent of British rule marked a stark disruption of social structures and attitudes that continue to shape the norms and values of contemporary society. Perhaps one of the most striking areas of influence is in

the imposition and adoption of English systems of law – particularly the common law and English legislation of the time – that remains to date, the bedrock of Nigeria's legal system.

As Gupta (2008) extensively illustrates, the criminalization of same-sex acts and behaviours were introduced into Nigeria via the colonial state's adoption of a penal code written for India, based on the values, anxieties and fears of Victorian England. Gupta (2008) traces the origins of British sodomy laws to the Indian Penal Code, introduced in 1860, and subsequently spread from that 'jewel of the empire' to almost all of Britain's colonies – where:

Colonial legislators and jurists introduced such laws, with no debates or cultural consultations, to support colonial control. They believe laws could inculcate European morality into resistant masses. They brought in the legislation, in fact, because they thought 'native' cultures did not punish 'perverse' sex enough. The colonized needed compulsory re-education in sexual mores. (Gupta, 2008)

Nigeria, divided as it was between Southern and Northern Nigeria, inherited two distinct codes of legal punishment that differ slightly in their definition and criminalization of sodomy. In both cases, the law is silent on same-sex relations between women. In Northern Nigeria, HC Gollan, then Chief Justice of the territory, adopted the Queensland Penal Code, modelled on the Indian Penal Code in 1904 (Gupta, 2008). In most of Southern Nigeria, indigenous laws maintained their force until 1916 although the colony of Lagos was governed directly by English criminal law. However, in 1916, the Queensland-derived Criminal Code was made applicable to all of Nigeria. However, this unification did not last. By 1960, a separate Penal Code (derived from the Criminal Code of Sudan) was enacted for Northern Nigeria (Olanrewaju, 2016). Nevertheless, the introduction of the Criminal Code in the South, and a Penal Code in the North marked the beginning of the criminalization of sexuality in Nigeria and, thus, legal discrimination on grounds of sexual identity (Gupta, 2008).

1.3 From Church to State

As Kirby (2013) illustrates in his paper 'England's Least loveliest export?', the laws on which this criminalization was drawn came from the social and cultural anxieties of the colonial power, Britain. Amongst these anxieties, a generalized fear of the power of sexuality inherited from an early, primitive, patriarchal society evolved into the codification of a sexual offence of sodomy.

The first mentions of an offence of sodomy in English law is found in the Norman text *Fleta and Breta* produced in 1290 – as Kirby (2013) outlines. Initially, it seems the scope of sexual offence was not limited to sexual acts between men but could also include any sexual conduct deemed 'irregular'. Thus, it extended to sexual intercourse with Turks and 'Saracens' as well as Jews. (Kirby, 2013). Until the 16th century, ecclesiastical courts, recognizing that these were principally a religious offence particular to Christians, tried such offences. However, after King Henry VIII's break with the Roman Catholic Church, these offences were brought under the jurisdiction of the secular courts. It was through this process that offences prosecuted primarily as religious offences fell under secular criminal prosecution in England. These laws criminalizing sodomy and buggery remained on English statutes books as the country began to acquire an empire and, through the process of colonial imposition, virtually no British colonized territory remained untouched by the laws, regardless of differing cultural or religious values.

Like virtually all other parts of the African continent, Nigeria's experience of colonialism was neither benign nor volunteered. The conquest of Nigeria began in earnest with the siege of Lagos in 1851, and was completed gradually with the series of wars in the Niger Delta, the manipulation of the Yoruba kingdoms and the eventual conquest and capitulation of the Northern regions of Nigeria. Following colonial conquest, Nigeria was ruled as three separate territories, Southern Nigeria, Northern Nigeria, and the Colony of Lagos. Each of these was governed by separate legal systems administered by governors selected by Britain. It is the perspectives of these officials that shaped the provisions of the criminal laws expressed in the Nigerian criminal code prior to independence. (Gupta, 2008) Much of the theoretical underpinning of these laws was grounded in pre-scientific understandings of the 'order of nature'. Yet, even though this understanding has evolved with the development of modern science, the laws remain static.

Scientific investigation increasingly points to: sexual orientation as an innate and unchangeable aspect of human identity; and that humans exhibit diversity in sexual orientation (Academy of Science South Africa, 2015). It was within this evolving context of scientific understanding that the sodomy laws in the United Kingdom were struck down in 1957, three years prior to Nigeria's independence, following the recommendations of the Wolfenden Report. However, the effects of the Wolfenden report were not felt in the United Kingdom's African colonies, including Nigeria. Nigeria adopted the criminal and penal codes of the colonial era into the national era without reform (Gupta, 2008).

Following this period, there was no significant legislation until the introduction of the Same Sex Marriage Prohibition Act (SSMPA) in 2014. The historical context, which led to the introduction of the SSMPA, a particularly 'draconian' piece of legislation is worth noting. Firstly, Nigeria like many countries in Africa (in the aftermath of the decline of the Soviet Union and the triumph of liberal democracy) witnessed democratization in the late 1990s following several years of military rule. The increased space for social movements agitating for citizens' rights, coincided with the global need to stem the HIV epidemic, throwing light on frequently ignored aspects of human sexuality in Africa. Within this context, the increased visibility of LGBT groups and identities within the continent became increasingly a lightning rod for conflict between Africa and the West. Tamale (2013) argues that western governments utilized the discourse of rights to pressure African countries; in turn, for African leaders rejecting any advocacy for increased space for LGBT rights and identities is seen as an assertion of sovereignty. An added influence has been the advocacy of evangelical movements from the west, principally the United States, campaigning against the legalization of homosexuality on religious grounds, an extension to Africa of the cultural conflicts in countries such as the United States, where the LGBT rights movement has increasingly scored success. It is with this background that the Same Sex Marriage Prohibition Act was passed, within the context of social stress in response to an increasingly tolerant international and African space for legislation and policy responsive to lesbian, gay and bisexual rights. Specifically, the legalization in South Africa of same-sex marriage in 2006, prompted increased anxiety that the liberalization of social values would spread across Africa. The religious context of Nigeria also influenced the introduction of the bill with active lobbying from the Christian Association of Nigeria (CAN), identifying the legislation as part of reducing the increasing permissiveness of Nigerian society. Okuefuna (2016) draws attention to the introduction of the legislation in the wake of political anxiety over the incumbent president's potential third term bid. While the bill was defeated in its first iteration, it succeeded on a second introduction, being signed into law in 2014 by Obasanjo's successor, Goodluck Jonathan.

One of the key impetuses behind the introduction of the SSMPA appears to also be rooted in a belief that not only was there a clamour for same-sex marriage, but that homosexuality or more accurately

homosexual practice was on the increase. Ironically, The SSMPA itself forced a historic precedent for the Nigerian state – it represented the first time that lesbian, and gay persons were acknowledged in Nigerian law, a historical precedent that underscores that the passage of the law was rooted in cultural anxieties about increased social freedoms in 21st century Nigerian society. However, as amply illustrated above, these laws run against the tide of history on issues of sexuality, and Nigeria's increasingly democratic social space.

1.4 Constitutional and International Law Framework

Despite the political and religious support for the criminalisation of same sex relationships and homosexual conduct, Nigeria's constitutional document as well as its commitments under international law, remain favourably disposed to principles of constitutional democracy, human rights and human dignity. It is on this premise that section 21 of the Constitution of the Federal Republic of Nigeria 1999 ('Nigerian Constitution') requires the state to protect, preserve and promote only those aspects of the Nigerian cultures that 'enhance human dignity and are consistent with the fundamental objectives' of the Nigerian Constitution. It is, therefore, ironic that political and religious arguments utilise the pseudo-Victorian cultural and religious arguments in support of limiting the fundamental rights guaranteed under the Nigerian Constitution. These fundamental rights are provided in sections 33 to 45 of the Nigerian Constitution and include: the rights to life, dignity of the human person, privacy, freedom of thought, conscience and religion, freedom of expression and the press, peaceful assembly and association, and freedom from discrimination. In particular, section 44 states that:

(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person: (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject

The phrasing of the rights as used in the Nigerian Constitution are not arbitrary; they align closely with the wording of state obligations under the International Bill of Rights: which consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The use of the word 'covenant' in the ICCPR and ICESCR is value indication of the importance attached by the international community to the protection of these rights. Nigeria has ratified the two covenants and is bound both by its ratification and by customary international law to respect, protect and fulfil its human rights obligations to everyone in Nigeria, including sexual minorities. Similarly, in the African region, Nigeria is a party to the African Charter on Human and Peoples' Rights, which is domesticated under Nigerian law and which Nigeria is obliged to enforce domestically.

It is against the backdrop of this constitutional and international framework, as well as Nigeria's pre-colonial and post-colonial context that we examine some of the discriminatory laws against sexual minorities in Nigeria.

1.5 Some Terminologies¹

Bisexual: A person emotionally, romantically, sexually or relationally attracted to both men and women, though not necessarily simultaneously; a bisexual person may not be equally attracted to

both sexes, and the degree of attraction may vary as sexual identity develops over time.

Gay: A synonym for homosexual in many parts of the world. In this document, it is used to refer to a man or woman who is emotionally, romantically, sexually and relationally attracted to other people of the same sex.

Gender: Socially constructed roles, behaviours and personal characteristics that a given society considers appropriate for males, females and others.

Gender-based Violence: Violence directed against a person on the basis of gender or sex. Gender-based violence can include sexual violence, domestic violence, psychological abuse, sexual exploitation, sexual harassment, harmful traditional practices, economic deprivation, and discriminatory practices based on gender. The term originally described violence against women but is now widely understood to include violence targeting women, transgender persons, and men because of how they experience and express their genders and sexualities.

Gender Expression: External manifestation of one's gender identity, usually expressed through masculine, feminine or gender-variant behaviour, clothing, haircut, voice or body characteristics. Typically, transgender persons seek to make their gender expression match their gender identity, rather than their birth-assigned sex.

Gender Identity: A person's deeply rooted internal sense of their gender, i.e., being male or female, both, or something other than female and male. For most people gender identity aligns with assigned sex but this is not often the case for trans persons.

Homophobia: The fear and hatred of or discomfort with homosexuals usually based on negative stereotypes of homosexuality.

Homosexual: A person who is emotionally, romantically, sexually or relationally attracted to people of the same sex.

Lesbian: A woman who is emotionally, romantically, sexually or relationally attracted to other women.

LGBT: A blanket term that refers to people who identify as lesbian, gay, bisexual, and/or trans.

Sexual Orientation: An inherent or immutable enduring emotional, romantic, sexual or relational attraction to another person; it may be a same-sex orientation, opposite-sex orientation or a bisexual orientation. It is not to be confused with sexual preference, which is what a person likes or prefers to do sexually; a conscious recognition or choice.

Transgender: A person whose gender identity or gender expression is different from their assigned sex.

Transphobia: The fear and hatred of, or discomfort with others because of their actual or perceived gender identity or gender expression.

Transsexual: A term describing people whose gender and sex do not line up, and who often seek medical treatment to bring their body and gender identity into alignment.

2. ANALYSIS OF DISCRIMINATORY LAWS

2.1 Criminal Code Act

Enactment: The Criminal Code Act was first enacted on 1 June 1916. It is now contained in Chapter C38 of the Laws of the Federation of Nigeria, 2004.

Jurisdiction: The Criminal Code Act applies across Nigeria. However, its jurisdiction is subject to the Penal Code (Northern States) Federal Provisions Act, which applies to the states of the former Northern Region of Nigeria. The Criminal Code itself is contained as a schedule to the Criminal Code Act. The Criminal Code applies as both federal and state law depending on who has constitutional authority to prosecute the relevant prohibited conduct. Because sexuality is not within the exclusive powers of the federal government, it comes under the ambit of state law. However, most of the southern states have continued to make use of the provisions of the Criminal Code as their state law, including aspects that deal with sexuality, as their state law.

Historical and political context: The Criminal Code was introduced to Nigeria in 1914. The Criminal Code was derived from a 1904 Criminal Code previously introduced in Northern Nigeria. This 1904 code was, in turn, based on the existing Criminal Code for the Colony of Lagos, which was modelled on the (Australian) Queensland Criminal Code of 1899. The provisions against homosexuality in the Queensland code were derived from the English Offences Against the Persons Act of 1861, which prohibits homosexual conduct as follows:

61. Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years.

62. Whosoever shall attempt to commit the said abominable Crime, or shall be guilty of any Assault with Intent to commit the same, or of any indecent Assault upon any Male Person, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not exceeding Ten Years and not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.

63. Whenever, upon the Trial for any Offence punishable under this Act, it may be necessary to prove carnal Knowledge, it shall not be necessary to prove the actual Emission of Seed in order to constitute a carnal Knowledge, but the carnal Knowledge shall be deemed complete upon Proof of Penetration only.

Discriminatory provisions: The Criminal Code, based on the value system of Victorian England, mirrors several of the discriminations against sexual minorities that existed in English society at the time. The relevant provisions are reviewed below.

214. Unnatural offences

Any person who: (1) has carnal knowledge of any person against the order of nature; or ... (3) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.

215. Attempt to commit unnatural offences

Any person who attempts to commit any of the offences defined in section 214 of this Code, is guilty of a felony and is liable to imprisonment for seven years....

217. Indecent practices between males

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, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for three years.

These provisions are discriminatory on two grounds. One, they discriminate on the grounds of the type of sex act being performed. Two, they discriminate on the grounds of whom a sex act is being performed with. On the first aspect, the discrimination here applies to male and female heterosexuals as well as to male and female homosexuals. Accordingly, heterosexual conduct can be found guilty under section 214 of the Criminal Code if it is considered by a court as a sexual conduct 'against the order of nature'. While there is no legislative definition of what constitutes the 'order of nature', judicial interpretations have viewed this to involve anal sex. In the absence of precise legislative definition, police and judicial interpretation could equally extend this phrase to include oral sex, sex acts between females, the use of sex toys, and any form of sexual conduct that is considered 'unusual'. There is no constitutional or international law basis that justifies why any of such consensual sex acts should be prohibited under the law while consensual sex acts of other types are protected. The bias of the legal system to favour some type of consensual sex acts over other types can only be explained as discrimination.

Similarly, the discrimination on the grounds of the person with whom a sex act has been performed is illogical and unconstitutional under a constitutional framework where everyone, subject to age restrictions, is considered as having equal rights under the law. The current value judgement of the Criminal Code suggests that men and women should be considered as having different values under the law and, as such, should have different capacity for sexual acts. Thus, the sexual act of a man with another man is given a different legal consequence from the sexual acts of a man with a woman. This position of the Criminal Code is directly contradictory of the provision of the Nigerian Constitution, which prohibits 'disabilities or restrictions' by reason only of, amongst other factors, the sex of a person. Unlike sex-based discriminations permissible under international law, the provisions of the Criminal Code are not an attempt to correct historical injustices against women or protect maternity.

Furthermore, by criminalising homosexual acts that occur in private, these provisions attempt to force a discriminatory attitude not just in public affairs, but also in private spaces. This attempt strips individuals of their right to associate while also infringing on their right to privacy. In summary, there is no human rights based explanation for the discriminations imposed under these provisions of the Criminal Code.

Enforcement: Since the resurgent wave of homophobia in the late 2000s, state authorities across the southern states of Nigeria have used the Criminal Code to arbitrarily arrest and detain persons perceived to be homosexuals. This has encouraged extortions, blackmail and assault by both state and non-state actors (Human Rights Watch, 2016; TIERS, 2015 & 2016). However, there is no well-known instance of successful conviction under the Criminal Code provisions. This may be due to the fact that the Criminal Code penalises sexual conduct rather than sexual orientation and the criminalised sexual conduct, much like heterosexual sexual acts, would often occur in private.

Successful conviction would have to rely on witnesses or the confession of one of the parties. Nevertheless, police authorities in the southern states often resort to extorting accused persons before releasing them (HRW 2016, TIERS 2015 & 2016). Media reports in the south often report anal rape and sexual assault of children as homosexual crimes further complicating the enforcement monitoring.

Comparison with other laws: The Criminal Law of Lagos State 2011 has repealed the application of the Criminal Code in Lagos, including the provisions that discriminate against sex acts and male persons. However, the new law includes two omnibus provisions on 'indecent' acts or practices.

134. Indecent Acts

Any person who: (1) wilfully and without lawful excuse does any indecent act in any public place; or (2) wilfully does any indecent act in any place with intent to insult or offend any person; is guilty of a misdemeanour, and is liable to imprisonment for two years.

136. Indecent Practices

Any person who commits any act of gross indecency with another person in public, or procures another person to commit any act of gross indecency in public with him or another person is guilty of a felony, and is liable to imprisonment for three years.

While it is commendable that the specific discriminations against homosexuals have been removed, the use of 'indecent act' and 'act of gross indecency' without specified criteria of what constitutes such acts leaves the provision open to abuse by police authorities and wide interpretation by judges that may end up discriminating against sexual minorities and certain type of consensual sex acts.

Internet links

(Osun, 2 persons, prosecution, conviction status unknown, 2012)

<https://www.premiumtimesng.com/news/145868-nigeria-police-prosecutes-two-homosexual-suspects-osogbo.html>

(Edo, prosecution, conviction status unknown, 2013)

<https://lawyersalert.wordpress.com/2013/08/03/nigeria-pastor-goes-to-jail-on-account-of-same-sex-conduct/>

(Lagos, 2 persons, prosecution, conviction status unknown, 2013)

<https://76crimes.com/2013/01/08/2-nigerian-pastors-could-face-years-in-prison-for-gay-sex/>

(Aba, prosecution, conviction status unknown, 2013)

<https://76crimes.com/2013/08/09/nigerian-pastor-on-trial-for-rumored-gay-sex/>

2.2 Penal Code (Northern States) Federal Provisions Act

Enactment: The Penal Code (Northern States) Federal Provisions Act ('Penal Code') was first enacted in 1960. It is now contained in Chapter P3 of the Laws of the Federation of Nigeria, 2004.

Jurisdiction: The Penal Code originally applied to Nigeria's Northern Region, forming part of the Penal Law of that region. Today, it applies as both federal and state law in the states that succeeded to the Northern Region. Like the jurisdiction of the Criminal Code, sexuality comes under the ambit of state

law and is, thus, subject to prosecution (or even amendment) by the relevant state. However, most of the northern states have supplanted the Penal Code with Sharia penal law, including in aspects that deal with sexuality.

Historical and political context: The Penal Code was introduced to Nigeria to cater to the concerns of northern Nigerians who argued that the provisions of the Criminal Code did not consider Islamic interests and practices. Accordingly, the Penal Code was modelled on the Criminal Code of Sudan that, in turn, was based on the 1860 Indian Penal Code. The extent to which the Penal Code can be assumed to reflect 'tradition' is debatable, as will be discussed below. Nevertheless, the Penal Code not only imports codified common law provisions but also includes customary Islamic approaches to criminal justice.

Discriminatory provisions: Like the Criminal Code, the Penal Code deprives sexual minorities of their autonomy, and prescribes legal consequences for acts contrary to the state's preference in sexuality. Section 284 of the Penal Code states:

Whoever has carnal intercourse against the order of nature with a man, woman or an animal, shall be punished with imprisonment for a term of which may extend to fourteen years and shall also be liable to fine.

Also, section 405(2)(e) describes a vagabond to include:

any male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession.

Some other states, such as Kano and Katsina, also include 405(f) and further define a vagabond as:

any female person who dresses or is attired in the fashion of a man in a public place.

Under section 407, the offence of being a vagabond is punishable by imprisonment of up to two years. These provisions of the Penal Code, just like the Criminal Code, discriminate on the grounds of the type of sex act being performed and on the grounds of whom a sex act is being performed with. Section 405(3)(e), in particular, discriminates against cross-dressing men (or women) and transgender people. This is not accidental, as the provision specifically targets the Yan Daudu subculture in northern Nigeria. The Yan Daudu are cross-dressing males who often also engage in homosexual acts with a history that predates the colonial period (Ayeni, 2017, 214). While the original indigenous communities were tolerant of this subculture, the Penal Code has criminalised same, and, in this process, alienated members of the Yan Daudu community from legal protection.

Enforcement: Similar to the trend in the southern states, the renewed homophobic attitude in the 2000s has resulted in several arrests under the Penal Code. However, unlike the southern states, there have been several documented convictions of homosexual conduct under the Penal Code (Human Dignity Trust, 2015).

Internet link

(Plateau, prosecution, conviction status unknown, 2013)

<http://www.pinknews.co.uk/2013/10/04/nigeria-two-men-charged-with-homosexual-behaviour-face-up-to-14-years-in-prison/>

2.3 Armed Forces Act

Enactment: The Armed Forces Act was first enacted in 1993 as the Armed Forces Decree. It is now contained in Chapter A20 of the Laws of the Federation of Nigeria, 2004.

Jurisdiction: The Armed Forces Act applies all over Nigeria as federal law. Its offences, however, apply only to persons subject to service law under the act.

Historical and political context: The Armed Forces Act is Nigeria's enabling statute for the establishment and composition of the military forces. Amongst other provisions, it sets out offences by service personnel and establishes a court martial for the prosecution of such offences. In character, the offences in the Armed Forces Act are similar to the Criminal and Penal Codes. It is, therefore, not surprising that the Armed Forces Act replicates the discriminatory provisions of the colonial codes against same sex relationships. It is noteworthy that homosexual conduct is not foreign to Nigeria as is often argued by African leaders. For example, in 1990, prior to the enactment of the Armed Forces Act, Major Gideon Orkar's speech in his failed coup against the Ibrahim Babaginda regime described the administration as 'dictatorial, corrupt, drug baronish, evil man, deceitful, homosexually-centred, prodigalistic, un-patriotic'. While the substance and validity of these descriptions is beyond the point of our analysis, nevertheless it points to the fact that homosexuality is not a recent or 'imported' phenomenon in Nigeria, even within the military.

Discriminatory provisions: Section 81 of the Armed Forces Act criminalises sexual autonomy and discriminates against sexual minorities in a similar manner as the Criminal Code. This provision states:

Sodomy

(1) A person subject to service law under this Act who: (a) has carnal knowledge of a person against the order of nature; or ... permits a person to have carnal knowledge of him against the order of nature, is guilty of an offence under this section. (2) A person subject to service law under this Act who, whether in public or private, commits an act of gross indecency with any other person or procures another person to commit an act of gross indecency with him or attempts to procure the commission of an act of gross indecency by any person with himself or with another person whether in public or private, is guilty of an offence under this section. (3) A person guilty of an offence under this section is liable, on conviction by a court-martial, to imprisonment for a term not exceeding seven years or any less punishment provided by this Act.

Once again, the vague provisions of 'against the order of nature' and 'gross indecency' are calculated to target either anal sex acts in general or, at least, same sex relationships. The provision also uses the phrase 'any person' which means that its provisions will apply also to heterosexual relationships. It is an invasion of the privacy of members of the armed forces for the law to be this concerned with regulating their sexuality. There is, thus, ample concern for the potential for discrimination that these provisions can generate within the rank and file of the military. Arguably, a military setting requires an atmosphere of cohesion and service harmony, not laws that enable discrimination within the service.

Also, this means that homosexuals cannot serve in the military openly, even if they do not engage in sexual acts in the course of their duties. This is not just an open discrimination against homosexuals, it is also a loss by the country of a fraction of its citizens willing to be soldiers.

Enforcement: The interpretation of this provision came up in the 2008 decision of the Supreme Court in *Major Bello Magaji v Nigerian Army* (2008). In that case, an army major had been charged with sodomy under the Armed Forces Act in 1996 and was convicted in 1997 by a court martial. He had appealed against the conviction all the way to the Supreme Court, which gave judgment in 2008. The facts of the case, as set out in the Supreme Court judgement, indicated that the major had sexually assaulted and raped four other males, including a minor, over a period of time. However, the case was prosecuted as a sodomy charge. Thus, instead of the court condemning the issue of statutory and actual rape, the court focused on the sex of the rape victims, describing homosexuality (and not rape itself) as 'bestial, barbaric and bizarre' and shameful. The court further described 'the order of nature' as used in the law to mean only sexual acts with females: 'carnal knowledge with the male sex is against the order of nature'. This case highlights a key consequence of discriminatory and homophobic laws: they have the effect of lumping actual criminals with ordinarily law-abiding citizens. At worst, this attitude gives the impression that rape by a man is okay as long as it is not targeted against other men. At best, it treats consensual sex between men as being legally equivalent to rape by a man against other men. This is both absurd and discriminatory to law-abiding citizens.

2.4 Same Sex Marriage (Prohibition) Act

Enactment: President Goodluck Jonathan signed the Same Sex Marriage (Prohibition) Act into law in January 2014. However, it is titled Same Sex Marriage (Prohibition) Act 2013. The full provisions of this law are set out in Appendix 1.

Jurisdiction: The Same Sex Marriage (Prohibition) Act ('SSMPA') is a federal enactment and applies as federal law across the entire jurisdiction of Nigeria. However, offences under it can be prosecuted before state High Courts.

Historical and political context: As noted in the previous chapter, the SSMPA is the outcome of political populism and religious reaction to events in other parts of the world. From the consecration of Gene Robinson as the first openly gay bishop by the Church of England in 2003 to the legalisation of same sex marriage in South Africa in 2006, the growth of tolerance towards LGBT persons in other countries has spurred a backlash of discrimination towards LGBT persons in Nigeria. This led to a growing but false narrative to paint homosexuality as a foreign invention, as 'unAfrican', ironically using religious and criminal law filters that are not actually African. Thus, a Same Gender (Marriage) Prohibition Bill was introduced in the National Assembly in January 2006 but it was unsuccessful. Amended versions were further introduced in 2008 and 2011 before culminating in the SSMPA, which was passed by the legislature in 2013 and signed in 2014.

Discriminatory provisions: The entire content of the SSMPA is discriminatory in nature. The intent to be discriminatory is executed without subtlety or any attempt at moderation or qualification. Several aspects of undue interference with citizens can be considered under different heads.

Discrimination against same sex persons living together: The SSMPA prohibits 'civil unions' which is defined as any arrangement between persons of the same sex to live together as sex partners. However, this definition leaves open opportunity for state interference in the private lives of same sex persons who live together as the law does not qualify under what conditions the police authorities are to infer that there is an intention 'to live together as sex partners'. There is, therefore, an automatic suspicion of same sex people who live together, and may put the burden of proof on such persons to show that they are not living as sex partners. This is unnecessarily burdensome and a potential infringement on the right to privacy of same-sex cohabitants. Constitutionally, the right to privacy coupled with the freedom of association permits everyone, irrespective of their sexual orientation and

gender identity/expression to determine who they want to cohabit with. Until the SSMPA, it was (and still is) unthinkable that the law would invade the privacy of a household to inquire into the sexual relationship of the inhabitants. As a matter of principle, human rights advocates and general citizens should resist this type of state policing.

Religious discrimination: Section 2(1) of the SSMPA prohibits marriage contracts or civil union between persons of same sex in churches, mosques or any other place of worship in Nigeria. This is a legislative attempt to prescribe belief, by forbidding religious people who are tolerant of homosexual relationships from solemnising a same-sex union by members of their congregation. In essence, the law has shown a preference only for religious beliefs and practices that are homophobic while discriminating against more tolerant beliefs and practices.

Matrimonial discrimination: Section 3 of the SSMPA declares that only marriages contracted between a man and a woman is to be recognised as valid in Nigeria. While the scope of this provision is unclear in relation to polygamy, it is certainly discriminatory against customary marital practices that are not conventional to the Judeo-Christian and Islamic modes of marriage, for example, the woman-to-woman marriage practices by some ethnicities in Nigeria.

Discrimination against LGBT generally: Sections 4 and 5 of the SSMPA contain the most invasive and interfering provisions against sexual minorities in particular, and possibly in Nigerian law in general. These sections go beyond the prohibition of homosexual conduct and prohibit even organised or personal 'support' for LGBT persons. Furthermore, these provisions also criminalise identity even in the absence of sexual acts by prohibiting direct or indirect 'public show of same sex amorous relationship' without definition or qualification. This means persons who identify as LGBT are not free to express themselves as such, for example by statements in interviews or photographs. The discrimination against LGBT persons is so strong that the law has no hesitation in criminalising non-LGBT persons who associate with LGBT persons by administering, witnessing, abetting or aiding a same sex relationship or by supporting 'the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings'. This means that even voluntary clerical duties or campaigning by non-LGBT persons at such processions or meetings carries a potential jail term of ten years. There is no justifiable reason for why an act that is not criminal in itself is criminal simply because it is associated with LGBT persons. For example, although corruption is a criminal act, campaigning for the freedom of someone suspected of corruption or associating with them is not a criminal act. That the SSMPA goes all the way to criminalise association and expression with LGBT people shows the severity of the law's discrimination against the LGBT community.

Enforcement: Even prior to the executive enactment of the SSMPA, the publicity generated by the legislative passage of the bill prompted a rash of arrests across Nigeria. Enforcement of the SSMPA has taken the form of invasion of privacy and attacks on the freedom of association. Particularly, these manifest as arbitrary arrests of perceived or alleged LGBT persons who may then be released after paying a 'bail' fee, even though this extortion is manifestly illegal. In particular, the police have relied on the provisions on display of 'same sex amorous relationships' to arrest persons with implied or actual homosexual media on their phones or laptops. Although, there has been no reported conviction under the SSMPA's provisions against advocacy groups or individuals who support LGBT persons, there have been reported invasions of meeting spaces where members of the LGBT community or their allies are gathered. For example, in the north of Nigeria, there have been mass arrests for alleged attendance of 'gay weddings', further cutting down on the freedom of association and providing additional validity to religious police units in some of the northern states. These blatant violations of the right to privacy and on the freedom of association continue to erode the scope of human rights in Nigeria.

Internet links

(Kano, 12 persons, arrest, prosecution status unknown, 2015)

<http://www.pinknews.co.uk/2015/01/27/nigeria-12-arrested-over-gay-wedding/>

(Oyo, 21 persons, arrest, no prosecution, 2015)

<https://www.gaystarnews.com/article/21-young-men-arrested-nigeria-being-gay-cult170515-131971/#sthash.h1eNaNvR.dpuf>

(Delta, 26 persons, arrest, prosecution status unknown, 2016)

<https://www.thetrentonline.com/caught-act-26-arrested-police-invade-lesbian-hideout-delta/>

(Zaira, 54 persons, prosecution, no conviction yet, 2017)

<https://www.nbcnews.com/feature/nbc-out/nigerian-court-puts-dozens-trial-over-alleged-gay-wedding-n756441>

(Lagos, 40 plus persons, prosecution, no conviction yet, 2017)

<http://www.bbc.com/news/world-africa-40774930>

2.5 Sharia Penal Code Laws

Enactment: Originally enacted by the Zamfara State government as the Sharia Penal Code Law No 10 of 2000 ('Sharia Law'). Since then, eleven other states in northern Nigeria have enacted similar laws. A list of these states and their Sharia Law is set out in Appendix 2.

Jurisdiction: The Sharia Law of each relevant state applies as state law in the jurisdiction of that state. It also applies to 'every person who is a Muslim and/or every other person who voluntarily consents to the exercise of the jurisdiction of any of the Sharia Courts' under the law.

Historical and political context: Islamic legal principles have been a part of Nigerian law since colonial times in the Northern Nigerian region. However, after independence, it was understood that Islamic law was subordinate to the Nigerian constitution, and applied only in relation to personal and family law issues, particularly in the areas of matrimony, inheritance and succession. In this way, Islamic law was no different from customary law and was administered as such. In particular, the 1999 Constitution (same as its predecessors) established Sharia Courts of Appeal with jurisdiction only in 'civil proceedings involving questions of Islamic personal law', thus separating criminal law from religious law. However, with the return of civilian rule in 1999 saw a resurgent clamour for the re-introduction of Sharia principles in both matters civil and criminal matters. Because states have constitutional jurisdiction to amend their criminal law in relation to non-federal matters, the Zamfara state government and others were soon able to pass ahead when 7 states adopted Sharia into their criminal codes in 2001, starting with Sharia Law as applicable criminal law within their states.

Discriminatory provisions: Chapter Section 8 of the Sharia Law, titled 'Hudud and Hudud-related offences' sets out prohibitions against several acts including sodomy (liwat) and lesbianism (sihaq). The general provision on sodomy states:

Sodomy (Liwat)

129. Whoever has anal coitus with any man is said to commit the offence of sodomy.

130. (1) Subject to the provisions of subsection (2), whoever commits the offence of sodomy shall be punished with stoning to death (rajm). (2) Whoever has anal coitus with his wife shall be punished with caning which may extend to fifty lashes

Some of the states law vary, for example, by including women in the definition of sodomy, requiring consent to be liable for the act, requiring witnesses as proof, or even using the familiar phrase 'intercourse against the order of nature'. In some states, the death sentence is applicable only to married men with a sentence of caning or imprisonment for unmarried men. Nevertheless, the Sharia Law provisions on sodomy have two unique discriminatory issues. First, they discriminate between married and unmarried men, prescribing different punishments on the basis of marital status. Secondly, they necessarily discriminate on the basis of religion, forcing Muslims who are homosexual into concealing either their sexual orientation or their faith when they should have the freedom to practice as constitutionally guaranteed. In essence, these provisions much like the Penal and Criminal Codes are incompatible with constitutional guarantees on freedom from discrimination, amongst other freedoms.

The general provision on lesbianism states:

Lesbianism (sihaq)

133. Whoever, being a woman, engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another has committed the offence of lesbianism.

134 Whoever commits the offence of lesbianism shall be punished with caning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six months.

The Sharia Law prohibition against lesbianism discriminates on the basis of sex and on the basis of religion. In relation to sex, although the conduct of same sex intercourse is being prohibited for women as it is for men, the difference in punishment between sodomy and lesbianism is irrational and arbitrary. It indicates that there are stringent legal consequences that follow from the actions of a male person whereas the actions of a female person do not attach much seriousness. It is arguable that if caning is good enough for women, then the death sentence is too high for men. More importantly, if the law can attach less seriousness to the consensual sexual acts of women, then it should not have attached any seriousness to consensual sexual acts in the first place.

Enforcement: The Sharia Law provisions against LGBT persons are often enforced, often through a state sponsored morality police (Hisbah). However, information on criminal proceedings in the Sharia courts is not as accessible as those of the regular courts. Nevertheless, there are reported instances of prosecutions and successful convictions.

Internet links

(Bauchi, 11 persons, prosecution, conviction status unknown, 2014)

<https://www.glaad.org/blog/islamic-court-nigerias-bauchi-state-has-put-11-muslim-men-trial-allegedly-being-gay>

(*Bauchi, conviction, caning, 2014*)

<http://www.cbc.ca/news/world/mubarak-ibrahim-convicted-of-sodomy-in-nigeria-lashed-20-times-1.2499>

2.6 Same Sex Marriage (Prohibition) Law of Lagos State

Enactment: The Same Sex Marriage (Prohibition) Law 2007 of Lagos State ('Lagos SSMPL') was enacted in May 2007.

Jurisdiction: The SSMPL is a state enactment and applies as state law within the jurisdiction of Lagos State.

Historical and political context: The Lagos SSMPL is an outcome of Nigeria's political and religious reactions to the change in legal attitude towards LGBT people in other countries in the mid-2000s. While the original draft bills for antigay laws failed at the federal legislature, a version of it was successful in the Lagos State legislature in 2007. Thus, the prohibition against same sex marriages had already taken effect in Lagos six years before the SSMPA.

Discriminatory provisions: The Lagos SSMPL is modelled on the same ideas as, and uses similar wording to, the SSMPA. The main difference between the two documents is that the Lagos SSMPL does not expressly criminalise expressions or 'public show' of same sex relationships. Nevertheless, all of its provisions are as discriminatory as the SSMPA and the comments on the SSMPA will apply here accordingly. However, under the legal doctrine of 'covering the field' the Lagos SSMPL will cease to have any force for as long as the SSMPA is in effect.

Enforcement: There has been no known enforcement of the Lagos SSMPL either in terms of arrest or prosecution under its provisions.

2.7 Prostitution and Immoral Acts (Prohibition) Law of Kano State

Enactment: The Prostitution and Immoral Acts (Prohibition) Law 2000 of Kano State ('Kano Law') was enacted in June 2000.

Jurisdiction: The Kano Law is a state enactment and applies as state law within the jurisdiction of Kano State.

Historical and political context: The Kano Law predates the Sharia Penal Code Law of Kano State by a few months. While the Sharia applies to Muslims and those who consent to its application, the Kano Law applies to everyone within the jurisdiction of Kano State. It can, thus, be seen as a secular law to complement the Sharia and generally criminalise actions that are also punishable under the Sharia.

Discriminatory provisions: While the Kano Law generally targets sex workers, section 9 of the law applies to transgender persons, transvestites and cross-dressing men. This provision states:

Any person being a male gender who acts, behaves or dresses in a manner which imitate the behavioural attitude of women shall be guilty of an offence and upon conviction, be sentenced to 1 year imprisonment or a fine of N10,000 or both.

As is the case with section 405(2)(e) of the Penal Code, this provisions seems to be an attempt at targeting Yan Daudu type communities and practices in Kano State, thus opening them to attack.

Enforcement: The Kano Law dates to a period just before the emergence of cohesive LGBT rights advocacy in Nigeria and, in the absence of accessible police and court documentation, it is difficult to determine the extent of its enforcement. However, there is one known case of a 2004 arrest and arraignment under the Kano Law.

Internet link

(Prosecution, conviction status unknown, 2004)
<http://news.bbc.co.uk/2/hi/africa/3615082.stm>

2.8 Prostitution, Lesbianism, Homosexuality, Operation of Brothels and Other Sexual Immoralities (Prohibition) Law of Borno State

Enactment: Prostitution, Lesbianism, Homosexuality, Operation of Brothels and Other Sexual Immoralities (Prohibition) Law 2000 of Borno State ('Borno Law') was enacted in December 2000.

Jurisdiction: The Borno Law is a state enactment and applies as state law within the jurisdiction of Borno State.

Historical and political context: The Borno Law predates the Sharia Penal Code Law of Borno State by two years, as the Sharia law was not signed in Borno until 2003. Nevertheless, in keeping with the policies of the other northern states at the time, the Borno law also elaborates on the provisions of the Penal Code and further criminalise sexual minorities in the state.

Discriminatory provisions: As the title of the Borno Law indicates, the law is targeted at sexual minorities as well as other sexual acts. The entire law is thus a discriminatory act by the state government. Various provisions highlight this intention:

3. Any person who engages in prostitution, lesbianism, homosexual act 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.

The Borno Law criminalises same-sex acts and identity, and then proceeds to criminalise association with sexual minorities. It also provides capital punishment for same sex acts. It is also important to note that the death sentence will apply to lesbians whereas under the Sharia law, caning and probable imprisonment is the penalty for lesbian acts. This is an obvious situation of

religious discrimination in the laws of Borno, as different legal consequences will apply to the same act depending on whether or not the accused person is a Muslim.

Enforcement: The Borno Law dates to a period just before the emergence of cohesive LGBT rights advocacy in Nigeria and, in the absence of accessible police and court documentation, it is difficult to determine the extent of its enforcement.

2.9 Discrimination by omission

2.9.1 Violence Against Persons (Prohibition) Act

Enacted as the Violence Against Persons Prohibition Act, 2015 (the 'VAPP Act'), this law is intended to 'prohibit all forms of violence against persons in private and public life' by providing 'maximum protection and effective remedies for victims and punishment of offenders'. This law describes violence to include any act that causes or may cause 'any person physical, sexual, psychological, verbal, emotional or economic harm whether this occurs in private or public life.'

Discriminatory issues: Although the VAPP Act is a federal enactment, it applies only in the Federal Capital Territory. This means sexual minorities, who are particularly vulnerable to acts of violence, cannot take advantage of the protections of the VAPP Act in other parts of the country.

2.9.2 Transgender discriminations

Nigeria is not a signatory to any of the international conventions that specifically protect transgender people especially in inter-jurisdictional aspects. Also, there is no legislation on gender change, which makes it difficult for transgender persons to have their status recognized. This is in addition to existing discrimination under vagrancy laws that are used to target transgender persons. The Compulsory Registration Act has no provision for amending details of gender identity. Section 40 of the Act provides for corrections – but not amendments to the register of births and deaths. Similarly, the National Civic Registration Act provides for the registration of every Nigerian citizen above the age of 18 with an identity card. However, it makes no provision for amending details of gender identity. Nevertheless, as a question of the freedom of expression, transgender Nigerians have a constitutional freedom to express themselves within the broadest range of the word. It is noteworthy that the Nigerian Constitution does not limit the meaning of expression. Section 39 of the Nigerian Constitution uses words like 'including' and 'without prejudice to the generality' when it give examples of the freedom of expression.

3. THE IMPACT OF DISCRIMINATORY LAWS

3.1 Violations of Nigeria's international law obligations

Nigeria is a member of the international community. As such, it is bound by international law, including international human rights law. Amongst the requirements of international human rights law are the treaty provisions of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and Peoples' Rights ('African Charter'). Nigeria has adopted or is a signatory to these documents, and thus is bound to apply their provisions in its laws and policies. These documents recognise that:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (UDHR, article 2)

Thus Nigeria is bound by its own undertaking to:

respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (ICCPR, article 2)

This is also emphasised by the African Charter (which has also been domesticated as Nigerian law) that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status (African Charter, article 2)

It has been recognised under international law jurisprudence that the phrase 'other status' includes discrimination on the grounds of sexual orientation and gender identity. Thus, just the mere existence of laws against LGBT persons in Nigeria is in direct violation of the foregoing undertakings by Nigeria under international law.

3.2 Negative perception of Nigeria

Following from the above, it is clear that Nigeria's reputation as a democracy that protects minorities has been impacted by the continued criminalisation of LGBT persons (and even their allies under the SSMPA). While some Nigerians may perceive the SSMPA and similar discriminatory laws as an assertion of Nigeria's sovereignty, it is important to note that Nigeria exists in a globalised world where the impact of discriminatory laws have a tendency to have repercussions across borders. The existence of discriminatory laws reduces the perception of Nigeria as a leading, progressive nation in Africa – a perception that was established through its anti-apartheid stance in Southern Africa and democratic interventions in West Africa. Considering then that Nigeria once fought against racial discrimination in the struggles against colonialism and apartheid, it is important for both government and citizens to continue to maintain aspirations of social equality. A positive perception of Nigeria applies not just to the state as a whole but also to individual Nigerians who travel the world for work and pleasure. No citizen has an advantage if Nigeria is perceived as one of the African countries with regressive and anti-democratic principles.

3.3 Reduced social cohesion and harmony

A negative impact of the SSMPA was the undermining of the perception that Nigerians are fundamentally equal under the law. The passage of the SSMPA signals the Nigerian state's indifference to violence against individuals who are perceived to be lesbian, gay, bisexual or transgender. Since the passage of the SSMPA and the renewal of prosecutions under other criminal laws, there has been a notable increase in private acts of violence, blackmail and extortion, and mob attacks against persons perceived as LGBT. (Human Rights Watch, 2016) Rather than achieve social harmony, the SSMPA and similar laws have fuelled intolerance and hatred, making the society less safe for everyone. Furthermore, police authorities have capitalised on these laws, with documented instances of: arbitrary arrests, police abuse of perceived LGBT persons, the use of degrading tactics during arrests, and violence in detention. (Human Rights Watch, 2016) Conversely, the SSMPA has also sparked a wider social debate on Nigerian attitudes to homosexuality and the concept of human rights, given their contradiction of the fundamental rights in the constitution. A number of Nigerian legal practitioners and civil rights activists have also highlighted that the law has opened up avenues for extortion and blackmail by both state and non-state actors (Sogunro, 2014).

3.4 Impact on social health and wellbeing of Nigerians

A further negative impact of discriminatory laws is in the area of health. On one hand, the existence of discriminatory laws deepens mental and psychological health issues for LGBT persons, and makes them less likely to seek medical care and attention on sexual health issues. On the other hand, the fear of enforcement of the law means that health and social workers are more reluctant to provide services to LGBT persons. Furthermore, discriminatory laws drive emotional wedges between sexual minorities and their families, friends and colleagues. Families may become hostile to members who disclose their sexual orientation with the possibility of violence or ostracisation. Even where families, friends and colleagues show support to LGBT persons, the existence of discriminatory laws still creates legal uncertainties that may cause psychosocial tensions for such relatives and acquaintances. In this way, discriminatory laws have a negative impact both on the wellbeing of sexual minorities and the larger society.

The overall impact is a less healthy society. This means a likelihood of increasing public health problems, particularly the spread of infectious diseases and increase in mental health issues. Human Rights Watch reports confirmation by a study on the impediment of access to HIV services by LGBT persons in Nigeria following the passage of the SSMPA. (Human Rights Watch, 2016) Similarly, a report commissioned by TIERS and Nigerian Health Watch reported a decrease in adherence to HIV treatment. Civil society organisations that work in health issues have reported a suspension in some of their activities related to sexual health for fear of falling foul of the law. Ifekandu (2015) records that the painstaking efforts to create an enabling environment for HIV and other STI management in Nigeria has been hampered by the introduction of the SSMPA. In a similar vein, PEN America in collaboration with PEN Nigeria reports that the social stigma and isolation engendered by the SSMPA makes LGBT people more vulnerable to mental ill health (PEN America, 2015).

3.5 Reduced economic and human resources

The difficulty involved in policing what is often private homosexual conduct, and the futility of expending police resources on a 'hard-to-prove' offence is a significant argument against its continued inclusion in the statute books. The administrative costs of policing, prosecution, and incarceration of consensual sex acts would have been better expended on dealing with sex acts that actually injure or harm other members of society such as rape and paedophilia. Economic resources are thus wasted on monitoring and prosecuting crimes that don't actually injure any victim. Similarly, consequent criminalisation segregates a fraction of the population from becoming fully functional citizens, and thus denying the country the full economic use of its human resources.

4. RECOMMENDATIONS

- All discriminatory laws based on the sexual orientation and gender identity or expression (SOGIE) of Nigerians should be repealed.
- The Nigerian government should make concerted efforts to include SOGIE issues and the health and welfare of sexual minorities in all national health and social plans and policies.
- In accordance with the right to freedom from discrimination as stated under the Nigerian Constitution, Nigeria should introduce specific anti-discrimination and anti-hate legislation to protect all human characteristics, including those based on sexual orientation and gender identity or expression.
- Concerted effort should be made to educate local and state governments on the effects of discrimination and gender-based violence, and on the necessity of protecting the rights of sexual minorities in Nigeria.
- The Nigerian government should comply with its obligations under the African Charter on Human and Peoples' Rights. Specifically, it should comply with observations by the African Commission on Human And Peoples' Rights in respect of the existence of discriminatory SOGIE laws in Nigeria.

ENDNOTES

1. *The definitions here are adapted from widely used definitions in several sources.*
2. *For example, the Convention on the Elimination of Discrimination Against Women in article 4 permits states to take ‘temporary special measures aimed at accelerating de facto equality between men and women’ and which should be discontinued once ‘the objectives of equality of opportunity and treatment have been achieved’.*
3. *(2008) 8 Nigerian Weekly Law Reports (Pt. 1089) 338.*
4. *Convention on the Recognition of Decisions Recording a Sex Reassignment 1999.*
5. *National HIV/AIDS & STIs Control Programme, Federal Ministry of Health, Nigeria: ‘Integrated Biological and Behavioural Surveillance Survey (IBBSS) 2014’ available at <http://naca.gov.ng/wordpress/wp-content/uploads/2016/11/Final-Nigeria-IBBSS-2014-report.pdf> (accessed 5 January 2015). The report indicates an increase from 13.5% in 2007 to 22.9% in 2014 in the men who have sex with men (MSM) community.*

BIBLIOGRAPHY

ASSA, 2015: Academy of Science South Africa 'Diversity in Human Sexuality: Implications for Policy in Africa' 2015

AYENI, VO, 2017: Ayeni, VO 'Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same Sex Marriage (Prohibition) Act' in Namwase, S & Jjuuko, A (eds) (2017) *Protecting the human rights of sexual minorities in contemporary Africa PULP: Pretoria*

BAKARE-YUSUF, & PEREIRA, 2015: Bakare-Yusuf, B & Pereira, C 'Gender and Sexual Diversity: Engaging Civil Society in Nigeria' (2017) *The Initiative for Equal Rights: Lagos*

DRIBERG, 1923: 5. Driberg, JH *The Lango: A Nilotic Tribe of Uganda* (1923) T Fisher Unwin: London

EPPRECHT, 2013: Epprecht, M *Sexuality and Social Justice in Africa: Rethinking Homophobia and Forging Resistance* (2013) Zed Books: London

FAUPEL, 1962: Faupel, J *African Holocaust: The Story of the Uganda Martyrs* (1962) PJ Kennedy: New York

GUPTA, 2008: Gupta, A *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism* (2008) Human Rights Watch: New York

HUMAN DIGNITY TRUST, 2015: Human Dignity Trust 'Criminalisation of Homosexuality, Nigeria' Human Dignity Trust (2015)

HUMAN RIGHTS WATCH, 2016: Isaack, W 'Tell me where I can be Safe: The Impact of Nigeria's Same Sex Marriage (Prohibition) Act' (2016) Human Rights Watch: New York

KIRBY, 2013: Kirby, M 'Lessons from Wolfenden – A Methodology for Homosexual Law Reform in the Commonwealth of Nations'

OKUEFUNA, 2016: Okuefuna, SO 'LGBT and the Law: Protecting the Rights of Minorities in Nigeria' (2016)

OLANREWAJU, 2016: Olanrewaju, O 'Historical Evolution of Nigerian Criminal Law' (2016) available at www.djetlawyer.com (accessed 25 March 2017)

PEN AMERICA, 2015: PEN America Centre 'Silenced voices, threatened lives: The impact of Nigeria's anti-LGBTI law on freedom of expression' (2015)

SOGUNRO, 2014: Sogunro, A 'The Straight Nigerian's Guide to the New Anti-Gay Law; (2014) available at <https://ayosogunro.com/2014/01/17/the-straight-nigerians-guide-to-the-new-anti-gay-law-by-ayo-sogunro> (accessed 25 March 2017)

TAMALE, 2013: Tamale, S 'Confronting the Politics of Sexualities in Africa' (2013) 56 *African Studies Review* 31

TIERS, 2015: The Initiative for Equal Rights '2015 Report on human rights violations based on real or perceived sexual orientation and gender identity in Nigeria' (2015)

TIERS, 2016: The Initiative for Equal Rights '2016 Report on human rights violations based on real or perceived sexual orientation and gender identity in Nigeria' (2016)

APPENDIX 1

SAME SEX MARRIAGE PROHIBITION ACT, 2013

APPENDIX 2

LIST OF SHARIA STATE LAWS

Borno State Sharia Penal Code Law, 2001
Gombe State Sharia Penal Code Law, 2001
Jigawa State Sharia Penal Code Law, 2000
Kebbi State Penal Code (Amendment) Law, 2000
Kaduna State Sharia Penal Code Law, 2002
Kano State Sharia Penal Code Law, 2000
Katsina State Sharia Penal Code Law, 2001
Niger State Penal Code (Amendment) Law, 2000
Sokoto State Sharia Penal Code Law, 2000
Yobe State Sharia Penal Code Law, 2001
Zamfara State Sharia Penal Code Law, 2000

SAME SEX MARRIAGE (PROHIBITION) ACT, 2013

EXPLANATORY MEMORANDUM

This Act prohibits a marriage contract or civil union entered into between persons of same sex, and provides penalties for the solemnisation and witnessing of same thereof.

SAME SEX MARRIAGE (PROHIBITION) ACT, 2013

ARRANGEMENT OF SECTIONS

Section:

1. Prohibition of marriage or civil union by persons of same sex.
2. Solemnization of same sex marriage in places of worship.
3. Recognized marriage in Nigeria.
4. Registration of homosexual clubs and societies.
5. Offences and penalties.
6. Jurisdiction.
7. Interpretation.
8. Citation.

SAME SEX MARRIAGE (PROHIBITION) ACT, 2013

A BILL

FOR

An Act to prohibit a marriage contract or civil union entered into between persons of same sex, solemnization of same; and for related matters.

[] Commencement.

ENACTED by the National Assembly of the Federal Republic of Nigeria:

1. (1) A marriage contract or civil union entered into between persons of same sex:
 - (a) is prohibited in Nigeria; and
 - (b) shall not be recognised as entitled to the benefits of a valid marriage.
- (2) A marriage contract or civil union entered into between persons of same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefit accruing there-from by virtue of the certificate shall not be enforced by any court of law.
2. (1) A marriage contract or civil union entered into between persons of same sex shall not be solemnized in a church, mosque or any other place of worship in Nigeria.
- (2) No certificate issued to persons of same sex in a marriage or civil union shall be valid in Nigeria.
3. Only a marriage contracted between a man and a woman shall be recognized as valid in Nigeria.
4. (1) The Registration of gay clubs, societies and organisations, their sustenance, processions and meetings is prohibited.
- (2) The public show of same sex amorous relationship directly

or indirectly is prohibited.

5. (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. Offences and Penalties.

(2) A person who registers, operates or participates in gay clubs, societies and organisation, or directly or indirectly makes public show of same 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, organisations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment.

6. The High Court of a State or of the Federal Capital Territory shall have jurisdiction to entertain matters arising from the breach of the provisions of this Act. Jurisdiction.

7. In this Act: Interpretation.

“marriage” means a legal union entered into between persons of opposite sex in accordance with the Marriage Act, Islamic Law or Customary Law;

“Court” means High Court of a State or of the Federal Capital Territory;

“same sex marriage” means the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship;

“witness” means a person who signs or witnesses the solemnisation of the marriage; and

“civil union” means any arrangement between persons of the

same sex to live together as sex partners, and includes such descriptions as:

- (a) adult independent relationships;
- (b) caring partnerships;
- (c) civil partnerships;
- (d) civil solidarity pacts;
- (e) domestic partnerships;
- (f) reciprocal beneficiary relationships;
- (g) registered partnerships;
- (h) significant relationships; and
- (i) stable unions.

8. This Act may be cited as the Same Sex Marriage (Prohibition) Act, 2013. Citation.



SALISU ABUBAKAR MAIKASUWA, OON, mni
CLERK TO THE NATIONAL ASSEMBLY

 **30 DAY OF DECEMBER, 2013**

SCHEDULE TO THE SAME SEX MARRIAGE (PROHIBITION) BILL, 2013

SHORT TITLE OF THE BILL	LONG TITLE OF THE BILL	SUMMARY OF THE CONTENTS OF THE BILL	DATE PASSED BY THE SENATE	DATE PASSED BY THE HOUSE OF REPRESENTATIVES
SAME SEX MARRIAGE (PROHIBITION) BILL, 2013	An Act to prohibit a marriage contract or civil union entered into between persons of same sex, solemnization of same; and for related matters.	This Act prohibits marriage contract or civil union between persons of same sex and provides penalties for the solemnization and witnessing of same.	17 th December, 2013	17 th December, 2013

I certify that this Bill has been carefully compared by me with the decision reached by the National Assembly and found by me to be true and correct decision of the Houses and is in accordance with the provisions of the Acts Authentication Act Cap. A2, Laws of the Federation of Nigeria, 2004.



SALISU ABUBAKAR MAIKASUWA, OON, mni
 Clerk of the National Assembly
 21st Day of December, 2013



DR. GOODLUCK EBELE JONATHAN, GCFR
 President of the Federal Republic of Nigeria
 21st Day of December, 2013

I ASSENT.

