

ADVOCACY, SOCIAL CONTROL, AND THE CRIMINALISATION OF SAME-SEX RELATIONSHIPS: THE EVOLUTION AND ENFORCEMENT OF 'ANTI-GAY LAWS' IN NIGERIA

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DECLARATION

I declare that this thesis, 'Advocacy, social control, and the criminalisation of same-sex relationships: The evolution and enforcement of 'anti-gay laws' in Nigeria,' which I hereby submit for the degree Doctor of Laws (LLD) at the Faculty of Law, University of Pretoria, is my work and has not been previously submitted by me for a degree at this or any other tertiary institution.

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DEDICATION

This thesis is dedicated to my late mother Julianah Taiwo Sogunro, who encouraged me to undertake this academic journey and died on July 9, 2018, just as soon as I started.

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ABSTRACT

Since the enactment of Nigeria's Same Sex (Marriage) Prohibition Act of 2013, advocacy for the protection of sexual and gender minorities in Nigeria has grown rapidly. This advocacy often toes a line of legal formalism, under an international human rights law framework. This framework uses strategic litigation, petitions before international bodies, presentation of violations reports to the national human rights bodies, and public engagement on the equality of application of human rights norms for sexual and gender minorities. Despite these efforts, political rhetoric and public opinion continue to be antagonistic to advocacy efforts, based on the claim of political and religious leaders that same-sex relationships and non-heteronormative sexuality and gender identity are incompatible with the cultures and religions of the Nigerian population.

This thesis argues that the *evolution* and *enforcement* of Nigerian laws criminalising same-sex relationships and non-heteronormative sexuality and gender identity ('criminalising laws') are part of a system of wider social control leveraged by the political elite to perpetuate its hegemonic power. Consequently, this thesis proposes that, to advance the legal protection of sexual and gender minorities in Nigeria, advocates must critically understand, and take measures to reduce, the underlying power dynamics in the criminalising laws.

Using doctrinal and empirical research, this thesis proposes democratic strategies to challenge and reduce hegemonic power dynamics in Nigeria, and to strengthen existing advocacy for the protection of sexual and gender minorities in Nigeria. The research shows that the evolution of laws criminalising same-sex relationships in Nigeria is based on the use of political homophobia by the political elite as a tool of social exclusion. It further concludes that law enforcement authorities in Nigeria are guided by hegemonic considerations in the enforcement of the criminalising laws. The thesis identifies social control linkages between the criminalising laws and the existence of wider social exclusion in Nigeria. An increased awareness by advocates of these underlying hegemonic motivations can lead to a more nuanced, more contextual, and more intersectional advocacy for the rights of sexual and gender minorities in Nigeria.

LIST OF ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACJA	Administration of Criminal Justice Act
ACJL	Administration of Criminal Justice Law
African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
AIDS	acquired immunodeficiency syndrome
CLS	Critical Legal Studies
CPA	Criminal Procedure Act
CPC	Criminal Procedure Code
Criminal Code	Criminal Code Act
HRC	Human Rights Committee
HIV	human immunodeficiency virus
ICARH	International Centre for Advocacy on the Rights to Health
LGB	lesbian, gay, and bisexual
LGBTI	lesbian, gay, bisexual, trans, and intersex
LGBTIQ+	lesbian, gay, bisexual, trans, intersex, queer, non-binary, and non-conforming identities

MSM	men who have sex with men
NGO	non-governmental organisation
Penal Code	Penal Code Act
SOGIE	sexual orientation and gender identity and expression
SSMPA	Same Sex Marriage (Prohibition) Act of 2013
TIERS	The Initiative for Equal Rights
UN	United Nations
Yogyakarta Principles	Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

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CHAPTER ONE: INTRODUCTION

1.1 Introduction

After Nigeria's enactment of the Same Sex Marriage (Prohibition) Act (SSMPA) of 2013,¹ interventions on and advocacy for the protection of sexual and gender minorities in the country have mostly focused on the decriminalisation of laws criminalising or discriminating against same-sex relationships and non-heteronormative sexuality and gender identity (described throughout this thesis as 'criminalising laws'). The methods of legal advocacy adopted for this purpose often toe a line of legal formalism² – distinguishing law from politics – and using strategic litigation, petitions before international bodies, presentation of violations reports to the national human rights bodies, and public engagement on the equality of application of human rights norms for sexual and gender minorities.³ From a socio-political perspective, advocacy has also involved producing evidence and research to counter the political rhetoric that largely portrays the existence of sexual and gender minorities in Nigeria as alien to African cultures and religions.⁴ While very limited progress in tempering public opinion has been

¹ Same Sex Marriage (Prohibition) Act of 2013 which was signed into law in January 2014.

² EJ Weinrib 'Legal formalism: On the immanent rationality of law' (1987) 97 *Yale Law Journal* 949. A defence of legal formalism is also offered in RS Summers *Form and function in a legal system: a general study* (2005).

³ See VO Ayeni 'Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same Sex Marriage (Prohibition) Act' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 222-223; A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1; PEN America Centre (PEN) 'Silenced voices, threatened lives: The impact of Nigeria's anti-LGBTI law on freedom of expression' (2015) 16 available at https://pen.org/sites/default/files/nigeriareport_FINAL_highres.pdf (accessed 31 July 2020); United States Department of State (USDOS) 'Country reports on human rights practices for 2016 - Nigeria' 39 <https://www.state.gov/documents/organization/265500.pdf> (accessed 31 July 2019); Human Rights Watch (HRW) "Tell me where I can be safe" The impact of Nigeria's Same Sex Marriage (Prohibition) Act' (2016) available at https://www.hrw.org/sites/default/files/report_pdf/nigeria1016_web.pdf (accessed 31 July 2020); The Initiative for Equal Rights (TIERS) '2015 Report on human rights violations based on real or perceived sexual orientation and gender identity in Nigeria' available on <http://www.theinitiativeforequalrights.org/resources1/2015-Report-on-Human-Rights-Violations-Based-on-Real-or-Perceived-Sexual-Orientation-and-Gender-Identity-in-Nigeria-.pdf> (accessed 31 July 2020); '2016 Report on human rights violations based on real or perceived sexual orientation and gender identity in Nigeria' available on <https://drive.google.com/file/d/0B3ZPtCiUOS85VGplcGpwNnlWVnc/view> (accessed 31 July 2020); O Makanjuola 'Why Nigerians still support Same Sex Marriage Prohibition Act' (17 May 2017) <https://guardian.ng/features/why-nigerians-still-support-same-sex-marriage-prohibition-act/> (accessed 31 July 2020).

⁴ S Gloppen & L Rakner 'LGBT rights in Africa' in C Ashford & A Maine (eds) *Research handbook on gender, sexuality and the law* (2020) 194; Ayeni in Namwase & Jjuuko (n 3 above) 209 – 214 reiterates some of the arguments on the existence of same-sex relationships in precolonial Nigeria; B Alimi 'If you say being gay is not African, you don't know your history' (9 September 2015) <https://www.theguardian.com/commentisfree/2015/sep/09/being-gay-african-history-homosexuality-christianity> (accessed 31 July 2020).

recorded through opinion polls,⁵ the presidency and the legislature continue to maintain a hostile stance in official rhetoric while the judiciary has dismissed, on technical grounds, at least two attempts to challenge the SSMPA.⁶ Although the SSMPA itself is still less than ten years old and there is still time for the situation to evolve, as at the time of this research, there is no indication that Nigerian laws and policies will become more accommodating towards sexual and gender minorities in the near future.

This research is, consequently, premised on the argument, derived from Critical Legal Studies, that any serious legal advocacy for sexual and gender minorities in Nigeria must critically engage with the social subtext of the law in order to yield positive outcomes. This thesis posits that legal advocacy efforts in Nigeria can be improved through an increased consciousness of the pervasive role of hegemonic power, that is, the dominant and pervasive power dynamics underlying the evolution and enforcement of the laws criminalising same-sex relationships in Nigeria. The growth and enforcement of these criminalising laws suggest that the regulation of sexuality in Nigeria is part of wider social control aimed at perpetuating hegemonic power. Greater consciousness by advocates working in the area of sexual and gender minority rights in Nigeria of these underlying motivations can lead them to more nuanced, more contextual, and more directed intersectional advocacy. Based on this premise, the research interrogates the role of dominant power dynamics in the evolution and enforcement of the regulation of sexuality in Nigeria with a view to proposing strategies to strengthen and complement existing advocacy for the protection of sexual and gender minorities in Nigeria.

There are three main aspects to this thesis. First, the research employs contemporary theories of power relations in society (particularly political homophobia, elite theory, and social exclusion theory) to examine the evolution of the laws criminalising same-sex relationships in Nigeria. Second, findings from field research are incorporated to analyse how these power relation theories are reflected in the enforcement of the criminalising laws in Nigeria. Third, the research outlines the linkages between the criminalisation of same-sex relationships and wider systems of inclusion and exclusions in Nigeria. These aspects are intended to provide a critical analysis of the underlying issues of hegemonic power dynamics in Nigeria and how

⁵ AT Nwaubani 'LGBT acceptance slowly grows in Nigeria, despite anti-gay laws' (17 May 2017) <https://www.reuters.com/article/us-nigeria-lgbt-survey/lgbt-acceptance-slowly-grows-in-nigeria-despite-anti-gay-laws-idUSKCN18C2T8> (accessed 31 July 2020).

⁶ S Tshabalala 'Nigeria's president was asked about gay marriage in the US. His reply: "sodomy" is "abhorrent"' (22 July 2015) <https://qz.com/460923/nigerias-president-was-asked-about-gay-marriage-in-the-us-his-reply-sodomy-is-abhorrent/> (accessed 31 July 2020); J Ameh, A Adepegba & L Baiyewu 'No going back on same-sex law, Reps vow' (22 April 2018) <https://punchng.com/no-going-back-on-same-sex-law-reps-vow/> (accessed 31 July 2020); *Teriah Joseph Ebah v Nigeria* (2014) unreported, Suit No FHC/ABJ/CS/197/2014; *Robert Igbinedion v Nigeria* (2012) unreported.

hegemonic power dynamics impact advocacy for sexual and gender minorities. In the next sections, I set out in detail the background to, and research processes for, the study.

1.2 Background to the study

Nigeria criminalises sexual and gender minorities through a combination of: inherited colonial criminal laws which prohibit acts defined as sodomy and offences ‘against the order of nature’;⁷ a plethora of state laws that incorporate Shari’a provisions against lesbianism and male homosexuality;⁸ and a federal law that prohibits, amongst other aspects, same-sex marriage or other same-sex romantic and emotional relationships, homosexual identity, as well as advocacy and support for these.⁹

While there is general consensus that these laws reflect some public opinion on same-sex relationships,¹⁰ the emergence, evolution, and enforcement of the criminalising laws from Nigeria’s colonial period to the present have not been a consequence of, and are not proportional to, public debate or opinion on these issues.¹¹ This disconnect between law and society is not unusual, as the Nigerian legal system itself developed as a legacy of English law, independent of ‘indigenous’ opinion or debate. As such, the original laws criminalising same-sex relationships in Nigeria were enacted by British colonial administrations without reference to the customs and aspirations of the colonised population.¹² Not until very recently did a wave of new state and federal laws regulating same-sex relationships seem to reflect Nigerian public opinion.¹³ Still, these laws (both colonial and post-colonial) have all continuously been justified by political actors in Nigeria as an expression of dominant cultural and religious beliefs of the citizens and, often, with an insistence on the consistent and impartial application of the criminalising law across society regardless of the diversity of cultures and religious practices in Nigeria.¹⁴

⁷ Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004 (‘Criminal Code’) sec 214 & 215; Penal Code (Northern States) Federal Provisions Act Cap P3 Laws of the Federation of Nigeria 2004 (‘Penal Code’) sec 284 & 405(2)(e).

⁸ Chapter VIII (*Hudud* and *Hudud*-related offences) of the Shari’a penal codes of the Northern Nigerian states, secs 129, 130, 133 and 134.

⁹ Same Sex Marriage (Prohibition) Act of 2013.

¹⁰ According to 2013 polls, 92% of Nigerians supported the anti-gay laws. <http://www.noi-polls.com/root/index.php?pid=287&ptid=1&parentid=66> (accessed 31 July 2020).

¹¹ A Gupta ‘This alien legacy: The origins of “sodomy” laws in British colonialism’ (2008) 4 – 8; M Epprecht & SE Egya ‘Teaching about homosexualities to Nigerian university students: A report from the field’ (2011) 23 *Gender and Education* 367–370.

¹² As above.

¹³ n 10 above.

¹⁴ ‘Obasanjo backs bishops over gays’ <http://news.bbc.co.uk/2/hi/africa/3955145.stm> (accessed 31 July 2020); <https://punchng.com/no-going-back-on-same-sex-law-reps-vow/> (accessed 31 July 2020).

In response – especially in the last seven years following the enactment of the SSMPA – there have been condemnations in academic literature, human rights advocacy, and in statements by international human rights bodies and the international community. Strong calls have been made for the protection of sexual and gender minorities in Nigeria and, inevitably, the main focus of the arguments has been on Nigeria’s obligations under international human rights law, which necessarily compel formal decriminalisation.¹⁵ The main arguments include the negative health effects of criminalisation,¹⁶ the legal validity of diverse African sexualities and ‘alien’ nature of same-sex laws,¹⁷ and the enforcement of constitutional rights.¹⁸ Despite the scope and force of these efforts, there has been no indication that interventions by advocates, academics, and international bodies against the laws criminalising same-sex relationships has achieved any change in law and policy. In any case, the Nigerian government continues to be vocal in its rhetoric against same-sex relationships.¹⁹

Despite the aggressive rhetoric from the Nigerian government, implementation of criminalising laws appears to be selective. As with other aspects of social regulation in Nigeria, the persons most affected by the laws regulating sexuality seem to be those who are already socially excluded in other ways. For instance, media reports of arrests and prosecutions principally feature groups of young men from low income brackets.²⁰ The consistency of this

¹⁵ n 3 above. See also T McKay & N Angotti ‘Ready rhetorics: Political homophobia and activist discourses in Malawi, Nigeria, and Uganda’ (2016) 39 *Qualitative Sociology* 397-412; A Agada ‘Assessing the human rights implications of the Nigerian law dealing with sexual orientation’ unpublished LLD thesis, University of Pretoria (2018); Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity available at http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf (accessed 31 July 2020); and ‘Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples’ Rights, Inter-American Commission on Human Rights and United Nations’ (2016) 29 – 32 available at http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf.

¹⁶ African Commission on Human and Peoples’ Rights (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)’ 4 - 18 November 2015, para 81; Human Rights Watch (HRW) ‘“Tell me where I can be safe” The impact of Nigeria’s Same Sex Marriage (Prohibition) Act’ (2016) available at https://www.hrw.org/sites/default/files/report_pdf/nigeria1016_web.pdf (accessed 31 July 2020) 45.

¹⁷ S Tamale ‘Confronting the politics of nonconforming sexualities in Africa’ (2013) 56 *African Studies Review* 31-35; B Bakare-Yusuf & C Pereira ‘Gender and sexual diversity: Engaging civil society in Nigeria’ a research study published by The Initiative for Equal Rights 17.

¹⁸ Ayeni (n 3 above) 222-223.

¹⁹ J Ameh, A Adepegba & L Baiyewu ‘No going back on same-sex law, Reps vow’ (22 April 2018) <https://punchng.com/no-going-back-on-same-sex-law-reps-vow/> (accessed 31 July 2020).

²⁰ ‘Dozens arrested in Nigeria after anti-gay law passes’ (14 January 2014) <https://nypost.com/2014/01/14/dozens-arrested-in-nigeria-after-anti-gay-law-passes/> (accessed 31 July 2020); ‘Mass Nigerian arrests for “homosexual acts” in Lagos State’ (31 July 2017) <https://www.bbc.com/news/world-africa-40774930> (accessed 31 July 2020); ‘At least 41 gay men arrested in Nigeria (31 July 2017)’ <https://www.news24.com/Africa/News/at-least-41-gay-men-arrested-in-nigeria-20170731> (accessed 31 July 2020); D Cooley ‘“I didn’t want my mum to know”: The men and boys arrested for being gay in Nigeria’ (22

pattern of enforcement has led, at least, one editorial to accuse the police of ‘prosecution by class’, an idea that has been denied by Nigerian authorities.²¹ Still, to date, there have been no arrests of high-profile Nigerians for same-sex offences. Neither has there been any reported hostile action against ‘mainstream’ non-governmental organisations that provide health and other social services to sexual and gender minorities. The selective application of the criminal laws against those who are most visibly outside dominant ideas of social order, such as young and unemployed men, nullifies any assumption of the impartiality of the law. It also contradicts the political rhetoric that the laws were designed to reflect public will, cultures, and religions. Instead, it points to the subtler issue of elite control of social behaviour.

While – as the research in Chapter Four shows, there are some advocacy efforts that seek to engage the underlying power dynamics in Nigerian society, the majority of the current advocacy efforts (such as strategic litigation, petitions before international bodies, and public engagement on the rights of sexual and gender minorities) are centred on a “rights-conscious” legal formalism approach to decriminalisation and, accordingly, are not equipped to address political issues of power dynamics. This inadequacy exists because the legal formalism methods of advocacy necessarily acknowledge the legitimacy of – and may even derive validity from – the state and from the same political system that generated the criminalising laws and their hegemonic values in the first place.²²

October 2017) <http://www.abc.net.au/news/2017-10-22/arrested-for-being-gay-in-nigeria/9069350> (accessed 31 July 2020); C Collison ‘Mass arrests of Nigerian “gay” men’ (6 September 2017) <https://mg.co.za/article/2017-09-06-00-mass-arrests-of-nigerian-gay-men> (accessed 31 July 2020); 5 gay men fighting after infecting each other with HIV arrested in Lagos (9 April 2018) <http://www.informationng.com/2018/04/5-gay-men-fighting-after-infecting-each-other-with-hiv-arrested-in-lagos.html> (accessed 31 July 2020); Ntsabo, M ‘Nigeria | Police arrest dozens of party-goers “accused” of homosexuality’ (12 June 2018) <http://www.mambaonline.com/2018/06/12/nigeria-police-arrest-party-goers-accused-of-homosexuality/> (accessed 31 July 2020); Nigeria: Police arrest over 100 alleged gays and lesbians (11 June 2018) <https://76crimes.com/2018/06/11/nigeria-police-arrest-over-50-alleged-gay-and-lesbians/> (accessed 31 July 2020); J Jackman ‘Six men arrested in Nigeria for being gay’ (17 August 2018) <https://www.pinknews.co.uk/2018/08/17/gay-sex-six-men-arrested-nigeria/> (accessed 31 July 2020); W Odunsi ‘Six gay suspects arrested in Abia hotel’ (17 August 2018) <http://dailypost.ng/2018/08/17/six-gay-suspects-arrested-abia-hotel/> (accessed 31 July 2020); ‘Police storm hotel in Lagos, arrest at least 57 suspected of homosexuality’ (29 August 2018) <https://www.news24.com/news24/Africa/News/police-storm-hotel-in-lagos-arrest-at-least-57-suspected-of-homosexuality-20180829> (accessed 31 July 2020).

²¹ M Alake ‘It is time for Nigerian Police to revise its policies on arresting gay people’ (29 August 2018) <https://www.pulse.ng/gist/pop-culture/nigerian-police-only-arrest-alleged-gay-men-on-the-mainland-id8786505.html> (accessed 31 July 2020).

²² Gabel and Harris note that ‘an excessive preoccupation with “rights-consciousness” tends in the long run to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the State rather than in the people themselves.’ (P Gabel & P Harris ‘Building power and breaking images: Critical legal theory and the practice of law’ (1982) 11 *New York University Review of Law and Social Change* 369 375). Similarly, Kollman and Waites remark that ‘Concepts of “rights” have sometimes been advanced in local contexts where poor individuals lack the education, language or resources to claim and operationalize them, contributing to feelings of disempowerment’ (K Kollman & M Waites ‘The global politics of lesbian, gay, bisexual and transgender human rights: An introduction’ (2009) 15 *Contemporary Politics* 7).

Certainly, formal decriminalisation is desirable as an important stage in the protection of sexual and gender minorities, as even the mere existence of laws criminalising sexual and gender minorities is problematic and has negative consequences.²³ It is, therefore, not unreasonable to conclude that once the criminal laws are removed, there is an automatic lessening of impediments to the general progress of sexual and gender minorities. However, this optimistic position does not account for: (i) the persistence of underlying hegemonic power that prompted the original enactment of the criminalising laws; and (ii) the weakness of Nigeria's formal legal system against these dominant power dynamics, demonstrated, for example, in selective arrests and prosecutions, the disregard of court orders, and state violations of constitutional rights. If the criminalising laws proceed from, and help to shape social behaviour to conform to the will of hegemonic power, then the legal formalism approach to advocacy will be futile. In essence, social transformation should be a more urgent focus for advocates than legal reform. Social transformation methods are not necessarily easier, especially since they involve political organising and can be met with political resistance. However, as will be discussed in Chapter Five, social transformation provides more opportunities for sustainable change that benefits sexual and gender minorities beyond legal reforms.

The inefficacy of a legal reform approach in Nigeria is demonstrated by the fact that these hegemonic power systems have evolved over decades and created even more repressive socio-legal norms that continue to co-exist with – even while overtly and expressly contradicting – legal rights that guarantee individual freedoms.²⁴ As Claude Ake observes on the application of human rights in the African context:²⁵

The Western notion of human rights lacks concreteness. It ascribes abstract rights to abstract beings. There is not enough concern for the historical conditions in which human rights can actually be realized. As it turns out, only a few people are in a position to exercise the rights which society allows. The few who have the resources to exercise these rights do not need a bill of rights. Their power secures them. The many who do not have the resources to exercise their rights are not helped any by the existence of these rights. Their powerlessness dooms them.

²³ For instance, in criminalised environments, sexual and gender minorities (and persons perceived as such) can be excluded from general health and social services, advocacy organisations may not be allowed to register legally, and there is a restriction on spaces and platforms for free expression. R Goodman 'Beyond the enforcement principle: Sodomy laws, social norms, and social panoptics' (2011) 89 *California Law Review* 643; E Cameron 'Unapprehended felons: Gays and lesbians and the law in South Africa' in M Gevisser & E Cameron (eds) *Defiant desire: Gay and lesbian lives in South Africa* (2013) 89.

²⁴ C Ake 'The African context of human rights' (1987) 34 *Africa Today* 6.

²⁵ As above.

As such, even in the unlikely success of advocacy through the formal legal process and the utilisation of rights language, the outcome will continue to be insufficient to protect *all* sexual and gender minorities in Nigeria. Advocacy in Nigeria must go beyond seeking reform in the text of the formal law. Instead, legal advocacy for sexual and gender minorities should seek social transformation by engaging with the nuances of power and social control, if it really seeks to guarantee substantive protections for the most excluded members of the community.

The argument provided in this thesis is not intended to lessen the importance of decriminalisation advocacy through formal legal institutions, but to propose a complementary type of advocacy that engages the context of power that underlies the creation and enforcement of the criminalising laws. This type of advocacy requires advocates to have an understanding of the socio-political system beyond the text of the law. It requires engagement with theories of power, particularly the understanding of political homophobia, and its interaction with elite control of society and social exclusion through law. These theories can help advocates to understand *why* these criminalising laws exist, *what* purpose they serve, *who* derives benefits from the laws, and *how* these laws can best be tackled through advocacy processes. The research interrogates official claims that criminalising laws are merely a reflection of popular will. In particular, to provoke ideas for more nuanced advocacy for the protection of sexual and gender minorities, the research demonstrates how political homophobia, through the regulation of sexuality, is used as a weapon in the perpetuation of elite control of legal, social, economic and political systems in Nigeria.

1.3 Research problem

In the following paragraphs, I outline the main aspects of the research and how these inform the research question. I also provide an overview of the theories relied on in the course of the research and their relevance to the research question.

1.3.1 Aspects of the research and theoretical framework

This research relies on several theories to explore three interlinking themes on dominant power dynamics and the regulation of sexuality in Nigeria. These themes and their relevant theoretical frameworks are briefly described in the following paragraphs. However, a more comprehensive engagement of the theories is provided in the discussion in Chapter Two.

First, this research employs *theories of power applicable to the evolution of the criminalising laws in Nigeria over various time periods* to examine the criminalisation of same-sex relationships in Nigeria. This aspect of the research engages the concepts of political homophobia, elite control, and social exclusion in the evolution of Nigeria's criminalising laws. It shows that, during the time periods in which the laws that criminalise sexuality in Nigeria were enacted, the motivations of the lawmakers were concerned with upholding a system of

hegemonic power and ensuring overall social control – by engineering moral panics and scapegoating already marginalised groups in society – even though these motivations are not overtly stated in political rhetoric. These theories are briefly highlighted in the next sub-section and discussed in more detail in the first part of Chapter Two.

Second, by examining the experiences of communities directly affected by the existence of the criminalising laws, this research incorporates field research to ascertain how *theories of power are reflected in the enforcement of the criminalising laws*. This part of the research builds upon theories of power by empirically investigating enforcement of the criminalising laws. A doctrinal legal formalism approach to the enforcement of criminalising laws assumes a consistency and impartiality in the enforcement of the laws; distinguishing legal issues from political issues.²⁶ However, the field research component is driven by theories of power highlighting and situating the selective enforcement of the law, and how it principally targets members of already marginalised groups who are perceived to be outside of, or threats to, hegemonic power systems. The findings of the field research, as they relate to the enforcement of the criminalising laws, are discussed in Chapters Three and Four of this thesis.

Third, the thesis argues in favour of a more contextual advocacy for the protection of sexual and gender minorities by outlining the *linkages between power dynamics in the criminalisation of same-sex relationships and wider systems of inclusion and exclusions in Nigeria*. This aspect of the research, following from the first two, considers how a more nuanced, intersectional, and conscious advocacy can address the plight of sexual and gender minorities in Nigeria. This discussion is covered in Chapter Five of this thesis.

1.3.2 Critical Legal Studies and the regulation of sexuality

This research problematises the laws governing same-sex relationships in Nigeria as they are an extension of hegemonic power dynamics in the country. *Hegemonic power* is a concept first popularised in the writings of Antonio Gramsci.²⁷ According to Gramsci, society is composed of both the general population and a ‘dominant fundamental group’. This dominant fundamental group – usually the political and economic elite – determine the general direction of society, that is they sustain a hegemony, through either the ‘consent’ of the general population or through the coercive power of the state.²⁸

While Gramsci principally addressed hegemonic power within a Marxist philosophical framework, the concept itself has transcended Marxism and has been utilised by various

²⁶ n 3 above.

²⁷ A Gramsci *Selections from prison notebooks* trans Q Hoare & GN Smith (1971); A Gramsci *Prison notebooks: Vol 1* trans JA Buttigieg (1992); A Gramsci *Prison notebooks: Vol 2* trans JA Buttigieg (1996).

²⁸ Gramsci (n 27 above) 12; J Schwarzmantel *The Routledge guidebook to Gramsci's prison notebooks* (2014) 72 – 79.

schools of thought including Critical Legal Studies (CLS).²⁹ Although feminist legal theory³⁰ and queer theory³¹ also problematise law as a tool of hegemonic power dynamics in society, this research follows a broader CLS approach. On the one hand, this approach is suitable because, within the Nigerian context, economic and social divisions often play a more distinctive role in the politics of the legal system.³² On the other hand, and as will be discussed in Chapter Two, the aspects of the Nigerian legal system that emphasise gender and heteronormativity are rarely derived from any long-established social or traditional constructions of sexuality and gender, unlike the case in Europe and the global West.³³ Instead, as the thesis demonstrates, these contemporary heteronormative ideas are derived from colonially imposed values maintained through laws and policies by a political elite for the benefit of perpetuating their power, particularly in socio-economic class relations; thus making CLS an appropriate framework for engaging power in the evolution and enforcement of the criminalising laws in Nigeria. Although CLS has no single theory, it unifies several ideas that can bring clarity to the analysis of the Nigerian legal environment undertaken in this thesis. These ideas include the arguments that: (i) laws do not completely determine the outcome of legal issues and, instead, the outcome of legal issues is just as dependent on the social context as it is on legal rules or legal reasoning;³⁴ and (ii) all law is politics and any legal discourse is 'discourse that concerns the basic terms of social life'.³⁵ In essence, CLS situates legal rules within hegemonic political power and the ideological struggles of society.

From this perspective, any advocacy that relies only on the language of human rights law and the formal litigation process is an advocacy that does not fully engage the social, economic and political interests that gave rise to the rules being challenged. This creates what CLS scholars have described as 'liberalism's contradictions',³⁶ for example, in the use of a

²⁹ MDA Freeman *Lloyd's introduction to jurisprudence* (2008) 1210 1220.

³⁰ From a feminist legal theory perspective, 'law is seen as both man-made and as male, in the sense that its structure and substance reflect men's interests, priorities and experiences, which are different from women's, and moreover constitute the male viewpoint as objective reality. The work of women's law is ... to expose the biases, injustices, inequalities and oppressions embedded in and maintained by laws, so as to conduce to gradual reform of law and society' N Lacey 'Feminist Legal Theory' (1989) 9 *Oxford Journal of Legal Studies* 383 389.

³¹ Queer theory is, by design, a less definitive theoretical framework. Nevertheless, queer theory also focuses on problematising the primacy of heterosexual norms in society, particularly the heterosexual constructions of gender (man versus woman) and sexuality (homosexual versus heterosexual) and how these rigid binaries permeate legal incidences. See MA Fineman 'Introduction: Feminist and queer legal theory' in MA Fineman, JE Jackson & AP Romero (eds) *Feminist and queer legal theory: Intimate encounters, uncomfortable conversations* (2016) 2 – 5; M Davies *Asking the law question* (2017) 285 - 286.

³² A Osita-Njoku 'The political economy of development in Nigeria: From the colonial to post-colonial eras' (2016) 21 *IOSR Journal of Humanities and Social Science* 11.

³³ Lacey (n 30 above) 383.

³⁴ Freeman (n 29 above) 1220 - 1221.

³⁵ As above. M Davies *Asking the law question* (2017) 199.

³⁶ Mark Kelman, quoted in Freeman (n 29 above) 1210, identifies three contradictions in legal liberalism: (i) contradiction between being committed to 'mechanically applicable rules' to resolve disputes and being

mechanical 'rule based' system in the pursuit of a more liberal society.³⁷ Instead, multiple strategies of advocacy must be utilised to challenge the politics underlying the law. As Gabel and Harris recommend, a more nuanced legal advocacy must 'subordinate the goal of getting people their rights to the goal of building an authentic or unalienated political consciousness' through methods that expand political consciousness, using the legal system to 'increase people's sense of personal and political power.'³⁸ In other words, the goal of social transformation is more important than seeking mere legal reforms to protect individual legal rights.

CLS has not been without criticism of its own methods. Critiques of CLS include the arguments that CLS does not offer any theoretical alternatives but only criticises existing methods and that – in functional legal systems – there is some value in the pursuance and use of legal rights methods for the protection of minorities and repressed groups.³⁹ Nevertheless, CLS has helped shape other schools of thought, including feminist and queer legal theory, and it still offers a critical method of engaging legal issues in contexts like Nigeria where the legal system is derived from colonial templates and is, arguably, sustained for the benefit of hegemonic political interests.

The existence of a relationship between hegemonic power and the rules around same-sex relationships have barely been engaged with by lawyers and advocates in Nigeria. However, academic scholars often indicate the importance of this relationship. For instance, in the broader African context, Tamale writes on the subtle and overt rewriting of African sexualities by 'the power elite'⁴⁰

to bolster their control over the political and social context. Such revision facilitates the control of the nations' very identities, and the citizens come to depend upon the authorities for their communal sense of self. The current homophobic upsurge and the legal winds of recriminalization of homosexuality that are sweeping across the African continent from Dakar to Djibouti and from Cairo to Cape Town are not coincidental or mere happenstance. The homophobic gusts blow amidst rising inflation, high unemployment, corruption, repression, and increased hopelessness among the populace.

committed to 'situation-sensitive, ad-hoc standards'; (ii) contradiction between the notions of subjectivity of values and objectivity of facts (and reason) and yet a commitment to knowing social values objectively; and (iii) contradiction between discourse of individual liberty and free will and 'determinist discourse' on the inevitable outcomes of existing social structures.

³⁷ Freeman (n 29 above) 1212 -1213.

³⁸ P Gabel & P Harris 'Building power and breaking images: Critical legal theory and the practice of law' (1982) 11 *New York University Review of Law and Social Change* 376.

³⁹ Davies (n 35 above) 205 - 210. Other criticisms have included the argument that, in relation to the American scholars who first propagated the theory, it has been critiqued for failing to incorporate race and racial issues, and for underemphasising the role that coercion has in the power of the state to suppress some groups. See KW Crenshaw 'Race, reform, and retrenchment: Transformation and legitimation in antidiscrimination law' (1988) 101 *Harvard Law Review* 1331.

⁴⁰ Tamale (n 17 above) 39.

Tamale also points out that ‘by rewriting the history of African sexualities, the power elite seek to obliterate same-sex relations in order to bolster their control over the political and social context.’⁴¹

In the more specific Nigerian context, Ayeni notes the existence of a larger ‘political’ problem confronting the protection of sexual and gender minorities.⁴² While he does not fully pursue this line of thought, he hints that criminalising laws are ‘less about public morality than it is about political power’.⁴³ Also, Ebobrah – while affirming the primacy of decriminalisation advocacy – recommends a multi-faceted approach, noting that ‘law has its limits and there are areas that judicial action cannot reach’.⁴⁴

The aim of legal advocacy ‘that the individual be left free of state interference in the most intimate domain of sexual choice’⁴⁵ may be suitable for protecting the rights of a few persons. However, this aim becomes an existential threat to structures of power that are founded on inequality and exclusion if it is applied to everyone. While such systems are willing to protect the sexuality of members of the hegemony, the idea of extending the same privileges (or recognising the same rights) for the broader population will radically change the foundation of society. This political dimension is the larger problem that confronts advocacy efforts.

1.3.3 Elite theory and political homophobia

Tamale’s argument on the rewriting of African sexualities indicates that hegemonic discourses on sexuality in the African context is a creation of, and sustained by, a dominant political elite. In this vein, elite theory is an analysis of hegemonic power that argues that the emergence of ‘elites are the inescapable consequence of conflicting interests in all large and complex collectivities’.⁴⁶ While the nature and configuration of the elite will vary from society to society, the essential feature is that an elite comprises a set of persons who are able to ‘affect political outcomes regularly and substantially’.⁴⁷ Elites are also defined as ‘individuals and small, relatively cohesive, and stable groups with disproportionate power to affect national and

⁴¹ S Tamale ‘Exploring the contours of African sexualities: Religion, law and power’ (2014) 14 *African Human Rights Law Journal* 150.

⁴² Ayeni (n 3 above) 222 234.

⁴³ As above.

⁴⁴ 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* 110 134.

⁴⁵ R Murray & F Viljoen ‘Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples’ Rights and the African Union’ (2007) 29 *Human Rights Quarterly* 90.

⁴⁶ J Higley ‘Elite theory and elites’ in KT Leicht & JC Jenkins (eds) *Handbook of politics: State and society in global perspective* (2009) 161.

⁴⁷ Higley (n 46 above) 163.

supranational political outcomes on a continuing basis'.⁴⁸ As Higley argues, where a 'consensually united' elite has created stable political institutions, the need to minimise political tensions often leads to the imposition of restrictive rules, especially on 'morally charged issues'.⁴⁹ As such:

The champions of such morally charged issues are likely to find that members of a consensually united elite distort, partially suppress, or simply confuse the issues if doing so seems necessary to maintain institutional stability⁵⁰

Political homophobia is 'the totality of strategies and tools ... through which holders of and contenders over state authority invoke sexual minorities as objects of opprobrium and targets of persecution'.⁵¹ Political homophobia can be deployed by the elite to create moral panics⁵² – a widespread belief that the stability of society is threatened – to maintain the dominant hegemony. For instance, Victor notes that 'a powerful elite can orchestrate a moral panic' through

the major institutions of a society to promote a campaign to generate and sustain public moral outrage about a threat from a target category of deviants. The actual intention of the campaign is to divert attention away from real problems in a society, the solution of which would threaten the economic and political interests of the elite. The elite fabricates a description of the threat and uses the institutions of society, including the mass media, religion, and law enforcement, to shape public opinion. The threat from supposed dangerous deviants is invented, or at least exaggerated, by the elite, to serve its own vested interests.⁵³

Through political homophobia, the elite can generate moral panics to influence policies and laws that ultimately serve the purpose of entrenching hegemonic power. The historical and contemporary use of political homophobia by the political elite in Nigeria is a key idea that runs throughout the course of this thesis and will be discussed in more substance in Chapter Two of this thesis.

⁴⁸ H Best & J Higley 'The Palgrave handbook of political elites: Introduction' in Best et al (eds) *The Palgrave handbook of political elites* (2017) 3.

⁴⁹ Higley (n 46 above)169.

⁵⁰ As above.

⁵¹ MJ Bosia 'Why states act: Homophobia and crisis' in ML Weiss & MJ Bosia (eds) *Global homophobia: States, movements, and the politics of oppression* (2013) 31.

⁵² JS Victor 'Moral panics and the social construction of deviant behavior: A theory and application to the case of ritual child abuse' (1998) 41 *Sociological Perspectives* 541 547.

⁵³ As above.

1.3.4 Social exclusion theories

The overall effect of the existence of a dominant political elite is the creation of a system of social identities that determines who has access to and who is excluded from public goods.⁵⁴ The study of this effect pivots into social exclusion theories. Social exclusion theories emerged in Western political thought as a framework for engaging social participation and alienation beyond economic considerations. Social exclusion is defined by Walker as:⁵⁵

The dynamic process of being shut out, fully or partially, from any of the social, economic, political, or cultural systems, which determine the social integration of a person in society. Social exclusion may, therefore, be seen as the denial (or non-realisation) of the civil, political and social rights of citizenship.

Allen et al also proposes a definition of social exclusion as:⁵⁶

a multi-dimensional process, in which various forms of exclusion are combined: participation in decision making and political process, access to employment and material resources, and integration into common cultural processes. When combined, they create acute forms of exclusion that find a spatial manifestation in particular neighbourhoods.

Arguably, the Western understanding of social exclusion as a situation that affects particular minorities or groups is not applicable to the Nigerian (and other African) context. In the Nigerian context, social exclusion affects the majority of the population and it is only the powerful that experience the highest levels of inclusion and, for this majority of the population, participation and inclusion is determined by the aggregation of their various identities.⁵⁷ Those who are most affected by restrictive laws are those whose aggregate identities – for instance the sum of their age, employment status, education level, sexuality, and gender – are considered as threats to the established order. As further analysed and demonstrated in Chapters Two and Chapter Five, this thesis engages social exclusion in Nigeria as an outcome of criminalising laws that are enforced as tools of hegemonic power dynamics.

1.3.5 The goal of a more nuanced advocacy

According to Anderson, '[a] rights argument ... must be linked to identified social interests and social conflicts, to ground a proper understanding of how these developments occur and how they may be advanced.'⁵⁸ Equally, a human rights approach to advocacy requires respect for

⁵⁴ S Berry 'Social institutions and access to resources' (1989) 59 *Africa* 41.

⁵⁵ R Walker 'Poverty and social exclusion in Europe' in A Walker & C Walker (eds) *Britain divided: The growth of social exclusion in the 1980s and 1990s* (1997) 8.

⁵⁶ J Allen, G Cars, & A Madanipour 'Introduction' in A Madanipour, G Cars, & J Allen (eds) *Social exclusion in European cities* (1998) 22.

⁵⁷ S Berry 'Social institutions and access to resources' (1989) 59 *Africa* 41.

⁵⁸ T Anderson 'The political economy of human rights' (2002) 50 *Journal of Australian Political Economy* 202.

the indivisibility of human rights. Consequently, this thesis proposes that advocacy should engage the criminalisation of sexual and gender minorities in Nigeria as necessarily related to wider social exclusions – particularly the social and economic curtailment of the majority for the benefit of an elite. For example, advocates for sexual and gender minorities should focus on the socio-economic or political status of victims of persecution rather than on their sexuality alone. Similarly, socio-economic factors impact on the ability to enforce rights and are in turn impacted by the unenforceability of rights. In legal contexts where socio-economic equality is illusory or non-existent, prosecution, arrest, and access to justice may all be determined – not by the rights recognised under law – but by the status of the relevant individual or groups in a process that benefits only an elite part of the population.⁵⁹

1.4 Research question

Ultimately, this thesis answers the question: *How are the laws criminalising or discriminating against same-sex relationships, non-heteronormative sexuality and gender identity in Nigeria ('the criminalising laws') derived from and enforced for the benefit of dominant power systems, and how can advocacy for sexual and gender minorities be improved by an understanding of the linkages between law and power dynamics?*

To arrive at an answer to the main question, this research considers the following sub-questions:

- (a) How do theories of political homophobia, social exclusion, and elite theory explain the emergence and evolution, over various time periods, of the legal framework criminalising same-sex relationships and non-heteronormative sexuality and gender identity in Nigeria?
- (b) Using the persecution and prosecution of self-identified gay men, bisexual men, and men who have sex with men (MSM) living in urban Nigeria as a focus, how are dominant power dynamics reflected in the enforcement of the criminalising laws?
- (c) What are the responses by advocates to the criminalising laws and in what ways have these addressed the role of power dynamics?
- (d) What are the linkages between dominant power in the criminalising laws and wider social exclusions in Nigeria and how can awareness of these linkages improve advocacy for sexual and gender minorities?

1.5 Definition of key terms

Some of the key terms used throughout this thesis are defined as follows:

⁵⁹ WJ Chambliss 'Toward a political economy of crime' (1975) 2 *Theory and Society* 149.

Advocacy: This term is used in this thesis in the broad sense of the strategies, tools, and processes publicly utilised and undertaken by individuals and by organised groups to influence social attitudes and to persuade powerholders to effect policy, legislative, and judicial changes for the benefit of sexual and gender minorities.⁶⁰

Sexual and gender minorities: To cover as much scope of non-heteronormative sexuality and gender as possible, this research uses the term ‘sexual and gender minorities’ as a broad term for diverse sexual orientations and gender identities that are not expressly heterosexual or heteronormative. It is also used as a broader alternative to the lesbian, gay, bisexual, and transgender/transsexual (LGBT) terminology. However, in direct excerpts and other appropriate instances, the research also uses LGBT or other LGBTIQ+ variations.

Power: This research adopts a CLS perspective that situates legal discourse as discourses of power. Accordingly, power is used in this study to refer to the ability of an individual or individuals to ‘wield legal discourses with facility and authority’ or to pay others to do this on their behalf.⁶¹ For the purpose of this research, *hegemonic power* is, borrowing from Gramsci as discussed earlier in the chapter, the directing of dominant legal discourse through social consent or coercion.

Power dynamics or power relations: are used interchangeably to refer to the individual, institutional, social and legal ways in which power is used and avoided, particularly in situations of unequal power.

1.6 Motivation

This research is undertaken as a Critical Legal Studies analysis, inspired by my experiences as a legal advisor in a Lagos-based organisation focused on the protection of the rights of sexual and gender minorities in Nigeria, and as a campaigner and advocate for the rights of sexual and gender minorities in Nigeria. The research also serves as a thematic continuation of my LLM mini-dissertation ‘Deepening the right to dignity of sexual minorities in Nigeria: An analysis of state obligations and responsibilities’ and my other advocacy writings and

⁶⁰ For discussions on advocacy as it relates to social movements, see B Klugman ‘Effective social justice advocacy: A theory-of-change framework for assessing progress’ (2011) 19 *Reproductive Health Matters* 146; J Garcia & R Parker ‘From global discourse to local action: The makings of a sexual rights movement?’ (2007) 12 *Horizontes Antropológicos* 13; and N Stammers ‘Social movements and the social construction of human rights’ (1999) 21 *Human Rights Quarterly* 980.

⁶¹ R Gordon ‘Law and ideology’ (1988) quoted in Freeman (n 29 above) 1226.

academic writings.⁶² During my period working with members of the sexual and gender minorities community and advocacy movement in Nigeria, I observed that the enforcement of the criminalising laws consistently targeted vulnerable groups in society, particularly lower class and unemployed young men. These observations contributed to my understanding that the content of the law plays only a minor role in the protection of the rights of many Nigerians. I observed that law enforcement against sexual and gender minorities seemed to reinforce hegemonic power in the Nigerian society. As such, alongside the provisions of the criminal law on sexual and gender minorities, other factors influence the choices made by the police on whom to arrest for real or perceived homosexual acts, the choices made by the prosecutor of whom to prosecute, as well as public debates and perception on these issues. By highlighting the role of hegemonic power and social control in the regulation of sexuality, this research aims to contribute to the literature on and improve advocacy efforts for the rights of sexual and gender minorities in Nigeria.

In summary, there are three principal motivations for undertaking this study: (i) there are a number of theoretical discussions on hegemonic power in the regulation and criminalisation of sexuality but not enough empirical studies to demonstrate these issues in Nigeria; (ii) the study seeks to inform wider society of the idea that the regulation and criminalisation of sexuality, like other criminal justice issues, is more of a status issue rather than a morality, cultural, or religious issue as political rhetoric implies; and (iii) inform advocates of the need to understand the nuances of hegemonic power that inform laws and their enforcement in order to design strategies that complement existing formal legal approaches to criminalising laws.

1.7 Literature review

The relevant literature for framing the research problem and for addressing the research question is broadly categorised into the following intersecting themes:

- i. Theories of power in the context of the Nigerian legal system*
- ii. Sexuality, sexual identity, and the rights of sexual and gender minorities in the Nigerian context*
- iii. Linkages between social exclusion and the regulation of sexuality*

⁶² A Sogunro 'One more nation bound in freedom: Themes from the Nigerian "anti-gay law"' (2014) 114 *Transition: An International Review* 47; A Sogunro & D Fatunla *Bad laws: Compendium of laws discriminating against persons based on sexual orientation and gender identity expression in Nigeria* (2017); A Sogunro 'Citizenship in the shadows: Insights on queer advocacy in Nigeria' (2018) 45 *College Literature* 632.

Theories of power in the context of the Nigerian legal system

Understanding how the evolution and enforcement of the criminalising laws benefit dominant power systems requires an understanding of elite theory and political homophobia and how the political elite in Nigeria exercise control over social dynamics. For this purpose, *The Palgrave handbook of political elites*⁶³ is used as an introductory text on the existing literature and research on political elites including theories and methods of research. It traces the origins of elite theory from Italian thinkers (Vilfredo Pareto and Gaetano Mosca) to postmodern writers such as C Wright Mills.

Although this text does not specifically capture the Sub-Saharan colonial experience, and the discussions do not directly deal with the regulation of sexuality, it nevertheless provides a background to the theoretical framework relied on in developing the thesis. Elite theory is further broadened in *Elite theory and elites*⁶⁴ where Higley notes the inherent existence of elites as ‘the inescapable consequence of conflicting interests in all large and complex collectivities’.⁶⁵ He proposes a definition of elites that is relied on in the thesis. This is the understanding of elites as ‘persons who ... are able to affect political outcomes regularly and substantially’.⁶⁶

The Nigerian experience of elitism can be understood through Higley’s conception of a ‘consensually united elite’ that emerges ‘through colonial home rule and independence struggles where local elites had already received or obtained in the course of their struggles experience in political bargaining and restrained competitions.’⁶⁷ The kind of political institutions organised by such an elite are often based on ‘a highly restricted suffrage’ and, as such, the ideals of liberal democracy are capable of posing a threat to the stability of those institutions. The response by such an elite to any potential destabilisation of existing institutions is, therefore, to ‘distort, partially suppress, or simply confuse the issues’.⁶⁸ This provides an explanation for why, in political rhetoric, Nigerian authorities do not acknowledge the existence of diverse African sexualities or admit that ‘moral laws’ were an imposition by colonial governments.

Social control for the benefit of a political elite brings up issues of social exclusion and political homophobia. The issue of political homophobia is a developing area of study on the strategic use of power in the regulation of sexuality, and has received attention through the

⁶³ Best et al (eds) *The Palgrave handbook of political elites* (2017).

⁶⁴ J Higley ‘Elite theory and elites’ in KT Leicht & JC Jenkins (n 46 above) 161.

⁶⁵ Higley (n 64 above) 163.

⁶⁶ As above.

⁶⁷ Higley (n 64 above)167.

⁶⁸ Higley (n 64 above) 169.

works of Weiss and Bosia, and Serrano-Amaya,⁶⁹ further discussed in Chapter Two. Other scholars have also expanded on the concept of political homophobia and applied it to African, European, Asian and international law contexts.⁷⁰

Regarding social exclusion, Byrne⁷¹ provides an introduction to the origins and dimensions of social exclusion in Western thought, and conceptualises social exclusion as an outcome of power dynamics, a product of competing interests in society. Although his work does not explore an African context, it helps to shape the analytical understanding of the theory which can then be adapted for the purpose of this thesis.

A more sub-Saharan context to the dynamics of social exclusion – and which demonstrate the intersectionality of inclusion and exclusion based on the aggregate of identities - can be found in Gore's⁷² analysis of the literature on social exclusion in sub-Saharan Africa which notes that the notions of social exclusion prevalent in discussions of poverty, inequality and social justice. He then proceeds to outline the conceptual and structural aspects of social exclusions, emphasising the importance of not applying concepts of exclusion 'fashioned in North America and Western Europe' to African states. This is because while exclusion is often thought of as a phenomenon affecting minorities (whether on the basis of class or other discriminations) in the Global North, exclusion affects the majority of the population in sub-Saharan Africa.

Conceptually, this kind of mass exclusion in African states is traceable to colonial systems when 'all the African population were politically and economically excluded in a variety of ways.' And so, in British colonies, 'they were categorically treated as "subjects" rather than "citizens"'. The creation of independent states did not improve the situation and so, even the rights that were derived from nationality were weak and tenuous. Formal legalism tends to assess rights and obligations through the identity of national citizenship. While formal legalism presumes that the criminal law applies equally to all national citizens in the same way

⁶⁹ MJ Bosia & ML Weiss 'Political homophobia in comparative perspective' in ML Weiss & MJ Bosia (eds) *Global homophobia: States, movements, and the politics of oppression* (2013) 1-29; JF Serrano-Amaya *Homophobic violence in armed conflict and political transition* (2017). 'Bosia and Weiss ... pioneered the study of homophobia as a modular and deliberate political strategy that has taken place in different parts of the world' (N Sleptcov 'Political homophobia as a state strategy in Russia' (2018) 12 *Journal of Global Initiatives: Policy, Pedagogy, Perspective* 140 143).

⁷⁰ R Schäfer & E Range 'The political use of homophobia: Human rights and the persecution of LGBTI activists in Africa' (2014) *International Policy Analysis* 1; N Sleptcov 'Political homophobia as a state strategy in Russia' (2018) 12 *Journal of Global Initiatives: Policy, Pedagogy, Perspective* 140; H Yulius 'Behind political homophobia: Global LGBT rights and the rise of anti-LGBT in Indonesia' (16 June 2017) (article for Heinrich Böll Stiftung) available at <https://th.boell.org/en/2017/06/16/behind-political-homophobia-global-lgbt-rights-and-rise-anti-lgbt-indonesia> (accessed 31 June 2020); LM Mendos (ed) *State-sponsored homophobia* (2019).

⁷¹ D Byrne *Social exclusion* (2005) 2 – 32.

⁷² C Gore 'Social exclusion and Africa south of the Sahara: A review of the literature' (1994) A report by the International Labour Organisation (Labour Institution and Development Programme DP/62/1994A) available on <http://agris.fao.org/agris-search/search.do?recordID=GB2013200767>.

as legal rights, in the context of social exclusions there are a range of identities (that are not linked to national citizenship) which determine the extent of inclusion and exclusion. These include: 'race, ethnicity, gender, livelihood, religion, age, language, place of origin, region, target-group status'.⁷³

Although Gore's work does not deal with the experiences of sexual and gender minorities, he engages with the relationships between social identity and access to resources and social goods, particularly the ways in which social exclusion is related to poverty – both as a cause of poverty and a consequence of poverty. He posits that the 'interrelationship between poverty and social identity in determining access to, and exclusion from, resources, activities and goods and services is a vital question'.⁷⁴ Gore highlights the aspects of social exclusion that still require analysis: (i) the ways through which membership and status within various corporate groups/ networks relates to social identity (e.g. gender, ethnicity, age, place of birth); (ii) the ways through which membership and status within groups and networks affect access to resources and other social goods; (iii) the ways in which economy and polity changes affect the content of rules of membership and rules of resource allocation within groups and networks, and the ways in which identities and rules are negotiated; and (iv) the consequences of all these relationships for the subordinate groups who are denied access to particular resources and social goods, for the dominant groups who restrict access to a particular group, and for the economy as a whole.⁷⁵

The issues highlighted by Gore provide opportunity for engaging with the factors that drive the prosecution and persecution of sexual and gender minorities in Nigeria. For example, is there a difference in the criminalisation of the sexuality of differing groups such as older gay men and younger ones? Are there differences in the impact of the law on richer gay men versus poorer ones? How does being older or younger, richer or poorer affect access to justice? Are there other factors that override sexuality in the determination of criminality? Is an unemployed gay man more or less criminalised than a gay employer of labour?

In his work, Gore also makes references to studies by Sara Berry on social inclusion and exclusion in relation to agricultural practices in sub-Saharan Africa.⁷⁶ Berry validates the theory that social identity strongly determines access to public goods. As such, 'exploitation operates through the subordination of some people within access-defining groups, rather than on the complete exclusion of people from ownership of the means of production.' According to Gore, Berry concludes that, it is the hope of gaining greater inclusivity that motivates individual behaviour rather than fears of punishment. Because access to productive resources

⁷³ Gore (n 72 above) para 1.2.

⁷⁴ As above.

⁷⁵ As above.

⁷⁶ Gore (n 72 above) para 1.4.

is regulated by a number of social identities based on multiple and overlapping criteria, she concludes that 'people invest in meanings as well as the means of production - and struggles over meaning are as much part of the process of resource allocation as are struggles over surplus or the labour process'.⁷⁷ To the extent that this is true, sexual and gender minorities in this type of social environment are more likely to work for advancement in their various social identities rather than expect protection through a purely legalistic decriminalisation remedy. Berry⁷⁸ makes the argument that social exclusion itself is not the problem – otherwise that could be dealt with by direct policy steps – but rather, it is that 'many Africans have become locked into multiple channels of access' thereby creating 'multiple and relatively fluid lines of social conflict'.⁷⁹ A gay man may be excluded from some types of social goods by virtue of being gay, but this may be mitigated by inclusion in other social goods based on considerations of age or wealth. A young poor gay man may be excluded on the basis of age, economic status, and sexuality. Clearly, the advocacy considerations for both men will be different. Gore notes that Berry's thesis 'affirms the value of a "multiple sites" perspective on social exclusion in Africa'. This focuses the interplay between social identity/entitlement and considerations of wider economic change. As such, Berry's research 'cautions against the reflex policy conclusion' – for example, as is often implied in decriminalisation advocacy – 'that inclusion is the solution to the problem of exclusion'.⁸⁰

The influence of the political elite over the legal system in Nigeria is brought into focus by Claude Ake's writings on the Nigerian political economy.⁸¹ These offer theoretical analysis of these constructions of elite theory and social exclusions in the Nigerian environment and the evolution of power dynamics in Nigeria since colonial rule. In 'The African context of human rights', Ake notes that, in the application of international human rights norms to African countries, there has been insufficient concern for 'the historical conditions in which human rights can actually be realized'.⁸² Yet, an examination of the context shows that even in a formal legalism 'rights-conscious' regime, only very few people have the ability to exercise those rights. The irony, of course, is that the few who are able to exercise these rights do not need a bill of rights to do so because their power already secures them against discriminatory or oppressive social attitudes and legal provisions. And yet, the majority who are excluded on the basis of one or the other social identity markers do not have the resources to exercise their rights and so will not be helped by the formal legal existence of these rights. 'Their

⁷⁷ As above.

⁷⁸ S Berry 'Social institutions and access to resources' (1989) 59 *Africa* 41.

⁷⁹ Berry (n 78 above) 50.

⁸⁰ Gore (n 72 above) para 1.4.

⁸¹ C Ake 'The Nigerian state: Antinomies of a periphery formation' in C Ake (ed) *Political economy of Nigeria* (1985) 9; C Ake 'The state in contemporary Africa' in C Ake (ed) *Political economy of Nigeria* (1985) 5.

⁸² C Ake 'The African context of human rights' (1987) 34 *Africa Today* 6.

powerlessness dooms them'.⁸³ If we think of inclusion as ordinary changes in law or the grant of favourable judicial decision, then this perspective confirms Gore's caution against the automatic conclusion that 'inclusion is the solution to the problem of exclusion'.⁸⁴ Advocates for sexual and gender minorities in these contexts have to be wary of the seduction of nominal legal change without any corresponding impact on the social contexts.

In another publication,⁸⁵ Ake observes that the legal norms in Nigeria, particularly the rules governing social life, do not have 'adequate institutional guarantee of their impartiality'. The experiences of social exclusions mean that the majority of Nigerians are not 'legal persons in the strict sense' and thus are unable to adequately compete in or make claims around economic or political competition within the legal framework. Ake notes that 'the essential attributes of market society – namely, formal freedom, equality and universalism, which underscore the possibility of a democratic polity ... are absent in Nigeria'.⁸⁶ And so, even though there may be legal norms that regulate conduct, social interaction itself is 'essentially normless' or, at least, is based on a preference of 'efficiency norms to legitimacy norms'. Again, within this context, Ake re-echoes Berry's research and concludes that 'contending groups struggle on grimly...convinced that their ability to protect their interests and to obtain justice is co-extensive with their power'.⁸⁷

Marxian paradigms on the causes and origins of criminal behaviour, also provide an insight into the construction of crime in Nigeria through the example of a study conducted in 1967.⁸⁸ The study argues that although crimes such as homosexuality are within the interests of the ruling class to control (and are as widespread among the upper classes as the lower classes), the crucial point was in the ability of the ruling class to control the discretion of the law enforcement agencies in ways that provide them with immunity,

'[f]or example, having a legal system encumbered with procedural rules which only the wealthy can afford to implement and which, if implemented, nearly guarantees immunity from prosecution, not to mention more direct control through bribes, coercion and the use of political influence'.⁸⁹

In society where class divisions are highly pronounced, criminal laws are a tool used by the state to keep the subservient classes in check. Thus, the criminalisation of an act is, in itself, less material to the probability of prosecution and conviction than the social status and

⁸³ Ake (n 82 above) 6.

⁸⁴ Gore (n 72 above) para 1.4.

⁸⁵ C Ake 'The Nigerian state: Antinomies of a periphery formation' in C Ake (ed) *Political economy of Nigeria* (1985) 9.

⁸⁶ Ake (n 85 above) 15.

⁸⁷ Ake (n 85 above) 9.

⁸⁸ WJ Chambliss 'Toward a political economy of crime' (1975) 2 *Theory and Society* 149.

⁸⁹ Chambliss (n 88 above) 166.

economic class of the person who has committed the act. Therefore, in such a legal environment, a focus on the fact of criminalisation does not sufficiently address the existence of criminalising laws, compared to a focus on socio-economic equality. On the content and operation of criminal law, as Chambliss notes:⁹⁰

'acts are defined as criminal because it is in the interests of the ruling class to so define them... members of the ruling class will be able to violate the laws with impunity while members of the subject classes will be punished ... as capitalist societies industrialize and the gap between the bourgeoisie and the proletariat widens, penal law will expand in an effort to coerce the proletariat into submission.'

Also, on the consequences of crime for society, the effect is that the criminal laws divert the attention of lower classes from 'the exploitation they experience, and directs it toward other members of their own class rather than towards the capitalist class or the economic system.'⁹¹ While a Marxist paradigm is insufficient for the purpose of conceptualising social exclusions in the Nigerian context, the strength of economic class in determining social inclusions and exclusions in the Nigerian context makes this analysis useful in an understanding of the interplay between social identity and criminalisation in Nigeria.

Sexuality, sexual identity, and the rights of sexual and gender minorities in the Nigerian context
An analysis of the enforcement of criminalising laws for the benefit of existing power structures requires an understanding of how sexuality plays into power dynamic in society. For example, Ngwena⁹² provides arguments on the power relationships inherent in the normative process of regulating sexuality. He notes that 'culture is used to build a state-sanctioned politically correct discourse.' Political power is used to exclude groups 'whose sexualities are outside the domain of majoritarian and hegemonic culture.' The outcome of this is to make society the victim and same-sex relationships the threat. Thus, 'oppression and suffering ... are not politically recognised as a juridical wrong but, instead, as just desserts.'⁹³

The colonial trajectories that have shaped contemporary misguided understandings of African sexuality have been extensively discussed by scholars such as Tamale,⁹⁴ who proffers methodologies and approaches to researching and teaching sexuality, gender, and power dynamics in African contexts. She suggests that contemporary researchers should think in terms of 'multiple sexualities', thereby engaging an approach that is 'specialised to reflect its

⁹⁰ As above.

⁹¹ As above.

⁹² C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018).

⁹³ Ngwena (n 92 above) 242.

⁹⁴ S Tamale 'Researching and theorising sexualities in Africa' in S Tamale (ed) *African sexualities: A reader* (2011) 11.

nuances, and its contextual and multi-layered nature.⁹⁵ She also urges the evolution of a theory of African sexualities that factor in the bilateral interactions with European influences and colonial history and how these have shaped contemporary African legal systems and their attitudes to criminality. A consideration of colonial influences will direct the research to examine the underlying political and economic relations that shaped European norms of 'good' and 'moral' family values and notions of sexuality and if these 'middle and upper class' aspirations continue to play a role in the direction of public opinion and legal attitudes to criminalising African sexualities and sexual rights. Also, Nyanzi⁹⁶ highlights five theoretical frameworks and paradigms for understanding the interactions of power, politics, and sexuality: governmentality (which engages how sexuality politics seeks to regulate social behaviour to produce 'governable citizens'), sexual and reproductive health (which undertakes clinical studies of sexuality in terms of reproduction issues and disease control), the charmed circle (exploring how society differentiates between 'good' and 'bad' sexual practices), sexual stereotypes (inquiring into how rigid assumptions are attached to identity), and sexual citizenship and rights (engages the extent to which the notion of citizenship in modern states include sexual autonomy). While the chapter does not directly discuss the effect of overlapping systems of social exclusions on the sexuality of gay men, it offers ideas on the interplay between hegemonic power, social inclusion, and sexuality that serves as background material for the study.

Existing literature on African sexualities, particularly in the work of Tamale, Aderinto, and Epprecht, also calls for a recognition of the connections between the persecution of nonconforming sexualities and the perpetuation of autocratic rule in African countries.⁹⁷ This includes, for instance, noting the historical and contemporary use of 'moral panics' orchestrated by the state to 'distract attention from the more significant socio-economic and political crises afflicting society.'⁹⁸ Tamale, for instance, does not just locate this agenda in the ruling government but in a 'political elite' that uses this scapegoating to entrench itself in power. This argument is also broadened to demonstrate the relationships between the regulation (and shaping) of African sexualities by law, culture, and religion and the perpetuation of dominant political systems.⁹⁹

⁹⁵ S Tamale 'Researching and theorising sexualities in Africa' in Tamale (n 94 above) 17.

⁹⁶ S Nyanzi 'Unpacking the [govern] mentality of African sexualities' in Tamale (n 94 above) 477.

⁹⁷ S Tamale 'Confronting the politics of nonconforming sexualities in Africa' (2013) 56 *African Studies Review* 31; S Aderinto *When sex threatened the state: Illicit sexuality, nationalism, and politics in colonial Nigeria, 1900 – 1958* (2015); M Epprecht *Sexuality and social justice in Africa: Rethinking homophobia and resistance* (2013).

⁹⁸ Tamale (n 97 above) 33.

⁹⁹ S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150.

Also, this research relies on reports of studies conducted by The Initiative for Equal Rights (TIERS);¹⁰⁰ Human Rights Watch¹⁰¹ (HRW), and PEN American Centre¹⁰² as secondary data sources on advocacy efforts in Nigeria, especially following the passing of the SSMPA. Other works that provide insights on the growth and state of advocacy for sexual and gender minorities in Africa and Nigeria include scholarly articles by Jjuuko¹⁰³ and Ayeni.¹⁰⁴

Linkages between social exclusions and the regulation of sexuality

Opportunities for a more nuanced advocacy for sexual and gender minorities – instead of simply relying on the concept of individual rights – can be derived from an exploration of wider social issues, especially the extant levels of socio-economic equality in society. In this regard, a series of reports by Andrew Flores and Andrew Park, based on studies carried out by the Williams Institute, provide empirical data on: the progress of LGBT acceptance in 141 countries, the correlations between acceptance of LGBT persons and the legal environment, and the correlations between inclusion of LGBT persons and the economic environment. Based on a statistical tool developed by the researchers, the study indicated that in the past 15 years, countries that were previously more accepting (for example Netherlands, Sweden or Spain), have become even more accepting, while countries that were less tolerant (for example Azerbaijan, Bangladesh, Ghana, and Georgia) have become even more so.¹⁰⁵ Social exclusion within the context of poverty and the economy plays a strong role in intolerance for sexual and gender minorities. Previous research indicated that ‘when countries grow stronger economies, people tend to feel more secure and more open to rights for LGBT people and other minorities. That effect is even stronger when economic gains are more evenly shared within an economy, so that everyone benefits.’¹⁰⁶ As discrimination against sexual and gender minorities means reduced opportunities for employment and education and overall reduction

¹⁰⁰ The Initiative for Equal Rights (TIERS) ‘2015 Report on human rights violations based on real or perceived sexual orientation and gender identity in Nigeria’; ‘2016 Report on human rights violations based on real or perceived sexual orientation and gender identity in Nigeria’.

¹⁰¹ Human Rights Watch “‘Tell me where I can be safe’ The impact of Nigeria’s Same Sex Marriage (Prohibition) Act’ (2016).

¹⁰² PEN America Centre ‘Silenced voices, threatened lives: The impact of Nigeria’s anti-LGBTI law on freedom of expression’ (2015).

¹⁰³ 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) 260.

¹⁰⁴ VO Ayeni ‘Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same Sex Marriage (Prohibition) Act’ in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 203.

¹⁰⁵ MVL Badgett, A Flores & A Park ‘The connection between strong economies and LGBT rights is no joke’ (27 April 2018) <https://www.advocate.com/commentary/2018/4/27/connection-between-strong-economies-and-lgbt-rights-no-joke> (accessed 31 July 2020); MVL Badgett, A Park, & A Flores ‘Links between economic development and new measures of LGBT inclusion’ (2018) 1.

¹⁰⁶ As above.

in economic contribution, then (in research across 120 countries) there was a correlation between acceptance and strong economies. Essentially, there is a continuous interaction between the level of democracy, the level of acceptance of sexual and gender minorities, and the strength of the economy. For instance, growing acceptance is best translated into legal rights within a working democracy, in a society with a free press and respect for the rule of law.

These interactions go both ways, with the strength of one increasing the others. The more willing society is to share the gains of the economy with sexual and gender minorities, the more opportunities there are for sexual and gender minorities to contribute to future economic gains. The Nigerian context indicates a weak legal system with an economic environment driven by social identities rather than legal norms. Advocating a broad-based decriminalisation or similar legal change without an understanding of the 'contextual reality' offers little protection under such a legal system. However, an understanding of the reality of the different marginalised groups can inform better advocacy tools. The central theme of the report is not just about legalising acceptance 'in the books' but about creating: (i) a democracy with strong voices; and (ii) a political economy with overriding equality.

Poverty is not just about lack of material comforts, but also about exclusion and restrictions on autonomy and capacity. The lack of sexual rights is a type of poverty. Armas,¹⁰⁷ for instance, notes that a rights-based approach to sexuality must maintain the indivisibility of human rights. This requires recognition of the interdependence of sexual rights with the rights to health, housing, food and employment. Sexual rights are much more than sex, they are an aspect of political participation at an intimate level. The repression of sexual rights has an economic impact on both the people directly affected by restrictions and their families have an economic impact, not only for the people directly affected, but also for their families, friends and social and labour networks. The economic status of victims also impacts the ability to access sexual justice.

Regarding the evidential basis for drawing connections between sexuality and poverty, a 2010 report¹⁰⁸ by the Swedish International Development Cooperation Agency (SIDA) concludes that, based on the available literature and research, the denial of sexual rights can contribute to poverty and conversely, poverty can make people more vulnerable to abuse of sexual rights. In essence the report highlights that sexuality and economic conditions are interconnected. For example, economic systems are often structured around ways that 'exclude or adversely include' people based on existing norms on sexuality and sexual rights,

¹⁰⁷ H Armas 'Whose sexuality counts? Poverty, participation and sexual rights' (2007) Institute of Development Studies, Working Paper 294.

¹⁰⁸ S Jolly 'Poverty and sexuality: What are the connections? Overview and literature review' (2010).

sexual expression within the society can have impact on material comforts while economic status can also impact on the ability to express sexuality. The study of class relations and the economic dimensions of sexuality is, therefore, important in the struggle for sexual rights.

Questions on how to conceive connections between sexual and economic justice, the possibilities that global capitalism open up for alternative sexual politics, and how new sexual norms and regulations are forged under the neoliberal world order – issues which are discussed in Chapter Five of this thesis – are also considered by Bedford and Jakobsen.¹⁰⁹ In resolving these questions, the authors consider the necessity to rethink perspectives that separate issues of sexual justice as irrelevant and immaterial to issues of economic justice. Borrowing from feminist theories, they note that ‘neither reproductive rights nor sexual autonomy can be discussed apart from economic justice’.¹¹⁰ With these connections in mind, they trace out the ways in which global neoliberal economic agendas have further intensified the challenges in attaining sexual rights, for example through the withdrawal of government support in health and reproductive rights services under the purported ideal of ‘family values’. In relation to criminality, they also note the tendency of the global economy to categorise sexual transactions that do not fit within a type of ideal as ‘deviant’ and thus policed and criminalised irrespective of context. This is often manifested in economic notions suggesting that ‘the family is under threat from a range of predatory forces’¹¹¹ compelling the state to institute policies that ultimately infringe on basic freedoms: ‘Neoliberalism in its newest form is characterised by a security economy that profits from making people illegal and then policing them.’¹¹² Although much of this work is global in perspective, it also offers useful insights on the interplay of external and internal economic pressures in the constructions of African sexualities and the obstacles to the assertion of sexual rights in the African context.

Contribution to the literature

There is ample literature on social control and systems of political domination. However, while literature has often alluded to the use of laws regulating sexuality to entrench control, there has been no study on the use of these laws in the Nigerian context. This research hopes to contribute to the literature by linking theories of sexuality and theories of hegemonic power to the evolution and enforcement of laws criminalising same-sex relationships in Nigeria. Also, through field research and analysis of findings, this research provides an empirical basis for exploring these theories in the context of the enforcement of criminalising laws in Nigeria.

¹⁰⁹ K Bedford & J Jakobsen ‘Towards a vision of sexual and economic justice’ (2009) 4 *New Feminist Solutions Series* 1.

¹¹⁰ Bedford & Jakobsen (n 109 above) 4.

¹¹¹ Bedford & Jakobsen (n 109 above) 21.

¹¹² Bedford & Jakobsen (n 109 above) 28.

1.8 Methodology

Answering the research question requires a socio-legal analysis of the criminalising laws in Nigeria, under theories that frame the origins, motivations, and enforcement of these laws and the interactions between enforcement and wider social control in Nigeria. This socio-legal approach involves both a reliance on legal texts and academic literature and an analysis of primary and secondary data on social contexts. This is also consistent with the Critical Legal Studies approach that this thesis is adopting. As such, in the analysis of legal history and enforcement, this research utilises both analytical and qualitative methods of research. In the following sub-sections, I describe the research approach, research design, research methods, and other issues such as sampling and data collection and analysis.

1.8.1 A CLS socio-legal approach

The nature of the inquiry undertaken by this research – an analysis of the ‘real’ basis for the criminalisation of same-sex relationships in Nigeria – necessarily invokes the use of a CLS socio-legal approach. A CLS socio-legal approach utilises a study of the historical and contemporary power relations that underlie legal provisions as well as a study of the lived experiences of the people most affected by the law. As discussed in section 1.3.2 above, a CLS approach situates legal rules within hegemonic political power and the ideological struggles of society. Similarly, a socio-legal approach is founded on

[t]he importance of placing law in its social context, of using socio-scientific research methods, of recognising that many traditional jurisprudential questions are empirical in nature and not just conceptual. A pervasive theme is the gap between legal rules and actually lived social norms.¹¹³

Because the text of the law itself only plays a very small role in the Nigerian context, advocacy for the rights of sexual and gender minorities should necessarily consider the context within which laws are formulated and enacted to make sense of their purpose. As such, a CLS socio-legal approach – as used in this research – engages the social realities of the criminalising laws and their historical and contemporary ramifications.¹¹⁴ This approach enables an enunciation of the ‘historical conditions in which human rights can actually be realized’¹¹⁵ and engages with the actual experiences of the legal framework by groups and individuals in society. A socio-legal analysis of the underlying motivations, factors, and processes in the

¹¹³ Freeman (n 29 above) 858.

¹¹⁴ As above; DN Schiff ‘Socio-legal theory: Social structure and law’ (1976) 39 *Modern Law Review* 287; R Cotterrell ‘Why must legal ideas be interpreted sociologically?’ (1998) 25 *Journal of Law and Society* 171.

¹¹⁵ Ake (n 82 above) 6.

creation of legal rules enables advocacy to go beyond demanding decriminalisation in a legalistic, acontextual sense, but to also address other subtle dynamics that are often obfuscated by political rhetoric.

Gore observes that 'States in Africa do not conform to the rational-legal ideal type which (supposedly) has universalistic standards of provision for national citizens.'¹¹⁶ This observation shows the wisdom in stepping back from the assumption that the Nigerian state is a disinterested party in the formation of legal norms. Instead, this research proceeds on the understanding that because the Nigerian state is a product of its colonial origins, contemporary social relations, legal norms, as well as inclusion and exclusion in the overall political economy can best be understood with reference to this colonial inheritance and its continuing legacy in shaping the development and application of legal norms. As Njoku observes on the relationship between law and society in Nigeria:¹¹⁷

[T]he main objective of institutionalizing colonial rule in the colonies in Africa was to stabilize the polity so as to source for raw materials, cheap-labour and huge market for their products. The above determined the way they administered the people.

In the years following independence, these laws and their contexts have not changed. Instead, an elite class¹¹⁸ operating the same legal systems and socio-economic interests has replaced the previously dominant colonising class.¹¹⁹

1.8.2 Research design

In keeping with the CLS socio-legal approach, this study adopts both doctrinal analysis and empirical research methods in analysis the criminalisation of same-sex relationships and non-heteronormative sexuality and gender identity in Nigeria. Nigeria is an important choice for this study as it offers an example of the internal contradictions besetting African countries aspiring to a form of liberal democracy while trapped in autocratic social and legal dysfunctions informed by their colonial origins and design. Nigeria has practiced a continuous democracy since 1999, and has a Bill of Rights entrenched into its constitution. However, the emergence of democratic government has only resulted in growing repression for contested rights, contrary to conventional liberal human rights wisdom. Even then, the application of repressive

¹¹⁶ Gore (n 72 above) para 1.

¹¹⁷ A Osita-Njoku 'The political economy of development in Nigeria: From the colonial to post-colonial eras' (2016) 21 *IOSR Journal of Humanities and Social Science* 11.

¹¹⁸ Although used as a single term, there are different categories of elite within the Nigerian political system including political, intellectual and religious.

¹¹⁹ RL Sklar 'The nature of class domination in Africa' (1979) 17 *Journal of Modern African Studies* 531; L Diamond *Class, ethnicity and democracy in Nigeria* (2015) 31; C Ake 'The African context of human rights' (1987) 34 *Africa Today* 6.

laws has not been equal across the board. Studying the intricacies of law and advocacy in the Nigerian socio-legal environment will contribute richly to advocacy for the protection of sexual and gender minorities in sub-Saharan Africa.

While the doctrinal aspects of the research rely on legal texts and archival documents, the field research was designed to utilise interviews with self-identified¹²⁰ gay men, bisexual men, and men who have sex with men (MSM) living in urban areas of Nigeria (specifically, people living in Abuja, Kaduna, Lagos, and Port Harcourt). This focus on men is based on the preponderance of media and organisational reports, relied on during the research design process, on the police persecution of men in Nigeria on the basis of their real or perceived sexual orientation and gender identity. Similarly, the decision to focus on urban areas was based on the consideration that almost all of the media reports relied on during the research design process indicate that the enforcement of the criminalising laws take place in cities. In designing the research, interview participant selection was limited to community members and advocates in four cities (Abuja, Kaduna, Lagos, and Port Harcourt), as a manageable representation of Nigeria's considerable geopolitical spread. Abuja and Kaduna are located in the predominantly Muslim North, while Lagos and Port Harcourt are located in the predominantly Christian South. Also, from my experience in Nigeria, I was aware that there are more accessible community support and advocacy groups in the selected cities. The interview sampling is described in sub-section 1.8.4 below while more details of the interviewees are set out in Appendix B and in the introductory sections of Chapter Three (for the community members) and Chapter Four (for the advocates).

1.8.3 Research methods

This research employs both doctrinal and empirical research methods. The doctrinal research utilises both primary data and secondary sources. Primary data was obtained through document analysis, including the analysis of legal texts and court judgements. Primary data was also obtained in the form of historical/archival documents at the National Archives of Nigeria located at the University of Ibadan campus, Ibadan. For this purpose, I visited the National Archives of Nigeria in February 2019 and was able to access colonial documents and records, including dispatches and letters from the years 1890s onwards. I took notes and was allowed to photograph select documents.

Secondary data sources comprised mainly: media reports, reports of organisations working on human rights issues including the protection of sexual and gender minorities, and

¹²⁰ Police arrests often target people for their real or perceived sexual orientation and gender identity/expression, irrespective of whether or not the persons are, in fact, sexual and gender minorities. Because sexual and gender minorities are a criminalised population in Nigeria, this research necessarily relies on men who self-identify to the researcher as having sexual or romantic attraction to other men, including self-identified bisexual men and other men who sleep with men (MSM).

scholarly writings on sexuality and gender, political homophobia, elite power, social exclusion, and other relevant areas of the research.

The empirical research was principally carried out in the form of qualitative research, through semi-structured interviews.¹²¹ The sampling, data collection, and data analysis for the empirical research are discussed in the following sub-sections.

I deal with the first research sub-question (*'how do theories of political homophobia, social exclusion, and elite theory explain the emergence and evolution, over various time periods, of the legal framework criminalising same-sex relationships in Nigeria?'*) principally through a doctrinal research method, using both primary and secondary data sources.

The second and third research sub-question (*'how is dominant power dynamics reflected in the enforcement of the criminalising laws?'* and *'what are the responses (by advocates to the criminalising laws and in what ways have these addressed the role of power dynamics?'*) are addressed through empirical methods, by way of face-to-face semi-structured interviews with community members and advocates. I also utilise media and organisational reports by human rights organisations and human rights bodies in answering these questions.

The fourth research sub-question (*'what are the linkages between dominant power in the criminalising laws and wider social exclusions in Nigeria and how can awareness of these linkages improve advocacy for sexual and gender minorities?'*) is addressed by utilising a combined analysis of both the doctrinal and empirical primary and secondary data sources.

1.8.4 Empirical research: Recruitment and sampling

The community of sexual and gender minorities in Nigeria has only begun to emerge into public presence in recent years but, for the most part, is still very much underground. However, by virtue of my professional background and my advocacy for the rights of sexual and gender minorities in Nigeria since 2012, I have knowledge of and access to community-based/non-governmental organisations and advocates through whom I was able to connect with a manageable sample of interviewees.

During the research design phase, I connected with key organisations and persons in the cities of interest, all known to me from my experience of working in the sector, and informed them of my research project and my interest in interviewing both community members and advocates. I received positive responses and was granted access to their staff and community networks. For the interviews with community members I utilised both convenience sampling (that is, making contact with available members of the research community)¹²² and a snowball

¹²¹ S Brinkmann 'Unstructured and semi-structured interviewing' in P Leavy (ed) *The Oxford handbook of qualitative research* (2014) 286 - 287.

¹²² JF Lynch 'Aligning sampling strategies with analytic goals' in L Mosley (ed) *Interview research in political science* (2013) 41.

sampling technique (which involved getting access to other members of the community based on recommendations from previous interviewees).¹²³ For the interviews with advocates, I used purposive non-random sampling (which involved making strategic choices about who to interview)¹²⁴ of both the staff of key organisations and of advocates in the relevant cities.

The resulting overall sample size for the interviews is 41 persons, comprising of 24 community members and 17 advocates. However, the aim of the research is not to achieve a broad representativeness that is capable of quantitative generalisation, but instead to represent a range of typical experiences through anecdotal evidence of the underlying theories of power dynamics framing this research. More details of the interviewees are provided in the 'Participant characteristics' section of Chapter Three and Chapter Four of this thesis in relation to community members and advocates respectively. Because of the highly sensitive nature of the area of research and the potential vulnerability of the participants to legal and social backlash (understood in this thesis as the risk of personal harm, legal liability, and socio-political repercussions against individuals), identifying details of the interviewees have been omitted from this study. Instead, an anonymised list of interviewees has been provided in Appendix B.

Although police officers and other state actors are also directly involved, in their official capacities, in the enforcement of the criminalising laws, I chose not to interview these persons for this research. This decision is based on the premise of the research that the state is not impartial and is an unreliable source on its own motives. Also, because non-heteronormative sexuality is officially taboo, statements by state actors may not reflect their actual opinion – or even reality. Accordingly, the 'law in action' experiences of people affected by the enforcement of the criminalising laws are more important to this research than official statements or 'law on the books'.¹²⁵

1.8.5 Empirical research: Data collection and data analysis

Primary data for the empirical research was principally obtained in the form of interviews with community members and advocates. The interviews were conducted with the aid of a questionnaire (provided in Appendix D) to collect the required information. These guide questions were arranged according to pre-identified themes. All the respondents were interviewed in person by the researcher and field notes were taken, with the use of a recorder for accurate transcription. All respondents were informed of the research protocol and provided with consent forms. I visited the four cities (Abuja, Kaduna, Lagos, and Port Harcourt) between January and February 2019 and interviewed, at least ten persons in each city,

¹²³ As above.

¹²⁴ As above.

¹²⁵ Freeman (n 29 above) 835.

including both advocates and community members. The interviews were conducted either at my hotel lodgings or in the office premises of my hosting organisation

The empirical research utilised thematic analysis as the qualitative data analysis technique. Thematic analysis is 'a method for identifying, analysing and reporting patterns (themes) within data'.¹²⁶ Unlike other forms of analysis, thematic analysis is not bound to a theoretical framework, and as such is more flexible for a qualitative research that relies on various theoretical frameworks such as this thesis.¹²⁷ A thematic analysis entails the 'search for themes'¹²⁸ in the interview data corpus. In this context, a theme is 'an implicit topic that organizes a group of repeating ideas'.¹²⁹

I started the thematic analysis process by transcribing the interviews and entering the transcript data into NVivo software. In the NVivo software, I organised the transcripts according to the cities in which the interviews were conducted. Using the research sub-questions as a guide, I then proceeded to assign codes to the relevant information in the data corpus to generate a data set relevant to the research sub-question. Coding is the process of analysing data to generate codes that can then be categorised into themes.¹³⁰ A code, as described by Saldana, is 'a word or short phrase that symbolically assigns a summative, salient, essence-capturing, and/or evocative attribute for a portion of ... data'.¹³¹

In order to provide a more linear and unbroken narrative of the empirical research for each of the two categories of research subjects, further details on the participant information and characteristics, the thematic data analysis process, and the setting of the research are provided along with the research findings in Chapter Three (which analyses interviews with, and discusses the experiences of law enforcement by, community members) and in Chapter Four (which analyses interviews with, and discusses responses to the criminalising laws by, advocates).

1.8.6 Empirical research: Ethical issues

The empirical research involved human subject participation, all of whom were part of the sexual and gender minorities community or movement and who are potentially vulnerable to legal and social backlash and, as such, this study required ethical clearance. For this purpose, ethical clearance was obtained from the Research Ethics Committee of the Faculty of Law, University of Pretoria (provided in Appendix A) prior to undertaking the interviews. The

¹²⁶ J Saldana *The coding manual for qualitative researchers* (2013) 177; V Braun & V Clarke 'Using thematic analysis in psychology' (2006) 3 *Qualitative Research in Psychology* 77 79.

¹²⁷ Braun & Clarke (n 126 above) 80 – 81.

¹²⁸ Saldana (n 126 above) 177.

¹²⁹ CF Auerbach and LB Silverstein *Qualitative data: An introduction to coding and analysis* (2003) 38.

¹³⁰ Saldana (n 126 above) 2.

¹³¹ Saldana (n 126 above) 3.

respondents were duly informed about the study, its aims, and how it could benefit or otherwise affect them, and they were provided with confidentiality forms; only once these forms were signed did interviews take place. Interviews were entirely voluntary and, other than a nominal sum for participants' travel expenses, no monetary incentive was given to the participants. To ensure confidentiality, all the interview recordings are stored and securely encrypted on an external storage device that has been handled only by the researcher, as required by the Research Ethics Committee for a minimum of ten years from the commencement of the study. During the transcription process, only carefully selected portions of the recordings, stripped of any revealing information, were provided to external transcribers through an online shared folder. These shared folders were deleted immediately after transcription. In the data analysis, the names of all participants – including advocates and community members – have been left out, and coded labels have been assigned instead.

1.9 Research limitations and challenges

Scope: An engagement of the relationships between the regulation of sexuality and elite social control in a country as populous and diverse as Nigeria is a very broad project that requires several perspectives. The research can only provide a limited perspective of power dynamics, in this case, through the experiences of self-identified gay men, bisexual men, MSM in urban areas. However, this research can provide a foundation that other studies into the subject can build on, for example, from a women's and a more specific transgender perspective.

Also, since less than ten years have passed since 2014 when the SSMPA was signed into law, enforcement of the law may still be open to other dynamics that are not considered in this study. In particular, the scope of the empirical research has been limited to the law enforcement situation in Nigeria as at the end of 2019. It is currently unknown how significant developments in Nigeria since then, particularly the introduction of a new policing law and widespread protests against police brutality in 2020, may impact power dynamics in Nigeria and, consequently, the extent of its effect on sexual and gender minorities in coming years.

The scope of this research is also limited to historical and contextual analysis of the criminalising and discriminatory laws in Nigeria. While it would be beneficial to also consider lessons and experiences from evolving advocacy in other jurisdictions in Africa or elsewhere, such a comparative approach is outside the scope of this thesis and outside the CLS approach (discussed in sub-sections 1.3.2 and 1.8.1 above) of situating any advocacy strategy within local contexts of power and politics.

Topic constraints: Discussing and engaging issues around sexuality is generally difficult in Nigeria's highly conservative environment. The issue of same-sex relationships makes this conversation even more difficult. Potential reluctance by interviewees was

mitigated by organising the interview meetings at community centres run by advocacy organisations and guaranteeing anonymity. Also, there was difficulty in accessing complete archival records of legislative and policy decisions on the emergence of the criminalising laws.

Positionality limitations: My professional and academic work in the last five years has involved engagement with people who identify as sexual and gender minorities in Nigeria, as well as the advocacy movements for the protection of their rights at community, policy, strategic litigation, and law enforcement levels. This situation posed two limitations in the course of field research. On one hand, as a known member of the advocacy movement, there is a risk that responses from other advocates may have been biased based on the perception of my work by the respondent. On the other hand, as a cisgender male ally, there is a potential limitation in being an outsider to the community and thereby obtaining only limited information or missing 'insider' cues and nuances in the responses of members of the community. These challenges are, however, also mitigated by my longstanding involvement in community work and my experience of community socialisation in the Nigerian context.

1.10 Thesis structure

The thesis has six chapters. **Chapter One** is the introduction and background to the study. Chapters Two to Five correspond to the four research sub-questions. Chapter Six is the summary and concluding chapter of the study. Chapter Two is titled **Power dynamics in the evolution of criminalising laws**. This chapter is an analysis and application of theories of elite power and social exclusion within the context of the emergence and growth of the criminalising legal framework in Nigeria. The chapter reviews the emergence of the legal framework on sexual and gender minorities in Nigeria at different periods of time and examine the socio-legal contexts of: colonial imposition, the retention of laws by the post-colonial state, and the recent wave of criminalisation under seemingly democratic regimes. Chapter Three is titled **Power dynamics in the enforcement of criminalising laws**. This chapter incorporates findings from field research on enforcement to provide an analysis of how law enforcement against sexual and gender minorities reinforces hegemonic power dynamics in Nigeria. Chapter Four is titled **Interrogating advocacy responses to criminalising laws and to power dynamics**. This chapter investigates responses to the legal framework (starting from the period of the introduction of the process towards the enactment of the SSMPA) and the extent, if at all, to which these responses have addressed the existence of hegemonic power in Nigerian society. It also discusses findings on if and how the understanding of power dynamics is utilised by advocates in shaping their work. Chapter Five is titled **Advancing advocacy for the protection of sexual and gender minorities in Nigeria**. Based on findings from the preceding chapters and from other secondary sources, this chapter draws out

linkages between the criminalisation of same-sex relationships and wider social exclusions in Nigeria. It also formulates ideas on how advocacy in Nigeria can utilise these intersections for the better protection of sexual and gender minorities.

CHAPTER TWO: POWER DYNAMICS IN THE EVOLUTION OF CRIMINALISING LAWS

2.1 Introduction

The previous chapter introduced the theoretical foundations of this thesis and also put forward the argument that to be effective legal advocacy for the protection of sexual and gender minorities in Nigeria must understand and critically engage with the social and political context of laws criminalising or discriminating against same-sex relationships and non-heteronormative sexuality and gender identity ('the criminalising laws') if it is to yield positive outcomes of non-discrimination and equal protection under law for sexual and gender minorities. Such an engagement requires an awareness of the dominant power dynamics and relations underlying the evolution and enforcement of the criminalising laws in Nigeria, with the understanding that these power dynamics are part of wider social control aimed at perpetuating hegemonic power for the benefit of a political elite. Based on these arguments, this thesis offers a Critical Legal Studies perspective of the criminalisation of same-sex relationships in Nigeria and the wider state dynamics of how homophobia is used strategically by the political elite. The previous chapter also notes that the broad purpose of this research is to highlight gaps in, and opportunities for legal advocacy for the rights of sexual and gender minorities in Nigeria and elsewhere with a similar socio-political context.

In this chapter, the thesis elaborates on and employs contemporary theories of power dynamics in society and, based on an understanding of these theories, examines the evolution and enactment of the laws criminalising same-sex relationships in Nigeria at different time periods. Accordingly, this chapter serves two broad purposes. First, within a unifying theme of hegemonic power, it reviews the relevant theories of political homophobia, elite power, and social exclusion in the context of the legislative criminalisation of same-sex relationships. Second, this chapter analyses the hegemonic contexts surrounding the enactment of the laws criminalising same-sex relationships in Nigeria, highlighting the overt and subtle deployment of the legal system by a structurally evolving but ideologically consistent political elite.

Other than this introductory part, this chapter is divided into four other sections. In the next section (section 2.2), I analyse and review theories of political homophobia, elite power and social exclusion as hegemonic ideals in the evolution of criminalising laws in Nigeria. However, this section does not attempt an exhaustive analysis of these theories but instead identifies their relevance to the thesis, particular as a precursor to the historical analysis that will be discussed in section 4 of this chapter.

In section 3, I provide a broad overview of the growth and nature of the Nigerian legal system, tracing its history from the application of colonial laws in the original colonies and protectorates to the development of a modern legal system. This overview is intended to provide an informative background for next section. In section 4, I enter into a substantive analysis of the evolution of the laws criminalising same-sex relationships in Nigeria at different time periods and the contexts of political homophobia, elite control, and social exclusion that shaped the enactment of these laws. This historical and contextual analysis is discussed under four broad time periods, each of which roughly corresponds to significant changes in both the political system and the legal treatment of sexual and gender minorities. The first phase of this legal history, from 1914 to 1960, covers the political formation of the Nigerian identity as a colonial state, and the introduction of homophobic colonial laws and values to enhance the political interests of the British Empire. The second phase, roughly between the 1960s and 1990s, involves the independence of Nigeria as a new state and the retention of homophobic colonial laws and values to legitimise the interests of a new political elite as they engaged in political struggles for the control of the Nigerian state, including a civil war and decades of military rule. The third phase, between the late 1990s and early 2000s, covers politics in the Northern Nigeria states in the period immediately after some 30 years of military rule, and the introduction of Shari'a laws into the criminal justice systems of these states. The fourth phase, roughly overlapping with the third from the 2000s to the present, also involves the post-military era and the reintroduction of electoral politics, and features the emergence of 'homegrown' homophobic laws promoted and adopted by contemporary Nigerian political leadership.

2.2 General foundations and analysis of theory

In the following paragraphs, I build up on the theories introduced in Chapter One and analyse the theories of political homophobia, elite power and social exclusion as they relate to the perpetuation of hegemonic power in Nigeria.

2.2.1 Understanding political homophobia

The concept of political homophobia has only begun to receive serious attention as a distinct theory and subject of study, and the scope and dimension of this theory is best exemplified in the works of Weiss and Bosia, and Serrano-Amaya.¹ For the purpose of this thesis, I borrow

¹ MJ Bosia & ML Weiss 'Political homophobia in comparative perspective' in ML Weiss & MJ Bosia (eds) *Global homophobia: States, movements, and the politics of oppression* (2013) 1-29; JF Serrano-Amaya *Homophobic violence in armed conflict and political transition* (2017). 'Bosia and Weiss ... pioneered the study of homophobia as a modular and deliberate political strategy that has taken place in different parts of the world'

from their work to define political homophobia as the conscious use of homophobia as ‘a political strategy, often unrelated to substantial local demands for political rights’.² It can also be viewed as ‘the use of homosexuality to produce fear for political purposes’.³ Political homophobia is the theoretical engagement of how

homophobia is deliberately fomented by political actors (often presidents and ministers – and not only in Africa) as soon as they get into a legitimacy crisis. In particular in economic crises, in which public criticism of abuses of power, excessive corruption, patronage and clientism by a small ruling elite begins to increase, heads of state and high-ranking politicians reach for the cudgel of homophobia and use it to attack people of different sexual orientation and/or gender identity vociferously in the regime-friendly media.⁴

Bosia and Weiss suggest that political homophobia is utilised as a tool: for constructing or reinforcing authoritative notions of ‘national collective identity’; for preventing alternative identities that may oppose this national collective identity, whether or not such other identities related to sexuality; for mobilizing around contentious issues and empowered actors; and as ‘a metric of transnational institutional and ideological flows’.⁵ Bosia goes further, suggesting three interconnecting frameworks for researching homophobia as: a tool by state actors for reconstituting belonging in periods of transition; a tool for affirming political rule when state actors are threatened by competition; and a tool for organising strategic alliances to build state capacity and scapegoat LGBT people within a Western sexual binary.⁶ Similarly, following up on research by Conway and others, Ashely Currier identifies three ways in which political homophobia may be useful to state leaders:⁷ it can be used as a way to silence dissent, from including both gender and sexual-diversity activists and political opponents; it allows leaders to deflect attention away from critical and sensitive issues; and it allows the rewriting of history from the perspective of the ruling party.⁸

Homophobia as a political tool

(N Sleptcov ‘Political homophobia as a state strategy in Russia’ (2018) 12 *Journal of Global Initiatives: Policy, Pedagogy, Perspective* 140 143).

² Bosia & Weiss (n 1 above) 2.

³ Serrano-Amaya (n 1 above) 1.

⁴ R Schäfer & E Range ‘The political use of homophobia: Human rights and the persecution of LGBTI activists in Africa’ (2014) *International Policy Analysis* 1.

⁵ Bosia & Weiss (n 1 above) 3.

⁶ MJ Bosia ‘Why states act: Homophobia and crisis’ in ML Weiss & MJ Bosia (eds) *Global homophobia: States, movements, and the politics of oppression* (2013) 31 32.

⁷ A Currier ‘Political homophobia in postcolonial Namibia’ (2010) 24 *Gender & Society* 110 115.

⁸ Currier (n 7 above) 116.

A key argument of this thesis is that the enactment and enforcement of laws criminalising same-sex relationships or regulating sexuality broadly in Nigeria are not merely random instances of discrimination but are part of systemic social control with the purpose of consolidating state power for the benefit of elite interests. For Bosia and Weiss, the traditional understanding of homophobia as ‘some deep-rooted, perhaps religiously inflected sentiment’ was not a sufficient method of analysing the incidents of homophobia in public discourse.⁹ Instead, homophobia has to be understood as a ‘conscious political strategy often unrelated to substantial local demands for political rights’¹⁰ and as ‘a state strategy, social movement, and transnational phenomenon, powerful enough to structure the experiences of sexual minorities and expressions of sexuality.’¹¹ Bosia further conceives of political homophobia as:

the totality of strategies and tools, both in policy and in mobilizations, through which holders of and contenders over state authority invoke sexual minorities as objects of opprobrium and targets of persecution.¹²

This understanding of political homophobia: (i) challenges the rhetoric often used by state actors that laws regulating sexuality in general or criminalising same-sex relationships are merely an expression of popular will; (ii) shifts focus from the merely legal aspects of criminalisation to the underlying political subtext; and (iii) identifies the linkages between homophobia and the political goal of controlling ‘state authority’. This last feature – the need to secure state power from ideas that could lead to more freedoms – is the most pervasive, if unspoken, theme in arguments by political leaders justifying the persecution of sexual and gender minorities. However, the political nature of homophobia is often masked by vague and imprecise arguments focusing on culture, religion, neo-colonialism, and even appeals to pseudo-science.¹³ As will be discussed in section 4 below, while the laws that criminalise same-sex relationships in Nigeria may seem to have been products of clinical and disinterested legislative processes, they are in fact political products, shaped both by ‘the politics and legacy of colonialism’¹⁴ and the need by elite groups to control state power through the course of Nigeria’s history.

Homophobia as a strategic tool

⁹ Bosia & Weiss (n 1 above) 2.

¹⁰ As above.

¹¹ As above.

¹² Bosia (n 6 above) 31.

¹³ T McKay & N Angotti ‘Ready rhetorics: Political homophobia and activist discourses in Malawi, Nigeria, and Uganda’ (2016) 39 *Qualitative Sociology* 397; A Sogunro ‘One more nation bound in freedom’ (2014) 114 *Transition: An International Review* 54 – 57; Bosia (n 6 above) 43 - 44.

¹⁴ Sleptcov (n 1 above) 142.

The use of political homophobia is strategic, and often deployed with a deliberate purpose, particularly when there is a legitimacy crisis in the state. Wiess and Bosia (2013) explain this use as

purposeful [strategy], especially as practiced by state actors; as embedded in the scapegoating of an 'other' that drives processes of state building and retrenchment; as the product of transnational influence-peddling and alliances; and as integrated into questions of collective identity and the complicated legacies of colonialism.¹⁵

A typical strategy of political homophobia is in the creation of moral panics, that is, 'a societal response to beliefs about a threat from moral deviants'.¹⁶ Stanley Cohen, who defined and popularised the term conceives of a moral panic as when '[a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests'¹⁷ As a strategy, political homophobia creates, encourages, or magnifies widespread thinking in society that sexual and gender minorities constitute a threat to social values and interests. To create these panics, homosexuality may be typified as an aberration to universal human nature, or as an erosion of African values through the invasion of western culture, or even as a public health concern. This strategy can be executed using several tactics and policies, including media propaganda, teachings in organised religions, and whipping up sentiments in public debates.

However, this thesis is concerned principally with the political use of laws to repress sexual and gender minorities and serve the interests of hegemonic power in Nigeria. As Sleptcov argues, the examination of legislation is an important aspect of engaging political homophobia as legislation 'denotes both the will of the legislator and demonstrates the perpetuation of political homophobia in the law'.¹⁸ In the case of Russia, for instance, Sleptcov explains how laws that criminalise same-sex acts produce 'a notion of the correct sexual behavior that transcends into the political realm, reinforcing the heteronationalistic nature of the nation-building'¹⁹ This allows Russian legislators to set up homosexuality as an ideology ('homosexuality') and exclude from political representation those whose ideology do not fit into the portrayal of Russia as 'purely heterosexual'.²⁰

¹⁵ Bosia & Weiss (n 1 above) 14.

¹⁶ JS Victor 'Moral panics and the social construction of deviant behaviour: A theory and application to the case of ritual child abuse' (1998) 41 *Sociological Perspectives* 541 542.

¹⁷ S Cohen *Folk devils and moral panics: The creation of the mods and rockers* (2011) 1.

¹⁸ Sleptcov (n 1 above) 145.

¹⁹ Sleptcov (n 1 above) 146.

²⁰ As above.

The language utilized by the legislators aims at restructuring sexuality on a political scale, subjugating homosexuality to heterosexuality. It allows for deployment of political homophobia in order to create a sense of national unity based on sexuality. Conservative heteronationalism reflected in the legislation portrays the Russian nation as purely heterosexual. Russians who do not fit the category are deprived of recognition and representation.

As will be discussed later in this chapter, the same idea of using political homophobia to pursue a nation-building rhetoric, as described by Sleptcov above, is present in the Nigerian context. In such a context where homophobia is used by the political elite as a political strategy, it is then necessary for activists and scholars to rethink social mobilisation by understanding who benefits from political homophobia and how its use is organised and deployed.²¹

Homophobia is modular

The issue of modularity engages political homophobia as a similarly recurring phenomenon that is 'imposed in a consistent way' across different political contexts.²² Although local context is important in the analysis of criminalising laws, the geographical spread of these laws at nearly the same moments in history,²³ and the existence of similar language in legislation and political rhetoric in different social and political contexts²⁴ contributes to the idea that political homophobia exhibits 'similar characteristic across cases where present'.²⁵ This aspect of political homophobia is crucial for understanding that, while the Nigerian historical and contemporary context matters, there is also an overarching theme of social control for elite interests in the deployment of political homophobia that transcends historical time and geographical space.

2.2.2 Elite power and hegemony

The term 'elite' is used to describe 'persons who ... are able to affect political outcomes regularly and substantially'.²⁶ Another definition considers it to mean 'individuals and small, relatively cohesive, and stable groups with disproportionate power to affect national and

²¹ Bosia & Weiss (n 1 above) 1 – 24.

²² Bosia & Weiss (n 1 above) 6.

²³ 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) 263 - 265.

²⁴ As above.

²⁵ Sleptcov (n 1 above) 141; Gloppen and Rakner also outline the similarity of patterns in the politicising of the rights of sexual and gender minorities in Africa. S Gloppen & L Rakner 'LGBT rights in Africa' in C Ashford & A Maine (eds) *Research handbook on gender, sexuality and the law* (2020) 194 199.

²⁶ J Higley 'Elite theory and elites' in KT Leicht & JC Jenkins (eds) *Handbook of politics: State and society in global perspective* (2009) 163.

supranational political outcomes on a continuing basis'.²⁷ In particular, the 'political elite' wield or control 'hierarchically structured institutions' including government, top industries, and the media with the capacity to significantly affect political decisions.²⁸ However, the structures and characteristics of a group that can be recognised as the political elite will vary from country to country and, as such, this diversity means there is no generally accepted theory on what constitutes the typology of the elite and their relationship to political effects.²⁹ This argument is particularly true in the case of Nigeria where, at different periods of its colonial, military, and civilian history of governments, different groups of individuals have constituted the nucleus of the political elite.

Nevertheless, an understanding of elite theory is traceable from the work of European thinkers such as Vilfredo Pareto and Gaetano Mosca all the way to writers such as C Wright Mills in more recent times.³⁰ Their ideas concretised the understanding of the existence of an elite versus the non-elite and the importance of the elite in shaping political outcomes and influencing, directing, or manipulating social values. The diversity of elite structures implies that a political elite can emerge in different ways in different contexts. In the Nigerian context, for instance, a type of elite political emerged, as Higley theorises, 'through colonial home rule and independence struggles where local elites had already received or obtained in the course of their struggles experience in political bargaining and restrained competitions.'³¹ According to Sklar, the elites that emerged in post-colonial times are characterised by high-status occupation, high income, superior education and the ownership or control of business enterprises.³² The idea of a political elite did not solidify in Nigeria until its 'first republic' in the 1960s.³³ Prior to this period, the colonial system had weakened the traditional systems of communal governance and substituted this with a hierarchical social and economic system that utilised and institutionalised political power as a factor of social interaction.³⁴ It was under these circumstances that a new elite inherited power from the British and became the foundation of a new political class. As noted by Sklar:³⁵

Political parties in Nigeria ... were conspicuous agents of class formation. They created elaborate systems of administrative and commercial patronage, involving the "liberal use of public funds to promote indigenous private enterprise, while many of their leading members entered upon a comparatively grand

²⁷ H Best & J Higley 'The Palgrave handbook of political elites: Introduction' in Best et al (eds) *The Palgrave handbook of political elites* (2017) 4-5.

²⁸ As above.

²⁹ As above.

³⁰ As above.

³¹ Higley (n 26 above) 167.

³² RL Sklar 'The nature of class domination in Africa' 17 *Journal of Modern African Studies* 531 533.

³³ L Diamond *Class, ethnicity and democracy in Nigeria* (2015) 31.

³⁴ Diamond (n 33 above) 30.

³⁵ Sklar (n 32 above) 534.

manner of life in parliamentary office.” ... In cases of conflict between newly dominant class-interest groups and communal-interest groups, the former would nominally prevail.

This new elite kept the lifestyle and social habits of the colonial administrators and also ‘the social distance they had maintained’.³⁶ Ultimately, the approach to governance by the postcolonial elite resulted in the limited political participation of the majority of the population and the consequent social exclusion.

The protection of elite interests often requires the utilisation of hegemonic power. Gramsci conceptualised the word ‘hegemony’ to describe the domination of bourgeoisie cultural values over other social classes to become the ‘common sense’ values for all.³⁷ Gramsci also reconceptualised class domination beyond the Marxist perspective of economic relations, and included ideological, political, and cultural relations in the perpetuation of existing dominant systems.³⁸ And so, within the scope of these multiple relations, hegemonic values are usually recognised ‘spontaneously’ as such by popular consensus and often voluntarily complied with by the majority of the population because they are perceived as the proper or ‘common sense’ thing to do. That is, the hegemony is ‘secured by the consent given by the mass of the population’³⁹ even where this majority of the population are, in reality, socially excluded from participating in social goods under the practical reality of these values.

This kind of dominant hegemonic process – that is, the imposition of the norms and values of the colonisers as universal ‘common sense’ values – was critical to the colonial project in Africa – and Nigeria – and, afterwards, in the postcolonial ‘nation-building’ project of successive African leaders.⁴⁰ As Ngwena points out, the hegemonic process is inherent in the use of ‘culture’ and arguments of ‘African culture’ to ‘build a state-sanctioned politically correct discourse’, including the exclusion of groups ‘whose sexualities are outside the domain of majoritarian and hegemonic culture.’⁴¹

The colonial hegemonic process in Africa was not merely an accident of history. Instead, it was driven by economic and political interests in securing control over the resources required for the growth of the European nations. This project was executed, amongst other things, through the introduction of a European style education and legal system that made a

³⁶ Diamond (n 33 above) 32.

³⁷ J Schwarzmantel *The Routledge guidebook to Gramsci's prison notebooks* (2014) 72 – 79.

³⁸ A Gramsci *Selections from prison notebooks* trans Q Hoare & GN Smith (1971)12; A Gramsci *Prison notebooks: Vol 2* trans JA Buttigieg (1996) 201; MDA Freeman *Lloyd's introduction to jurisprudence* (2008) 1157.

³⁹ A Gramsci *Selections from prison notebooks* trans Q Hoare & GN Smith (1971)12, 198 - 199; Schwarzmantel (n 37 above) 74.

⁴⁰ C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018).

⁴¹ Ngwena (n 40 above) 242. See also S Osha ‘Unravelling the silences of black sexualities’ (2004) 18 *Agenda: Empowering Women for Gender Equity* 92.

claim to having an intrinsic validity outside the sociocultural contexts.⁴² Those members of the colonised society who conformed to these colonial values were rewarded through the ability to participate in the colonial project as educators, missionaries, administrators, and industry professionals.⁴³ In this way, the dominant colonial values became transferred from the colonisers to a new set of local elite.

The need to preserve the hegemonic values necessitates the elite creating what Higley describes as political institutions based on 'a highly restricted suffrage'.⁴⁴ Such institutions have limited receptiveness to reform and are generally incompatible with the ideals of liberal democracy. Threats to the stability of these institutions provoke a reaction by the elite to 'distort, partially suppress, or simply confuse the issues'⁴⁵ usually through the spread of moral panics, and in the case of sexual and gender minorities, reliance on political homophobia. In a similar vein, Tamale points out to the use of these moral panics as critical to the perpetuation of elitism in postcolonial African countries.⁴⁶ By institutionalising hegemonic values and focusing the attention of the public on threats to those values, the political elite can 'distract attention from the more significant socio-economic and political crises afflicting society'.⁴⁷

The relationships between political homophobia and hegemonic elite power is described in Nyanzi's analysis of governmentality – a term first conceptualised by Michel Foucault as 'technologies and procedures for directing human behaviour' – in African cultural settings.⁴⁸ According to Nyanzi, the process of producing 'governable citizens' is interwoven with how 'citizens think about and respond through organised practices shaping behaviour'.⁴⁹ Ultimately, 'acceptable behaviour' is determined not by the inherent value or harm of the individual's behaviour, but by the extent to which it conforms to 'socially acceptable standards' and, through this process of socialisation, people govern their own conduct as well as the conduct of others.⁵⁰

2.2.3 Social exclusion

In Chapter One, I provided Walker's definition of social exclusion as involving a process of 'being shut out, fully or partially, from any of the social, economic, political, or cultural systems,

⁴² M Epprecht *Sexuality and social justice in Africa: Rethinking homophobia and resistance* (2013) 118 -128.

⁴³ Epprecht (n 42 above) 124.

⁴⁴ Higley (n 26 above) 169.

⁴⁵ Higley (n 26 above) 169.

⁴⁶ S Tamale 'Confronting the politics of nonconforming sexualities in Africa' (2013) 56 *African Studies Review* 31.

⁴⁷ Tamale (n 46 above) 33.

⁴⁸ S Nyanzi 'Unpacking the [govern] mentality of African sexualities' in S Tamale (ed) *African sexualities: A reader* (2011) 477.

⁴⁹ Nyanzi (n 48 above) 481.

⁵⁰ As above.

which determine the social integration of a person in society.⁵¹ Similarly, social exclusion is considered as an integrated and multi-dimensional process, including exclusion from decision-making and the political process.⁵² The consideration of social exclusion in this thesis focuses on two levels: (i) a primary level where it specifically affects vulnerable sexual and gender minorities who are excluded from sociocultural participation through political homophobia; and (ii) the secondary level where it generally affects the majority of society who are excluded from political participation and access to social goods through the manipulation of dominant values.

Byrne's understanding of social exclusion as an outcome of power dynamics between competing interests in society⁵³ is relevant to both of these levels. On the one hand, the exclusion of sexual and gender minorities in Nigeria through criminalisation helps to perpetuate the idea that the dominant hegemony is working to preserve the cultural and religious values of the majority, in the fabricated struggle between the interests of sexual and gender minorities and the interests of the rest of society. On the other hand, the exclusion of the majority of society through the manipulation of perceptions of social values helps to secure hegemonic power favouring elite interests against that of the majority. By focusing on sexual and gender minorities (and other vulnerable groups) through the legal system, the political elite are able to keep the majority of the population out of meaningful discourse relating to the control of the political system. This manipulation of social values and interests through legislation focusing on issues of sexual conformity subsumes, diminishes, and distracts from other values that are able to lead to anti-hegemonic debates on social justice and equality. In essence, the focus on excluding sexual and gender minorities from sociocultural participation is linked to the exclusion of the majority of the population from political participation.

However, this is merely one aspect of the issue. Beyond examining the deployment of political homophobia in the enactment of laws targeting sexual and gender minorities as a means of social control, it is also important to consider the actual enforcement of those laws and how enforcement sustains hegemonic power. It is in this consideration of the enforcement practice that Gore's analysis of social exclusion as an 'interrelationship between poverty and social identity'⁵⁴ becomes relevant. This means that enforcement of exclusionary laws is not uniform across one identity. Instead, enforcement is determined by an aggregate of identities 'based on multiple and overlapping criteria'.⁵⁵ This is what Berry describes as 'multiple

⁵¹ R Walker 'Poverty and social exclusion in Europe' in A Walker & C Walker (eds) *Britain divided: The growth of social exclusion in the 1980s and 1990s* (1997) 8.

⁵² J Allen, G Cars, & A Madanipour 'Introduction' in A Madanipour, G Cars, & J Allen (eds) *Social exclusion in European cities* (1998) 22.

⁵³ D Byrne *Social exclusion* (2005) 2 – 32.

⁵⁴ C Gore 'Social exclusion and Africa south of the Sahara: A review of the literature' (1994) A report by the International Labour Organisation (Labour Institution and Development Programme DP/62/1994A) para 1.2 available on <http://agris.fao.org/agris-search/search.do?recordID=GB2013200767>

⁵⁵ Gore (n 54 above) para 1.4.

channels of access' which, in turn, create 'multiple and relatively fluid lines of social conflict.'⁵⁶ As such, social exclusion is not uniform across one strand of identity and, in the case of sexuality, other factors of identity such as age, educational level, employment status, economic and social status are likely to play a significant role in the extent to which criminalising laws have a negative impact on an individual.

Within this interplay of identities, an issue that often comes up in literature is the issue of respectability and how individuals often use this as a means of achieving social inclusion and protecting themselves from threats of social exclusion.⁵⁷ Respectability has been defined as 'acceptance of the norm' by following 'a normative standard of behaviour in public, while being aware of continual evaluations against that standard'.⁵⁸ This requires the individual to engage in what Johshi describes as 'repetitive performance of social norms based on the behaviours society deems respectable'.⁵⁹ However, because there is an inherent conflict between the individual's sense of self and the performance they have to undergo, there is continuous social and self-evaluation of this process:⁶⁰

This means that a person neither is nor can become respectable, since this connotes a kind of stability and permanency that can only be illusory; rather, she is only ever in the process of being and becoming respectable by doing respectability.

In the Nigerian context, the issue of respectability and how it translates into everyday strategies by sexual and gender minorities will be further engaged in the analysis of the field research in Chapters Three and Four of this thesis.

2.3 Setting the stage: the growth and nature of the Nigerian legal system

The application of theories of political homophobia, elite power, and social exclusion to the evolution of laws criminalising same-sex relationships in Nigeria is more effectively accomplished through an awareness of the historical growth of Nigerian law.⁶¹ The sovereign entity now known as the Federal Republic of Nigeria originated as an administrative amalgamation of several communities first by the trading entity known as the Royal Niger Company, and later by the British Government, which then administered the territories as

⁵⁶ S Berry 'Social institutions and access to resources' (1989) 59 *Africa* 50.

⁵⁷ Y Johshi 'Respectable queerness' (2012) 43 *Columbia Human Rights Law Review* 415; DZ Strolovitch & CY Crowder 'Respectability, anti-respectability, and intersectionally responsible representation' (2018) 51 *Politics Symposium, Political Science & Politics* 340.

⁵⁸ Johshi (n 57 above) 418.

⁵⁹ Johshi (n 57 above) 419.

⁶⁰ As above.

⁶¹ TO Elias *The Nigerian legal system* (1963); AEW Park *The sources of Nigerian law* (1963); AO Obilade *The Nigerian legal system* (1979); CO Okonkwo (ed) *Introduction to Nigerian law* (1980).

separate colonies and protectorates and, ultimately as one country.⁶² Accordingly, what is now the Nigerian legal system and its criminal laws originally developed along different trajectories in the different British-controlled territories until these separate systems were integrated as one national legal system under the guidance of British colonial administrators. Today, the original variations are embodied in provincial (state) laws across the country. Nevertheless, there is a general uniformity in the socio-political context of their evolution over time and so they can be studied as one broad Nigerian legal system.⁶³

The societies and communities that would later become known as 'Nigeria' had their own legal systems, including their criminal laws, and these remained unaltered for a while after the British arrived in the early 1800s.⁶⁴ However, in 1863 a newly established colonial government introduced English Common Law into the southern coastal kingdom of Eko, by then referred to and eventually renamed 'Lagos'.⁶⁵ The British also established 'a legislature and a system of courts of the English type', while still allowing 'continued administration of customary law' within the coastal colony of Lagos for a smoother administrative process.⁶⁶ These legal developments came in the wake of several political upheavals, including a British naval bombardment of the Eko kingdom in 1851, a consular treaty between Eko and Britain in 1852, and finally a forced treaty in 1861 ceding Eko to Britain as a colony. The legal system introduced into Lagos (formerly Eko) would eventually form the kernel of Nigeria's legal system as the administration and legal system evolved over the next 100 years until Nigeria's independence in 1960.

Meanwhile, in interior parts of the south, 'customary laws' in their various forms continued to be prevalent while north of the River Niger – towards the trans-Sahara – Islamic law (which had been introduced from 1804 to 1808, nearly 60 years previously) was practiced.⁶⁷ These other interior communities were not under British control although they traded with British adventurers who continued their attempt to gain control of the coastal kingdoms in the south. These attempts were granted European international legitimacy when, in 1885, the Berlin Conference recognised the claim of the British and their trading companies to all of the territorial areas and seaports that would later be known as Nigeria. In 1900, the

⁶² The historical references in this section relies on the comprehensive narrative of Nigerian history in M Crowder *The story of Nigeria* (1962) and R Bourne *Nigeria: A new history of a turbulent century* (2015).

⁶³ Presently, the Nigerian legal system is inclusive of the received English law (which include the common law of England, principles of equity, and English 'statutes of general application' enacted before 1900), colonial ad-hoc legislation (called ordinances), and 'proper' Nigerian law (which include parliament and military enacted legislation, judicial decisions, customary laws, and domesticated international law). For more on these, see Park (n 61 above), Obilade (n 61 above), Okonkwo (n 61 above).

⁶⁴ CO Okonkwo *Okonkwo and Naish on criminal law in Nigeria* (1990) 4.

⁶⁵ Ordinance 3 of 1863 cited in Park (n 61 above) 1.

⁶⁶ As above.

⁶⁷ SL Sanusi 'Politics and Sharia in northern Nigeria' in B Soares & R Otayek (eds) *Islam and Muslim politics in Africa* (2007) 179.

British Crown formally purchased these territories from the Royal Niger Company as 'the Southern Nigeria Protectorate' and 'the Northern Nigeria Protectorate'. Under the command of Frederick Lugard, the British then began a series of both diplomatic and violent tactical campaigns against the original ruling houses in both the coastal and interior territories.⁶⁸ In 1904, having secured British control north of the Niger, Lugard proclaimed a Criminal Code to aid British administration over all of what would later become Nigeria. This code was modelled on an 1899 version that was then in use in the Queensland colony, Australia. Curiously, this Queensland code was itself based on a draft code that had been rejected in 1878 in Britain creating a situation where 'the Codes that the English denied themselves, they gave it with largesse to their colonies and dependencies'.⁶⁹

In 1914, the coastal and other territories in the Southern Nigeria protectorate were merged under one administration with the territories in the Northern Nigerian protectorate to become the Colony and Protectorate of Nigeria. This political amalgamation meant the Northern Criminal Code was extended to the whole country.⁷⁰ This legal union would not last long. Very soon, it became clear to the British that it was easier to displace the various traditional legal systems in the southern territories than it was to displace the Islamic legal system in the northern territories. The Muslim population – under the guidance of their scholars and traditional emirates – agitated for a criminal law system that reflected their values and 'in the political situation of the time' they could not be ignored by the colonial government.⁷¹ However, the British resisted these demands long enough until they were ready to leave the country. In 1959, a year before Nigeria's independence, a separate Penal Code was enacted for Northern Nigeria, modelled on the code in use in Sudan, which in turn was based on an 1860 Penal Code drafted by Lord Macaulay for India. This code was a 'compromise between the reformers and the traditionalists' and ensured that 'traditional Moslem crimes... are preserved'.⁷²

After Nigeria's independence from the British in 1960, the two codes – the Penal Code in the north and the Criminal Code in the south – continued to govern criminal justice administration across the country. When the two regions were fragmented into three and then four regions, and ultimately into 36 states, the succeeding jurisdictions in each region inherited the respective codes with local amendments and alterations over time. Despite these

⁶⁸ Crowder (n 62 above); Bourne (n 62 above).

⁶⁹ J Michael & H Wechsler *Criminal law and its administration: cases, statutes, and commentaries* (1940) cited in AG Karibi-Whyte *History and sources of Nigerian criminal law* (1993) 3.

⁷⁰ Okonkwo (n 64 above) 4 - 5. This Criminal Code would become the basis for the codes in British-controlled East and Central Africa. However, the desire by the British not to undermine Islamic law (by exempting native tribunals from the operation of the code) meant a simultaneous practice of both British law and Islamic law and it was a matter of chance which court an accused was tried before.

⁷¹ Okonkwo (n 64 above) 9.

⁷² Okonkwo (n 64 above) 9 - 10.

variations across the country, it is important to emphasise that ‘both the Criminal Code and the Penal Code have a common origin, employ the same concepts, and are governed by the same philosophical considerations’.⁷³ This understanding also applies to the broader legal system, and as such, despite the federal nature of Nigeria’s legal system, the original existence of the country as two regions means there is a uniformity in the context of these laws.⁷⁴

2.4 Political homophobia, social exclusion and elite power in the criminalisation of same-sex relationships in Nigeria

In the previous section, I discuss the evolution of the Nigerian legal system as a direct product of Nigeria’s colonial history. In this section, I turn to a more in-depth analysis of the laws criminalising same-sex relationships at different stages of Nigerian history, first by setting out the text of the criminalising provisions, then by examining the contexts of political homophobia, social exclusion, and elite power surrounding the enactment of the laws in the respective periods.

2.4.1 Colonial phase (1914 – 1960)

*The criminalising laws*⁷⁵

The legal framework criminalising same-sex relationships in Nigeria were first introduced across Nigeria in 1914, following the amalgamation of Nigeria as one administrative territory. Today, those colonial provisions criminalising same-sex relationships are (generally) set out in sections 214 – 217 of the Criminal Code and sections 284 and 405 of the Penal Code. The Criminal Code states:⁷⁶

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....

⁷³ Karibi-Whyte (n 69 above) ix.

⁷⁴ As above.

⁷⁵ Criminal Code Act Chapter C38 Laws of the Federation of Nigeria 2004 (‘Criminal Code’) applicable across Nigeria except in the northern states, and the Penal Code (Northern States) Federal Provisions Act Chapter P3 Laws of the Federation of Nigeria 2004 (‘Penal Code’) applicable in the northern states of Nigeria.

⁷⁶ n 75 above, secs 214 – 217.

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.

Similarly, the Penal Code states:⁷⁷

284. 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.

Section 405(2) of the Penal Code defines 'vagabond' as:

(e) 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.

(f) any female person who dresses or is attired in the fashion of a man in a public place.⁷⁸

The context of political homophobia in the colonial phase

The deliberate and unilateral inclusion of provisions criminalising same-sex acts in the colonial criminal laws by the British colonial government is a demonstration of Bosia and Weiss's conceptualisation of political homophobia as a 'conscious political strategy' often unrelated to substantial local demands for political rights.⁷⁹ Still, it is important to critically examine the ways in which these laws constituted a philosophy of political homophobia and how this philosophy strategically favoured the political and economic interests of the colonial project across all of the British Empire. In view of this goal, I will examine the context of political homophobia in the colonial laws from two perspectives: (i) the origins of homophobic laws in England and their codification in the Queensland Code and its offshoots; and (ii) the process and *raison d'être* for introducing these codes in Nigeria.

Regarding the first perspective, it is useful for understanding the analysis in this section to trace the origins of homophobia from the hegemonic politics of England to the colonial Queensland Code. The first occurrence of a law criminalising same-sex relationships in England was in 1533, under the reign of King Henry VIII, when the offence of 'buggery' – punishable by hanging – was legislated by parliament.⁸⁰ The year that this legislation was passed was not happenstance. In 1533, King Henry VIII married Anne Boleyn against the

⁷⁷ n 75 above, sec 284.

⁷⁸ Not all the penal code states have retained this sub-section (f).

⁷⁹ Bosia & Weiss (n 1 above) 2.

⁸⁰ L Crompton *Homosexuality and civilization* (2003) 362.

directives of the Pope and in 1534 he declared himself the head of the Church of England. And so, the direct criminalisation of homosexuality by the English parliament coincided with the political struggles between the English monarch and the papacy; with the English parliament limiting the jurisdiction of the ecclesiastical church,⁸¹ and in this way demonstrating the political motivation behind the use of homophobia. Strategically, the English monarch was also able to make accusations of homosexuality against the monks in the papal monasteries as a pretext for seizing their lands and assets.⁸² 'Within a few years the monasteries were dissolved and their wealth transferred to Henry and those nobles and lawyers who had supported his policies'.⁸³ These actions were carried out without criminal trial and, in fact, the only documented criminal trial on the issue of homosexuality was steeped in politics:⁸⁴

In northern England a violent rebellion challenged Henry's action. It was in connection with this revolt that we find what seems to be the only formal charge of sodomy on record in Henry's reign. Lord Hungerford, who had been a close companion of Henry in his youth and an associate of Cromwell's, was convicted of treason and of sodomy with his male servants. In addition, he was accused of employing a priest who had criticized the 'plucking down of abbeys.' This was the crux of the matter; the sodomy charge appears to have been brought to bolster a case that was primarily political.

And so, the introduction of laws criminalising same-sex relationships in England was deeply connected to a morality intended to sustain the political and economic interests of the English monarchy. The theological question of whether or not priests should be able marry – a key issue between the Protestants and the Catholics – was framed around homosexuality through political propaganda, with Catholic monks constantly accused of being 'sodomites'.⁸⁵ When the Catholics were temporarily restored to political favour in 1553 under the reign of Queen Mary, the buggery law was repealed, but was reinstated in 1564 after Queen Elizabeth I – a Protestant – came to power. This reinstated statute, with an amendment of the sentence from death to life imprisonment, would go on stay in the English statute books until eventually repealed in 1967. More importantly, this 1564 statute influenced the codification of homophobia into the criminal laws of British colonies starting with the Queensland Code in Australia and, ultimately, the Criminal and Penal Codes of colonised societies like Nigeria.⁸⁶

The use of legislation to enforce political homophobia in England reinforced the 'protestant' Christian values that secured the political interests of the monarchy, creating a

⁸¹ Crompton (n 80 above) 363.

⁸² As above.

⁸³ Crompton (n 80 above) 364. Interestingly, as Crompton notes, these seizures were simply based on a report commissioned by the monarch, the law itself was never used directly to prosecute and convict the monks.

⁸⁴ As above.

⁸⁵ Crompton (n 80 above) 365

⁸⁶ A Gupta 'This alien legacy: The origins of "sodomy" laws in British colonialism' (2008) 4 – 8.

hegemonic ideal that guided the notion of a dutiful citizen of the English Crown.⁸⁷ And so, under this ideal, there was a 'natural' order of things and acts that did not fit into this so-called natural order were to be frowned on. The language of the codified homophobic legislation emphasised that same-sex relationships were 'against the order of nature' or 'unnatural offences'. As Gupta notes:⁸⁸

Edward Coke, in his seventeenth-century compilation of English law, wrote that 'Buggery is a detestable, and abominable sin, amongst Christians not to be named.' He stressed the foreign derivation of the term—'an Italian word'—as well as the act itself: 'It was complained of in Parliament, that the Lumbards had brought into the realm the shamefull sin of sodomy, that is not to be named.' He nonetheless named it as acts "committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast.'

This understanding of a hegemonic ideal or 'an order of nature' guided the beliefs and acts of the traders, explorers, missionaries, and administrators of the British Empire. It informed their attitudes to other cultures and societies – termed 'savage', 'primitive', and 'barbaric' – that did not fit into this worldview and it justified the imposition of colonialism. This brings me to the second perspective of political homophobia in the colonising laws: the process and *raison d'être* for introducing these codes in Nigeria.

Much like the use of political homophobia in the conflict between the English monarchy and the papacy, the use of political homophobia served British interests in the colonial project through three interlocking processes: (i) the undermining and erasure of existing norms and values; (ii) the introduction of British hegemonic ideals to justify British political control; and (iii) the establishment of British political control to secure British commercial interests.

After the British administration took control of Lagos in 1862, both the English common law and native law were initially implemented simultaneously. However, the colonial authorities gradually imported the body of English law, including the common law and doctrines of equity, for use in the colony. Park,⁸⁹ commenting on the process, justifies this decision on the grounds that: (i) large numbers of Europeans had arrived in the colony following the acquisition of political power by Britain; (ii) local laws were unsuitable for large-scale commercial activities; and (iii) Europeans were unwilling to be bound by unwritten and seemingly unascertainable 'tribal' laws. These reasons, while convenient for the colonial administrators, did not consider the values and ideals of the indigenes nor did they accommodate the disapproval of the indigenes. Instead, the colonial government actively

⁸⁷ In 1701, the English Parliament passed the Act of Settlement forbidding Roman Catholics or their spouses from ascending to the English throne.

⁸⁸ Gupta (n 86 above) 14 – 15.

⁸⁹ Park (n 61 above) 16.

undermined the population, particularly in its attempt to codify the criminal laws, a decision that met with strong resistance from the inhabitants of Lagos. In 1899, members of the colony petitioned the Colonial Office on the issue of codification and amongst other points, insisted that

the Bill is inconsistent with its ostensible object; and its obtrusiveness and elasticity are so great as to defeat that object. It has created new crimes and punishments which had never been in existence in the Laws of the Colony either by Statute, Ordinance or Common Law. (b) Some of the provisions of the Bill have a tendency to subvert such manners and customs of the people of this Colony as are common with them and which are not repugnant to humanity, equity and good conscience; to disturb certain rights and immunities hitherto enjoyed by the natives of the Colony; and to import a foreign system which is not beneficial to the people.⁹⁰

However, in a dispatch by Denton, the Acting Governor of the Colony, he dismisses the dissatisfaction of the people of Lagos (noting that they are 'obstinate to a degree in a dogged unreasoning way') with content of the proposed Criminal Code:⁹¹

That the natives, i.e. the uneducated element, have been imposed upon is clear to me from the questions they ask with regard to the measure, but unfortunately the idea has got into their heads that the Bill creates new offences, that the punishments under it are far more severe than under the existing law and that some of the officers entrusted with the administration of justice would be only too glad to take advantage of the increased powers of punishment which they allege it gives.

Denton's language here is patronising and paternalistic. For him, the public opinions of the people of Lagos who are to be governed by the proposed Criminal Code is merely a case of obstinacy. He refuses to engage with the issues, secure in the confidence that the values embedded in the Criminal Code were inherently superior to any objections that could be raised by the colonised population. And yet, neither Denton nor the other administrators consider that the English people had previously rejected similar attempts at a code for England. The arguments that were considered legitimate by the English were now considered as unreasonable by the Lagosians. As Gupta notes, 'The colonial environment was the perfect field for experiments in rationalizing and systematizing law. The colonies were passive laboratories.'⁹² The attempt to introduce the Queensland Code failed in Lagos in 1899 but in 1916, Frederick Lugard – without the hindrance of public debate – introduced the code across all of Nigeria.

⁹⁰ HF Morris 'How Nigeria got its criminal code' (1970) 14 *Journal of African Law* 141.

⁹¹ Morris (n 90 above) 141.

⁹² Gupta (n 86 above) 15.

The introduction of the Criminal Code assisted in substituting English values with the existing values of the indigenous people in the colonial state. For the local administrator, there was political mileage to be gained such that 'if a colonial chief justice or attorney-general wishes to gain the favour of the Colonial Office, he offers to codify the laws he helps to administer'.⁹³ For the British Empire, the imposition of English values guaranteed the security of the colonial project. Frederick Lugard, in the now infamous essay, 'The white man's task in tropical Africa',⁹⁴ summarises this project as 'a dual mandate' for the colonists to act

as trustees on the one hand for the development of the resources of these lands, on behalf of the congested populations [of Europe] whose lives and industries depend on a share of the bounties with which nature has so abundantly endowed the tropics. On the other hand they exercise 'a sacred trust' on behalf of the peoples who inhabit the tropics and who are so pathetically dependent on their guidance.⁹⁵

And so, the first object of the colonial project was to extract resources of the colonies for the benefit of Europe while the second object was to 'guide' the people in the colonies in paternalistic fashion. To the extent that modern African societies and governments have almost wholly accepted and adopted this 'guidance, then this objective of the colonial project has been successful. As Gupta notes:⁹⁶

Despite the claims of modern political leaders that anti-sodomy laws represent the values of their independent nations, the Queensland Penal Code spread across Africa indifferently to the will of Africans. The whims, preferences, and power struggles of bureaucrats drove it. After the Criminal Code of Nigeria was imposed, colonial officials in East Africa—modern Kenya, Uganda, and Tanzania—moved gradually to imitate it. A legal historian observes that the 'personal views and prejudices' of colonial officials, rather than any logic or respect for indigenous customs, led to replacing IPC-based codes with QPC-based codes in much of the continent.

The context of elite power in the colonial phase

Lugard's theory of 'the dual mandate' as the responsibility of colonisers points to the fact that the British colonial government considered itself as a naturally privileged elite tasked with the duty of guiding the colonised people. Lugard himself considered the populations he governed as societies in need of his intervention:⁹⁷

⁹³ HL Stephen 'A model criminal code for the colonies' (1899) 1 *Journal of the Society of Comparative Legislation* 439.

⁹⁴ FD Lugard 'The white man's task in Africa' (1926) 5 *Foreign Affairs* 57. See also FD Lugard *The dual mandate in British tropical Africa* (1922).

⁹⁵ FD Lugard 'The white man's task in Africa' (1926) 5 *Foreign Affairs* 58.

⁹⁶ Gupta (n 86 above) 23.

⁹⁷ Bourne (n 62 above) 15.

The Fulani Emirates formed a series of separate despotisms, marked by the worst forms of wholesale slave-raiding, spoliation of the peasantry, inhuman cruelty and debased justice...The South was, for the most part, held in thrall by Fetish worship and the hideous ordeals of witchcraft, human sacrifice and twin murder. The great Ibo race to the East of the Niger, numbering some 3 millions, and their cognate tribes had not developed beyond the stage of primitive savagery.

In the Lagos Colony, and then across the Nigerian Protectorate, the relationship between the colonial government and the population was a hierarchical one, with the white colonial officers sitting at the top of the hierarchy. In December 1897, a colonial officer in Lagos, WT Thiselton-Dyer, remarked on his understanding of the colonial work.⁹⁸

I am entirely of the opinion of the Governor General that the natives of this and indeed of all the West Africa Colonies 'require close parental control and guidance on the part of the Government'. Its work, in point of fact, must for a long time to come be quite as much missionary as administrative.

The elitism in the statement above is buttressed by Lugard's own analysis of colonial administration where he explains administrative powers:⁹⁹

The Resident is the backbone of the administration. He is Judge of the Provincial Court, of which his staff are commissioners. Through them he supervises and guides the native rulers—as I shall describe in chapter x. In the provinces with the most advanced native organisation he is counsellor and adviser, while among primitive tribes he must necessarily accept a larger measure of direct administration. His advice when given must be followed, and his authority is supported by the weight of the British Administration.

However, elite privilege was not limited to the colonial administrators, it also encompassed all other Europeans in the territory, particularly missionaries, educators, and entrepreneurs. Because of this expanded racially-based elitist context, the inclusion of homophobic laws in the Criminal Codes became even more urgent for the colonial administrators. This colonial anxiety is described by Gupta as 'fears of moral infection from the "native" environment':¹⁰⁰

A sub-tradition of British imperialist writing warned of widespread homosexuality in the countries Britain colonized. The explorer Richard Burton, for instance, postulated a 'Sotadic Zone' stretching around the planet's midriff from 43 degrees north of the equator to 30 south, in which 'the Vice is popular and endemic ... whilst the races to the North and South of the limits here defined practice it only sporadically amid the opprobrium of their fellows.' The European codifiers certainly felt the mission of moral reform—to correct

⁹⁸ Dispatch from WT Thiselton-Dyer, Dec 31, 1897 to Edward Wingfield at the Colonial Office, London. This and other dispatches cited in this section are archived at (and were retrieved from) the National Archives of Nigeria, University of Ibadan campus, Ibadan.

⁹⁹ FD Lugard *The dual mandate in British tropical Africa* (1922) 128.

¹⁰⁰ Gupta (n 86 above) 16. See also S Aderinto *When sex threatened the state: Illicit sexuality, nationalism, and politics in colonial Nigeria, 1900–1958* (2015) 10.

and Christianize 'native' custom. Yet there was also the need to protect the Christians from corruption. Historians have documented how British officials feared that soldiers and colonial administrators—particularly those without wives at hand— would turn to sodomy in these decadent, hot surroundings. Lord Elgin, viceroy of India, warned that British military camps could become 'replicas of Sodom and Gomorrah' as soldiers acquired the 'special Oriental vices.'

The introduction of vagrancy laws into the colonial criminal laws effectively criminalised poverty in the local population, thus perpetuating the distinction between the (mostly white) political elite and the rest of the people.

The context of social exclusion in the colonial phase

As the 'dual mandate' conceptualised by Lugard implies, the British colonial project and its accompanying legal system were principally directed at securing British political and economic domination through British access to and control of local resources disguised as moral and political guidance. From the outset, resistance (both violent and nonviolent) by the communities to the colonial project was suppressed through the unleashing of British military might.¹⁰¹ Regarding the seemingly 'beneficial' outcomes of colonial rule, Njoku explains that any seeming development under colonial rule was directed towards exclusionary rather than inclusive social and political participation:¹⁰²

Nigeria as a colonial entity enjoyed boom in the agricultural production and the mining of mineral resources such as iron ore, tin and coal. Foreign exchange was earned from the above resources. Each region had a comparative advantage through which it made its contributions to the center. The North for instance, was known for groundnut production, the West for her cocoa while the East produced palm oil.... the British political economy in Nigeria was along the line of economic exploitation of the colonized by foisting it into the orbit of the European capitalist economic system. The operations and activities of the colonial authorities had no potential for stimulating economic development. ... the overall subordination of colonized nations by dominating foreign power is to "keep the colonized people in complete political subjection, and to maximize local human and natural resources".¹⁰³

This focus on resources also meant that the colonial state concentrated any development agenda only in urban centres that enhanced the commercial production and distribution process. In the words of one colonial administrator:¹⁰⁴

¹⁰¹ Crowder (n 62 above); Bourne (n 62 above).

¹⁰² A Osita-Njoku 'The political economy of development in Nigeria: From the colonial to post-colonial eras' (2016) 21 *IOSR Journal of Humanities and Social Science* 9.

¹⁰³ Osita-Njoku (n 102 above) 9 – 15.

¹⁰⁴ 1898 letter 'Re: Sanitation of Lagos' from Osbert Chadwick to the Crown Agents for the Colonies stored in the National Archives of Nigeria collection.

It seems clear that if Lagos could be reduced to a mere place of business, by eliminating all the poor population, which is unable to pay for sanitary improvement, if there were only business establishments and buildings of high class, with the dwellings of a few labourers that will be required for work, in connection with the port and various mercantile establishments, the difficulty of sanitation would be greatly diminished so much so that it might be possible to carry out some serious sanitary works.

In a bit of self-awareness, the official acknowledges that 'This procedure [of eliminating all the poor population] would be somewhat drastic' but he then justifies it on the basis of public health.¹⁰⁵ As Ake explains, the colonial investment in Nigeria was only to the extent needed to yield profits:¹⁰⁶

Following the capitalist rationality of maximum output, they invested only in what had to and where they had to. Not surprising, the places in which colonialism fostered some development were in places which were convenient collecting centres for commodities, such as Kano; places from where the commodities could be shipped abroad, such as Lagos; places where climate was to the taste of Europeans and which could be used as administrative headquarters.

If we understand this colonial project as an exploitative one, it necessarily follows that the legal system that was built around it was principally meant to cater to this goal, and not targeted social inclusivity or political participation. This is evidenced not just in the introduction of homophobic laws to exclude a subset of the community and alienate more tolerant perspectives on sexuality, but also demonstrated by the wider exclusion of poorer members of the colonised population through the use of vagrancy and other laws that criminalised the person rather than any harmful act. Gupta notes:¹⁰⁷

In the colonies, these laws both served the 'civilizing mission' and gave police enough power to punish almost any behaviour, or people, they wanted. Sexual conduct—or sexualized identities—were among those singled out. The 1899 Sudanese Penal Code [the basis for Nigeria's Penal Code] is an instructive instance. As noted earlier, this code, unique among British colonial laws, did not punish consensual sodomy. It compensated, however, by creating a new identity within the 'habitual vagabond': the 'catamite.' (The Northern Nigeria code also followed this example). The code listed seven types of 'vagabonds,' one of them the 'catamite,' defined as a "any male person who 1) dresses or is attired in the fashion of a woman in a public place or 2) practises sodomy as a means of livelihood or as a profession.

Although the term 'catamite' is not used in the Penal Code, the substance of the definitions of vagabond are retained by the law.¹⁰⁸ Similarly, the Criminal Code criminalises 'idle and

¹⁰⁵ As above.

¹⁰⁶ C Ake *A political economy of Africa* (1981) 43.

¹⁰⁷ Gupta (n 86 above) 28.

¹⁰⁸ Sec 405(e) Penal Code.

disorderly persons'¹⁰⁹ with the same intent of criminalising a type of identity that does not fit into the hegemonic values of the colonising powers.¹¹⁰ To be clear, the colonial administrators did not think that only a subset of the population fell into these categories. Instead, the colonial perception of the majority of the population – including the traditional chiefs – suggests that anyone could be criminalised on the basis of their identity alone. For example, an administrator described an encounter with two uncooperative traditional chiefs as follows:¹¹¹

On my recent visit to the Mahin community, the Amapetu or 'king of Mahin' complained of the conduct of two of his chiefs (both stipendiary) the Bales [chiefs] of Ipetu and Atijere. The first named was at the time in the town of Mahin so I sent for him: the man behaved very insolently in my presence and I ordered him to be taken to Epe there to be dealt with: on the following day he was sorry for himself and apologised...Of the Bale of Atijere I have little to write. He is a very useless individual and should never have been appointed as Bale.

The summary of the foregoing discussion is to situate the colonial project in Nigeria – just as elsewhere – as one that intentionally sought to establish the power of a racial elite with a clearly defined hegemony that used criminal laws to control, repress, and socially exclude a majority of the population from the imposed systems of governance. Within this machinery of elitism and social exclusion, sexuality in general, and homosexuality in particular, were weaponised as areas to perpetuate the 'savour versus savage' narrative. Tamale provides an insightful analysis of the social psychology involved in this regulation of African sexuality.¹¹²

African sexuality was depicted as primitive, exotic and bordering on nymphomania. Perceived as immoral, bestial and lascivious, Africans were caricatured as having lustful dispositions. Their sexuality was read directly into their physical attributes; and the attributes were believed to reflect the culture and morality of Africans. By constructing Africans as bestial, the colonialists could easily justify and legitimise the fundamental objectives of colonialism: it was a "civilising mission" to the barbarian and savage natives of the "dark continent". The imperialists executed this mission with force, brutality, paternalism, arrogance, insensitivity and humiliation. The body was a focal target of this assault.

¹⁰⁹ Sec 249 Criminal Code.

¹¹⁰ The hegemonic construct of these laws continue to have an effect into modern times. For instance, according to media reports, over a hundred women, allegedly strip club dancers, were arrested from different locations in Abuja in April 2019 for prostitution and being 'nuisances': 'Nigerian court rules against arrest of sex workers' <https://pettyoffences.org/nigerian-court-rules-against-arrest-of-sex-workers/> (accessed 8 May 2020). 'Officials raid Abuja night club, arrest 34 strippers' (19 April 2019) <https://www.premiumtimesng.com/regional/north-central/326152-officials-raid-abuja-night-club-arrest-34-strippers.html> (accessed 8 May 2020); 'Again, police raid Abuja clubs, arrest 70 women' (28 April 2019) <https://www.premiumtimesng.com/news/headlines/327355-again-police-raid-abuja-clubs-arrest-70-women.html> (accessed 8 May 2020).

¹¹¹ Letter dated 10 January 1809 from the District Commissioner to the Colonial Secretary, *Epe letter book*, (1908 - 09) 188.

¹¹² S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 53.

This process of demonising African sexuality while simultaneously hegemonising European values in Africa, is what Ngwena¹¹³ notes as the power relationships inherent in the normative process of regulating sexuality, where a hegemonic culture is imposed by the dominant political elite – in this case the colonial government – and then political power is used to exclude groups ‘whose sexualities are outside the domain of majoritarian and hegemonic culture.’¹¹⁴

2.4.2 The early post-colonial phase (1960s – 1990s)

The criminalising laws

While the foregoing discussion on the colonial phase of Nigeria’s legal history shows the introduction of laws criminalising same-sex relationships, this section considers the period towards independence and immediately after the colonial period. In this section, the discussion engages the rationale behind the retention of colonial laws by the government of the newly independent country and its successors. During this period, the state did not enact any new laws criminalising same-sex relationships and non-heteronormative sexuality and gender identity. Instead, the hegemonic values and ideological context that came with British dominance continued to serve the interests of the new political elite and deployed accordingly. However, in 1993 – 33 years after the exit of the British – the Nigerian military government at the time enacted a law to regulate military affairs¹¹⁵ and incorporated provisions on sodomy from the colonial enactments. Accordingly, the most relevant criminalising laws for the following discussion on this period of time are sections 214 – 217 of the Criminal Code, sections 284 and 405 of the Penal Code, and section 81 of the Armed Forces Act. Regarding sexuality, the Armed Forces Act imitates the provisions of the Criminal Code and provides as follows:

81. 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 (b) has carnal knowledge of an animal; or (c) 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

¹¹³ Ngwena (n 40 above) 242.

¹¹⁴ As above. See also Currier (n 7 above) 113, where the author observes that European colonizers in southern Africa developed discourses that emphasized Africans’ gender, sexual, and racial difference from white Europeans, often through “signifiers of perversity”.

¹¹⁵ Armed Forces Act of 1993 Cap A20 Laws of the Federation of Nigeria 2004 sec 81.

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.

The context of political homophobia in the early post-colonial phase

As Nigeria prepared for independence in 1960, the British authorities redistricted the country into new regions – Western Region, Mid-West Region, Northern Region, and Eastern Region – each with its own semi-autonomous government, and with a parliamentary-style federal government at the centre. This structure replaced the previous ‘North’ and ‘South’ political geography that had been the norm during the colonial period. Although there is no known public debate on sexuality either nationally or regionally in the years following independence, the near-wholesale adoption of the Criminal and Penal Codes by the governments of the newly created regions, without a review of the extent to which those laws conformed with the values of their population indicates the satisfaction of the political leadership with, and their intention to continue, the inherited British values on sexuality. In fact, at a 1958 Constitutional Conference, the general decision was taken to allow only the written criminal law and abolish customary criminal law in Nigeria.¹¹⁶ This retention of colonial laws – rather than a return to customary norms – could be seen as having strategic value for the postcolonial political elite. It fostered the notion of a modern state with formal institutions and a citizenship identity distinct from the prior ethnocentric loyalty to precolonial traditional institutions.¹¹⁷ It also legitimised the access to power, and the corresponding control of economic resources and government by the new crop of rulers.¹¹⁸

The nationalism philosophy that helped to realise the independence of several African countries was not merely about obtaining freedom from colonial powers, but also about forging a common identity for the colonised peoples – invariably in line with the national and subnational identities constructed by the colonial powers. Nationalism meant that the organic

¹¹⁶ Okonkwo (n 64 above) 10. Customary law is still applicable non-criminal matters, particularly in issues of family law and succession. However, customary laws are not considered ‘law’ but ‘facts’ to be proven by evidence, justified on the grounds that rules of customary law are not ‘generally not accessible in written form’ - Park (n 61 above) 83. More importantly, for customary law to be applicable, 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 for these ‘tests’ were the colonial values and laws and, over the century, many traditional practices were whittled away in legal decisions that used these tests.

¹¹⁷ Ethnocentrism, or tribalism, as shaped by the colonial government continued to be a key identity in the postcolonial state. However, as Diamond argues, it was the class divide between the political elite and the rest of the population that led to the failure of democracy in the years following independence and in the decades afterwards. Diamond (n 33 above) 298.

¹¹⁸ Diamond (n 33 above) 16 30-32.

and traditional values and norms of the colonised communities had to be subsumed by and under a new hegemonic construction of the nation-state. This idea had baffled colonial administrators who – having seized political control from existing traditional societies – did not understand why they should give that control to a new type of political system. For instance, as nationalist agitations in Nigeria grew in the 1920s, the then Governor of Nigeria, Hugh Clifford, in his speech to the Legislative Council derided ‘the fantastic claim to a common nationality’ and remarked as follows in an unusual burst of Eurocentric self-awareness:¹¹⁹

It can only be described as farcical that ... Nigeria can be represented by a handful of gentlemen drawn from half a dozen coast towns ... who in the safety of British protection, have peacefully pursued their studies *under British teachers, in British schools* ... whose eyes are fixed, not upon African native history or tradition or policy, nor upon their own tribal obligations and duties to their natural rulers ... but upon political theories evolved by Europeans to fit a wholly different set of circumstances. [emphasis added]

Although the colonial government had their own self-serving imperial reasons for not wanting to relinquish political control, the objection that the new educated elite was not representative of the communities it sought to govern was reasonable. As Epprecht explains, the new elite was already ‘deeply affected by the colonial ideology of respectability’ that defined its worldview and receptive attitude to colonial criminal laws:¹²⁰

African progressives may have been furious at the racism and hypocrisy of European individuals in Africa. However, the ideology of respectability as a marker of modernity and progress remained powerfully attractive to those Africans hoping to rise above both the crumbling traditional moral economy on the one hand, and rampant urban indiscipline on the other.

And so, for the elite to gain political legitimacy, it had to promote both a new national identity and the ‘respectable’ values in which they had been trained as necessary for the independent country.¹²¹ In this way, the retention of colonial laws and its accompanying values became useful tools towards social control and the installation of a hegemonic ideology that benefitted the new political elite. Political homophobia, a critical part of this hegemonic ideology, was centred around what Epprecht describes as ‘the cult of respectability’:¹²²

¹¹⁹ Lugard (n 99 above) 84.

¹²⁰ M Epprecht *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* (2013) 124. Similarly, Aderinto describes the growth of elitist respectability attitudes in colonial Lagos as an ‘attempt to mold the city in their own image by making prescriptive recommendations for the pathway to a “modern,” “respectable,” and “safe” social existence’, Aderinto (n 100 above) 31.

¹²¹ Epprecht (n 118 above) 124 – 128.

¹²² As above. As noted in section 2.2.3 above, the performance of respectability has now become a lived reality of sexual and gender minorities in Nigeria as will be analysed in Chapter Three and Chapter Four of this thesis.

The main focus of the cult of respectability was the performance of a monogamous marriage, with a judiciously fertile wife largely confined to the domestic and churchgoer sphere and a husband who demonstrated his masculine persona of duty, earning power, self-control and paternal authority.

While the educated class in the coastal and southern areas of Nigeria led the formation of an elite under the 'cult of respectability',¹²³ in the predominantly Muslim Northern Nigeria this process was also upheld by the emirates in accordance with Islamic theocracy.¹²⁴ In any case, it was the elite in the North who had agitated for the creation of the Penal Code to incorporate notions of criminal behaviour compatible with *both* Islamic doctrine and British values,¹²⁵ and it was just natural that, after independence, the Northern leadership would continue to retain these laws.

Although the issue of homosexuality did not feature in public discourse in the 1960s, the stigma attached to it by the colonial and nationalist elite was already pervasive enough to be useful as a political tool. For example, after the first military coup in January 1966, the coup leader, Major Chukwuma Kaduna Nzeogwu, made the following pronouncement:

You are hereby warned that looting, arson, homosexuality, rape, embezzlement, bribery or corruption, obstruction of the revolution, sabotage, subversion, false alarms and assistance to foreign invaders, are all offences punishable by death sentence.¹²⁶

While disruptive acts such as looting or arson, physically violent acts such as rape, and acts of economic corruption such as bribery may be considered as worthy of revolutionary attention, it remains unclear how and why homosexuality – whether used in the sense of an identity or a sexual act – could have been considered as important enough not just to merit the attention of a military rebellion, but also to get a death sentence. The probable explanation is that it was included to give the military coup a legitimacy that would resonate with the prevalent values of the existing elite and thereby ensure support for the revolutionaries. Fortunately – at least, as far as this aspect of the coup is concerned – a counter-coup by other military officers quickly terminated Nzeogwu's legal regime. In any case, 1966 marked the end of 'the First Republic' and for the next 33 years, until 1999, Nigeria would be ruled by military

¹²³ Epprecht (n 120 above) 124 – 128.

¹²⁴ Sklar (n 32 above) 534.

¹²⁵ Okonkwo (n 64 above) 9.

¹²⁶ 'Radio broadcast by Major Chukwuma Kaduna Nzeogwu – announcing Nigeria's first military coup on Radio Nigeria, Kaduna on January 15, 1966' *Vanguard* <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 7 July 2020). Nyeck also provides a similar analysis of the use of political homophobia as a tool for delegitimising state officials in post-colonial Cameroon in SN Nyeck Mobilizing against the Invisible' in SN Nyeck & M Epprecht (eds) *Sexual diversity in Africa: Politics, theory and citizenship* (2013) 8.

dictators, with only a brief civilian interlude between 1979 and 1983 (called 'the Second Republic').¹²⁷

However, Nzeogwu's style of using political homophobia as a strategy to legitimise disrupting an existing regime would be copied in 1990 when another would-be coup leader announced his reasons for rebelling:¹²⁸

I Major Gideon Orkar, wish to happily inform you of the successful ousting of the dictatorial, corrupt, drug baronish, evil man, deceitful, homosexually-centred, prodigalistic, unpatriotic administration of General Ibrahim Badamosi Babangida.

Again, the inclusion of sexuality in an issue primarily challenging the political competence of the head of state can reasonably be interpreted as the political use of homophobia by a challenger to gain support for a political struggle by appealing to the post-colonial hegemonic values that, by the 1990s, were now entrenched through the legal system into the values of the population.

The criminal law case of *Magaji v Nigerian Army*¹²⁹ provides a useful study of the success of political homophobia in Nigeria and its permeation into judicial and legal reasoning. The rationale of the judgement in the case shows how the laws criminalising same-sex relationships lack any inherent validity in terms of preventing harm but, instead, are dependent on dominant religious values for their validity as part of the criminal law. The facts of the case are straightforward: One Major Bello Magaji of the Nigerian Army was alleged to have had 'carnal knowledge' of four men over a period of time 'against the order of nature' and was arraigned before a General Court Martial of the Nigerian Army in 1997. Although he was charged with sodomy, the evidence provided at the trial through witness statements was more consistent with a case of rape (or sexual assault) by the soldier against the other men (who, variously, were minors, coerced, or dosed and could not give their consent to the sexual acts).¹³⁰ However, the General Court Martial tried and convicted Major Magaji for sodomy and

¹²⁷ By general usage, Nigeria is understood to have had four 'republics', that is, periods of distinct constitutional democracies. The First Republic – under a parliamentary style constitution – began at independence in 1960 and ended with the first military coup in 1966. The second republic commenced in 1979 with a new presidential style constitution and was terminated with a military coup in 1984. The Third Republic did not materialise as the 1992 transition process (managed by the military government) to democratic government was aborted after the 1993 presidential elections were annulled. The Fourth Republic has been in existence since 1999, after the military successfully transitioned the country to a new constitutional government.

¹²⁸ 'April 1990 coup d'état speech' <https://dawodu.com/orkar.htm> (accessed 27 July 2020).

¹²⁹ *Major Bello Magaji v The Nigerian Army* (2008) 8 Nigerian Weekly Law Reports (Part 1089) 338. Case report available at <https://www.judyl.legal/case/magaji-v-nigerian-army-9de3873c-75b9-4be2-86fd-ad9f8ef99708> (accessed 20 July 2020).

¹³⁰ Rape under Nigeria's federal laws in 1997 was defined around women and so a charge of rape could not have been brought against the accused. On the other hand, sexual assault would have been too mild a description for the non-consensual sex.

sentenced him to 7 years in prison. Following the conviction by the General Court Martial, Major Magaji unsuccessfully appealed to the Court of Appeal and then to the Supreme Court which gave judgement against him in 2008. Justice Niki Tobi, who gave the lead judgement, seemed to be more offended with the accused's sexual preference for other *men* than with the accused's rape of other persons, revealing the role of the prevalent hegemonic value system in arriving at a decision. Some 94 years after the introduction of the laws criminalising sexuality across Nigeria, the Nigerian judge could comfortably state: 'This appeal involves the beastly, barbaric and bizarre offence of sodomy; a more common place name is homosexual or homosexuality'.¹³¹ Justice Tobi then proceeds to give meaning to the colonial expression 'the order of nature':¹³²

The Armed Forces Decree does not define carnal knowledge. Section 6 of the Criminal Code Act defines carnal knowledge or the term carnal connection. The term implies that the offence, so far as regards that element of it, is complete upon penetration. While carnal knowledge is an old legal euphemism for sexual intercourse with a woman, it acquires a different meaning in section 81. The section 81 meaning comes to light when taken along with the proximate words 'against the order of nature'. 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.

From this paragraph, it is evident that the judge's reasoning is derived from both a personal religious worldview ('nature should mean God and not just the generic universe that exists independently of mankind or people') as well as an antiquated understanding of biology consistent with 18th to 19th century knowledge ('The natural function of anus is the hole through which solid food waste leaves the bowels and not a penis penetration'). Both of these systems were derived from colonial-era knowledge and its ideology of respectability that generally permeated the thinking, perspectives, and decisions of Nigeria's educated elite of the 1960s. Justice Tobi finishes his judgement with more concerns:¹³³

¹³¹ n 129 above.

¹³² n 129 above.

¹³³ n 129 above.

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. Although a bit of the dent is on the Army, I am not prepared to hold that Force guilty of the conduct of the appellant. The Army did not ask him to commit this heinous and atrocious offence. He is a terrible criminal. And he is alone, clearly alone.

As such, to go against the hegemonic value system – by having same-sex relations – was not just a daring act against the political and legal system, but also a blasphemy against the spiritual order guiding the Nigerian society. This is the concrete end that political homophobia seeks: to perpetuate the existing hegemony by setting up its laws and systems as a representation of divinity. As Tamale reasons,¹³⁴ when such a deification process is completed, the hegemonic values are no longer recognised as an imposition, but rather as a 'natural' aspect of the society and the elite justify their power as inherently necessary to safeguard this natural order. As the discussion on the next phases of Nigerian legal history shows, the political rhetoric of Nigeria's elite has copiously justified the retention of laws criminalising same-sex relationships as a reflection of the cultural and religious values of society rather than the – historically accurate – dominant values of a colonial power.

The context of elite power in the early post-colonial phase

As discussed in the paragraphs above, the retention of laws criminalising same-sex relationships helped to turn the notion of a common national value into a political reality that could be wielded against political opposition. This use of political homophobia also helped to secure the position of the new elite, not just as guardians of the new morality, but also as trustees of the country's resources. To give a clearer picture of the process in this phase of Nigeria's legal history, the following paragraphs discuss the context of elite power during the period and how elite power shaped perceptions of same-sex relationships.

Throughout the colonial period, the British administrators and – to an extent, their wives – constituted the bulk of the political elite. Others included the European missionaries, educators, and entrepreneurs. By the beginning of Nigeria's independence process, Nigeria's political elite consisted of both the traditional ruling families and the British-trained educated and professional elite class.¹³⁵

¹³⁴ Tamale (n 46 above) 39; S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150 166.

¹³⁵ A Banjo 'The elite and political process in Nigeria' (2011) 38 *Africa Insight* 50 – 61; Aderinto (n 100 above) 30 – 31.

While the traditional ruling families had collaborated with the British – willingly or otherwise – and facilitated the process of indirect rule, the educated and professional class were more inclined towards the nationalist philosophy that sought to eject and replace the colonial administration. However, when the nationalists had their way and Nigeria secured its independence process, the authority of the traditional ruling families continued to be recognised under regional laws enacted by the new parliaments.¹³⁶

Nigeria's post-colonial political elite were not necessarily representative of the general population, and could even be perceived as being 'the greatest obstacle to the wishes and aspirations of the Nigerian people'.¹³⁷ The growing demarcation between the British-educated minority and the rest of the population was already evident as far back as the original attempt to introduce the Criminal Code. For instance, a colonial officer remarked:¹³⁸

I would point out that the opposition of such men as Mr. R. B. Blaize, Mr. J. S. Leigh, Mr. C. S. Williams, Captain J. P. L. Davies and Mr. J. A. Savage must be regarded as serious as they have great influence with the bulk of the population who, not understanding English and unable to read and write, depend upon their better educated fellow countrymen for the views they take.

Denton (the colonial officer in question) understood that the Criminal Code could not be successfully imposed without the cooperation of the educated minority. Fortunately, for the legacy of British colonialism, the educated minority – as discussed as above – also had their own reasons for wanting to adopt British criminal law values despite their dissatisfaction with the colonial political system.

It is also noteworthy that following independence, the new elite often review and amend colonial laws, particularly those relating to commerce and industry. In Nigeria, for instance, laws relating to corporations, taxes, and investments and securities have all gone through several changes and are now very different from their colonial origins. However, the Criminal and Penal Codes remain substantially retained in their colonial form. Kaoma describes this seeming inconsistency between the post-colonial approach to commercial law and the post-colonial approach to criminal law as a pointer to the use of political homophobia by the new elite:¹³⁹

¹³⁶ The British colonial government had started the practice of appointing or removing traditional kings and chiefs and the post-colonial state continued this practice by investing the power of appointment and removal in state governors under 'Chieftaincy Laws' of the different states.

¹³⁷ Banjo (n 135 above) 52.

¹³⁸ Morris (n 90 above) 141.

¹³⁹ K Kaoma 'The marriage of convenience: The US Christian right, African Christianity, and postcolonial politics of sexual identity' in ML Weiss & MJ Bosia (eds) *Global homophobia: States, movements, and the politics of oppression* (2013) 77.

Postcolonial Africa is highly critical of colonial laws and values, but one colonial legacy is the English law that reads the same across Anglophone Africa. 'Carnal knowledge against the order of nature' is illegal in many African countries today, just as it was in colonial times. Compounded by the religious teachings of Christianity and Islam, this law has been assimilated into all aspects of African society and is defended with pride. ... Worse still, political leaders defend these laws by alluding to traditional African beliefs and religions. Homosexuality is un-African, uncultural, un-Christian, and un-Islamic — thus illegal.

Even though most African countries claim to aspire to a form of constitutional democracy today, many still retain – or have even expanded – the colonial criminal laws and their restrictive interpretation of rights. By continuing to retain these restrictive and discriminatory criminal laws, the political elite is able to wield political homophobia as a tool of social organising and control, and thereby perpetuate its own hegemonic position.

The context of social exclusion in the early post-colonial phase

By fostering a sense of national identity and a value system constructed around their own 'British trained' worldview, the new elite could comfortably sit at the top of economic and political structures of the independent country. This history is consistent with the views of Bosia of how political homophobia is used by state actors to reconstitute belonging, especially in periods of 'profound changes in the international system where processes of sovereignty and belonging are in question and an emergent national security apparatus seeks to re-establish authority'.¹⁴⁰ Within the immediate period after independence, the existing laws and legal system favoured an educated, European middle-class value system that was not representative of a majority of the population. By legitimising the British values in which they had been trained, the new political leadership could include and exclude other members of the society based on the extent to which the overlapping identities of individual citizens fit into the postcolonial normative system. In this way, social exclusion in postcolonial Nigeria affected both the sexual and gender minorities who were already legally repressed and the general population that were uneducated in British laws and values. In the absence of a true citizenship status, religious and ethnic identities became more pronounced and – as I discuss below – strengthened the hegemonic control of the political elite, leading to even more exclusion for sexual and gender minorities.

2.4.3 The Shari'a legislations (early 2000s)

The criminalising laws

¹⁴⁰ Bosia (n 6 above) 32.

Shari'a laws are currently in force in 12 out of the 36 states in Nigeria.¹⁴¹ Each of the states has a separate enacting law and there are some variations in the texts of the law. However, the substance of the provisions is the same and they are set out in Chapter 8 of the Shari'a law ('*Hudud* and *Hudud*-related offences') as follows:

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.¹⁴²

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.

Political homophobia, elitism and social exclusion in Shari'a states

Hegemonic Islam in Nigeria, as a political ideology aimed at power and social control through the imposition of value systems should be distinguished from the practices of Islam as an individual's personal religion. Islam as a hegemonic system grew from the conquest by Usman dan Fodio of the territories that now constitute Northern Nigeria in the early 1800s and the creation of emirates from the original indigenous cultures and kingdoms in that region. This Islamic conquest took place nearly a century before the British took political control of the entire region. After a series of wars fought against the British from 1900 to 1903, the emirates capitulated to colonial powers. However, the existing Islamic political hegemony continued to exercise significant influence enough to persuade the British to consider a separate criminal law code, reflecting Muslim values, for the Northern Protectorate. These agitations were considered and consequently brought about the enactment of the Penal Code for Northern Nigeria in 1958.¹⁴³ After independence, non-criminal provisions of Islamic law were deemed as customary law: these could be used legally in relation to family and personal law issues,

¹⁴¹ These are: Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara states.

¹⁴² There are variations in the texts of different states, such as whether or not women are included in the definition of sodomy, whether or not consent to the sexual act is required for culpability, whether or not witnesses are required as proof. Sentencing for sodomy also varies depending on whether or not the accused is married.

¹⁴³ Karibi-Whyte notes that 'Muslim militancy...resulted in the enactment of the Penal Code. This posture was politically expedient for the Government of the Northern states, which saw in it a clear identity between the predominant religion, the social system, and the criminal law.' Karibi-Whyte (n 69 above) ix.

but could not be used as criminal law.¹⁴⁴ Successive Nigerian Constitutions were also clear that not only was Nigeria a secular state, but any criminal law had to be written and enacted by the legislature.¹⁴⁵ In theory, this ideal forbids the enactment and enforcement of a nationally applicable religious law. However, in practice, this restraint has only worked within the federal criminal jurisdiction. State legislatures still had power to make their own criminal laws and in 1999, just as soon as Nigeria returned to a democratic system of government and elected public officials had taken office, the governor of Zamfara state announced his intention to govern his state under the Shari'a criminal law.¹⁴⁶ Despite the general antagonism across the country that followed this announcement, by 2001 seven of the Northern states had enacted Shari'a criminal law applicable within their territories.¹⁴⁷

Political homophobia in the Shari'a provisions is directly demonstrated by the upgrading of homosexuality to a capital offence, and thereby severely extending the punishment from what had been applicable under the extant Penal Code. More critically, the enactment of Shari'a criminal laws had political value for the government of the relevant states. First, in a predominantly Muslim environment, the appeal to religious sentiment guaranteed popular support that could be converted into political capital. For instance, Ibrahim Shekarau won the governorship of Kano State in 2003, promising to extend the application of Shari'a to areas where the Christian minorities in the state lived.¹⁴⁸ And yet, there is no clear certainty that, even with the broad support from the Muslim majority, the laws reflected the wishes of the population. As a report by Human Rights Watch notes:¹⁴⁹

In most cases, the Sharia legislation was rushed through in a hurried and incomplete way. A human rights activist and lawyer told Human Rights Watch: 'Advocates of Sharia wrote the laws in a few weeks. The authors knew they were imperfect but rushed them through for political reasons. Now they are gradually reviewing them. They wanted to precipitate a fait accompli.'

Second, focusing on religious laws helped to distract the population from the actual issues plaguing the relevant states, by reframing social and economic problems as moral problems. From 1999 to date, much of the indices in Northern Nigeria continue to trail behind their

¹⁴⁴ Obilade (n 61 above) 83; Constitution of the Federal Republic of Nigeria ('Nigerian Constitution') secs 262 & 277.

¹⁴⁵ Nigerian Constitution secs 10 & 36(12).

¹⁴⁶ Human Rights Watch "'Political Shari'a" Human rights and Islamic law in Northern Nigeria' *HRW.org* (21 September 2004) section IV <https://www.hrw.org/report/2004/09/21/political-sharia/human-rights-and-islamic-law-northern-nigeria> (accessed 27 July 2020).

¹⁴⁷ As above.

¹⁴⁸ 'Kano: Nigeria's ancient city-state' BBC (20 May 2004) <http://news.bbc.co.uk/2/hi/africa/3708309.stm> (accessed 27 July 2020).

¹⁴⁹ n 146 above.

southern counterparts.¹⁵⁰ As the Emir of Kano – a kingdom in the neighbouring state to Zamfara – remarked at the 2017 Mo Ibrahim Forum:¹⁵¹

We have had it in Nigeria – people came and said they were implementing Shari’a. Zamfara state started Shari’a in Nigeria, it has the highest rate of poverty in the country today. And it’s a matter of time for people to realise that this is all deception, this is all politics. It’s not about religion, it is about politicians appropriating religion as a discourse for getting into power and for competing for the resources.

This admission of religious manipulation for political gain by Emir Sanusi Lamido Sanusi – who came to the throne in 2014, more than a decade after the original Shari’a debates – is a rare statement from a member of the northern aristocracy,¹⁵² and this issue emphasises the next point.

Third, because the north is culturally governed by a Muslim aristocracy that traces its legitimacy to the religious conquests by Usman Dan Fodio in the early 1800s, the existence of Shari’a laws – as was practiced prior to the British colonial conquest – reinforces the political legitimacy of the existing emirates and aristocracy.¹⁵³ In terms of actual beneficial social ordering, these laws served no additional purpose not already covered by the existing Penal Code. Instead, the enactment of the Shari’a criminal law helped to promote the lawmakers as moral guides of the respective populations, thus securing them even more political advantage. The rapid adoption of these laws in contiguous states within a very short time period also demonstrates the modularity of political homophobia.

2.4.4 The Same Sex Marriage (Prohibition) Act 2013 and other new laws (2000s – 2010s)

The criminalising laws

While this section focuses on the enactment of the Same Sex Marriage (Prohibition) Act 2013 (SSMPA) at the national level, there were other state-level laws, particularly in Lagos, Kano,

¹⁵⁰ United Nations Development Programme ‘National human development report 2018: Achieving human development in North East Nigeria’ (2018) available at http://hdr.undp.org/sites/default/files/hdr_2018_nigeria_finalfinalx3.pdf.

¹⁵¹ Mo Ibrahim Foundation ‘2017 Ibrahim Forum - Session 1’ YouTube.com (24 April 2017) <https://youtu.be/ZT3cDm9UCes?t=4670> (accessed 28 July 2020).

¹⁵² Emir Sanusi is generally considered as a departure from the traditional northern Nigeria elite and, in March 2020, he was deposed by the state governor, amongst other reasons, ‘to safeguard the sanctity, culture, tradition, religion and prestige of the Kano emirate’. ‘Nigeria’s emir of Kano dethroned for “disrespect”’ BBC (9 March 2020) <https://www.bbc.com/news/world-africa-51804764> (accessed 27 July 2020).

¹⁵³ However, it should be noted that Shari’a is ‘received’ Islamic law, and it was historically imposed on the indigenous cultures of Northern Nigeria during the jihad wars of the early 1800s, much in the same as the later British colonial laws. In this process of subjugating indigenous cultures, hegemonic Islam has also erased or nearly erased indigenous practices that celebrated sexual and gender diversity such as the ‘*Yan Daudu*’ male non-heteronormative sexual and gender practices in Northern Nigeria. See RP Gaudio *Allah made us: Sexual outlaws in an Islamic African city* (2009) 3 – 8.

and Borno states that anticipated or propelled the enactment of the SSMPA. In Borno state, a law enacted in 2000, the 'Prostitution, Lesbianism, Homosexuality, Operation of Brothels and Other Sexual Immoralities (Prohibition) Law' ('Borno Law') states:

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.

A similar law was enacted in 2000 in Kano state as the 'Prostitution and Immoral Acts (Prohibition) Law' ('Kano Law'). Amongst other provisions, the Kano law also provides as follows:

9. 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.

While the Borno and Kano laws focused on a 'modern' language to recriminalise acts or behaviour that were already criminalised under the Penal Code within the ambit of generic 'morality' laws, the 2007 law enacted in Lagos, 'Same Sex Marriage (Prohibition) Law' ('Lagos law') went a step further and focused exclusively on voiding and criminalising same-sex marriages. According to section 4 of the Lagos law:

4. (1) Any person who is joined in marriage with a person of the same sex within Lagos State shall be guilty of an offence and shall be liable on conviction to a term of (10) ten years imprisonment.

- (2) Whosoever performs, witness, aids or abets the celebration of a same sex marriage shall be guilty of an offence and shall be liable on conviction to a term of (5) five years imprisonment.

The language, style, and even the title of the Lagos law would later be adopted in the more exhaustive SSMPA, which was first proposed in 2006 and finally enacted in 2013. Section 5 of the SSMPA states:

4. (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 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.

It can be argued that the Lagos law and the SSMPA were the outcome of a more organised approach to the political use of homophobia, based on an increasing awareness by lawmakers of issues of sexuality, sexual orientation, and gender identity in Nigeria. These laws went beyond the sexual acts criminalised under the colonial laws and were concerned with contemporary global debates on identity and relationships, despite the fact that no such issues were raised in public debates in Nigeria at the time. While Nigerian leaders and lawmakers expressed their actions as ‘the will of the people’, the socio-political context surrounding the passing of these laws, as discussed in the next paragraphs, indicates that the enactment of the laws was more correctly an expression of the will of the political elite.

Political homophobia, social exclusion, and elite power in renewed discriminatory laws

The socio-political context of the enactment of the SSMPA and other new state laws recriminalising same-sex relationships mirrors the context of the elite retention of colonial laws in the 1960s. In the previous periods, a colonial political order had given way to a nationalist political order. In the latter case, a military political order had given way to a civilian (seemingly democratic) political order. In those two instances, a new generation of politicians had obtained power through the electoral process and required a means of establishing their legitimacy despite governance failings and perpetuating their power and control over the people. In both cases, the political elite was able to achieve these goals by imposing values on the population and proceeding to police these values. Homophobia as a political tool helped to unite the population behind the political leaders, establish the leadership as a necessary moral authority, and distract national conversation away from the unfair distribution of social and economic resources.

If we think of political homophobia as a strategic political tool, then the enactment of the new breed of homophobic laws can be interpreted as a mechanism for securing the power of Nigeria’s political elite following the return to civilian rule in 1999. Like the Shari’a legislations of the 2000s, the new homophobic laws were proposed and enacted at a period when Nigeria’s new leaders needed to establish their ‘moral’ legitimacy. While the ostensible catalyst for this ‘moral’ leadership was the consecration of Gene Robinson by the Episcopal

Church in the United States,¹⁵⁴ the broader social and political contexts indicates that there was a merger of elite interests across the religious and political spectrum, such that the then President Olusegun Obasanjo, at a meeting with over 300 African bishops on the issue, declared homosexuality as 'unbiblical, unnatural and definitely unAfrican'.¹⁵⁵ Curiously, this statement in itself was either borne out of genuine ignorance of colonial history or the deliberate co-opting of Victorian England hegemonic values as 'African' values. In this way, the current political elite continue to use the same methods introduced by the colonial project without making any reference to legacy of colonial history and the imposition of colonial values on the indigenous population.¹⁵⁶

Political homophobia has also been utilised as a means of legitimising the existing political elite since the end of military rule in 1999. In the twenty years since Nigeria's return to a form of constitutional democracy, Nigerian leaders have continued to struggle with delivering the 'dividends of democracy'. The global effect of sinking oil prices has reduced income for the Nigerian government, in turn affecting foreign exchange power and inflation and thereby aggravating domestic poverty levels¹⁵⁷ and also creating a crisis of democracy.¹⁵⁸ Within this scenario, political homophobia has proven to be a 'low-hanging fruit' for the political elite to reach for as a way of placating the population and renewing their legitimacy. Although the original Same Gender (Marriage) Prohibition Bill was unsuccessfully proposed in the federal legislature in 2006,¹⁵⁹ 2008, and 2011, it was not until 2012, when the Goodluck Jonathan administration was facing criticisms on public corruption and the growing menace of the Boko Haram terrorists that the dormant bill was revisited and passed as a populist measure.¹⁶⁰ Ironically, although the Jonathan government enjoyed the short-term public approval of the law, it was the opposition party (whose member had initially introduced the bill)

¹⁵⁴ 'Statement from the bishops of the Anglican Church of Nigeria' (21 November 2003) <http://www.anglicannews.org/news/2003/11/statement-from-the-bishops-of-the-anglican-church-of-nigeria.aspx> (accessed 15 July 2020).

¹⁵⁵ 'Obasanjo backs bishops over gays' BBC.com (27 October 2004) <http://news.bbc.co.uk/2/hi/africa/3955145.stm> (accessed 15 July 2020).

¹⁵⁶ 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* 113; M Rubenstein 'An Anglican crisis of comparison: Intersections of race, gender, and religious authority with particular reference to the Church of Nigeria' (2004) 72 *Journal of the American Academy of Religion* 341 353.

¹⁵⁷ World Bank Group 'Poverty & equity brief – Nigeria' (2020) available at https://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_NGA.pdf (accessed 8 May 2020).

¹⁵⁸ The Economist Intelligence Unit 'Democracy index 2019: A year of democratic setbacks and popular protest' (2019) 22.

¹⁵⁹ Human Rights Watch 'Nigeria: Obasanjo must withdraw bill to criminalize gay rights' *HRW.org* (23 March 2006) <https://www.hrw.org/news/2006/03/23/nigeria-obasanjo-must-withdraw-bill-criminalize-gay-rights> (accessed 15 July 2020).

¹⁶⁰ 'Anti-gay law: Lawyers urge FG not to succumb to foreign pressure' *Vanguardngr.com* (16 January 2014) <https://www.vanguardngr.com/2014/01/anti-gay-law-lawyers-urge-fg-succumb-foreign-pressure/> (accessed 15 July 2020).

that would win the general election in 2015. After coming into office, the new President Buhari informed the world during a state visit to the United States that 'Sodomy is against the law of the country and abhorrent to our culture'.¹⁶¹

The trajectory of Nigeria's democracy indicates the continuing intersection of political homophobia with elitism. This intersection is demonstrated, for example, in the paternalistic assumptions by political leaders that they determine 'African culture', without any visible recourse to history or to public opinion. By linking political homophobia to paternalism, political leaders are able to use political homophobia as a distraction from governance issues and the existence of widespread social exclusion. Nigeria's history from 1999 till date has featured the alienation of citizenship identity (due to the failures of the state) and the growth of religious identity through the influence of religious leaders. The co-mingling of religion and state has resulted in the growth of an influential religious circle within the political elite. Political homophobia, therefore, is a tool that continues to remain beneficial to the political elite in maintaining hegemonic dominance and to distract public opinion away from crisis of leadership. In terms of reaffirming the legitimacy of the elite, political homophobia has also been useful as a coherent ideology to define and present an 'African' culture that is distinct from Western culture,¹⁶² thereby giving political leaders the opportunity to assert their usefulness by waging war against and declaring victory over an imagined foreign enemy.

2.5 Conclusion

As proposed in Chapter One, any serious legal advocacy for sexual and gender minorities in Nigeria must critically engage with the social subtext of the law in order to yield positive outcomes. By employing relevant theories of political homophobia, elite power, and social exclusion, this chapter has set out the social and political context surrounding the evolution of criminalising laws at various time periods in Nigeria's history.

Elite theory suggests that a stable, cohesive, group of individuals who are able to affect political outcomes or control hierarchical institutions in government and society will try to make use of hegemonic values to maintain their interests, including the use of political homophobia in appropriate contexts. In the Nigerian context, this chapter demonstrated the composition of

¹⁶¹ 'Buhari "pointblank" on gay rights, says "No" to U.S. — 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 July 2020).

¹⁶² McKay & Angotti '(n 13 above) 411. An example of this use of political homophobia is contained in paragraph 7 of the African Union Executive Council's decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) (June 2015) on the grant of observer status by the ACHPR to the Coalition of African Lesbians. The paragraph directs the ACHPR to 'take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values'.

the political elite and traces its origin in Nigeria from the officials of the colonial administration, to the pre-independence educated minority (who became post-independence democratic and military leaders) and, later, evolving into the symbiotic elite structure inclusive of Islamic and Christian religious leaders. At each of these stages of elite instances, this chapter shows that political homophobia was a strategic tool to protect elite interests and maintain the legitimacy of the elite by creating, retaining, or strengthening laws that criminalised same-sex relationships. The outcome of – and also incentive for – this process of elitist hegemony includes the social exclusion of a large majority of the population: On one hand, the preservation of elite interests at different time periods of Nigeria’s history has resulted in social exclusion of the majority, on the other hand the pervasiveness of social exclusion has led to the use of political homophobia as a tool for justifying elite hegemony and preserving elite legitimacy. However, these subtle interactions between history, hegemony, and governance does not feature in the rhetoric of contemporary advocates for the criminalisation of same-sex relationships. Instead, they base their arguments on a historically false argument of preserving ‘African’ cultural or religious values. In reality, they are deliberately or inadvertently preserving an elite hegemonic project that began with the colonial conquest of Africa.

However, understanding the subtext surrounding the *evolution* of a criminal law system does not help advocacy much unless the context of *enforcement* is also understood. While this chapter has demonstrated the existence of power dynamics in the evolution of the laws criminalising same-sex laws in Nigeria, it cannot provide insight into the existence of power dynamics in their enforcement. To understand the presence or otherwise of power dynamics in the enforcement of the criminalising laws, it is necessary to engage the communities that are most affected by these laws and understand their experiences. Using the persecution and prosecution of self-identified gay men, bisexual men, or MSM living in four cities in Nigeria as a focal point, the next chapter will proceed to discuss the presence and persistence of power dynamics in the everyday enforcement of the criminalising laws.

CHAPTER THREE: POWER DYNAMICS IN THE ENFORCEMENT OF CRIMINALISING LAWS

3.1 Introduction

The previous chapter discusses the evolution of laws criminalising same-sex relationships in Nigeria in the context of hegemonic power dynamics. The discussion emphasises how political homophobia in Nigeria perpetuates social exclusion for the benefit of elite interests that enact the laws criminalising same-sex relationships in Nigeria across different periods of time. The theoretical discussion in Chapter Two explains how the history of dominant power dynamics in Nigeria influences social inclusion and exclusion, engaging the identities of individual members of society in the determination of their individual rights and obligations. In this sense, an individual's identity is, in fact, an aggregate of overlapping, coinciding, and intersecting identities: gender, age, sexuality, employment status, religion, economic class, and social and political influence. In the context of power dynamics, the highest level of inclusion is vested in those individuals whose aggregate identity gives them significant power within the Nigerian political and economic spaces. These individuals constitute the political elite, as detailed in Chapter Two.

From this apex of elite power, social inclusion proceeds downwards in proportion to the relative position of an individual to the political elite. Access to public institutions and processes of government therefore becomes a continuous tug-of-war, based on influence and power that determines the extent of inclusion or exclusion for each individual, rather than a predetermined process based on accessible and certain legal rights and duties. While elite power – and the preservation of that power – shapes the creation and enactment of Nigerian legislation, including legislation that discriminates against sexual and gender minorities, it is the interplay of hierarchical power dynamics within society that shapes how these laws are enforced in the day-to-day interactions between individual citizens and the state institutions. These day-to-day interactions are the focus of this chapter.

While the previous chapter deals with hegemonic power dynamics in the evolution and enactment of the relevant federal and state laws criminalising or discriminating against same-sex relationships and non-heteronormative sexuality and gender identity in Nigeria ('the criminalising laws'), this chapter is concerned with the more practical issue of hegemonic power dynamics in the day-to-day enforcement of the criminalising laws. To achieve this objective – and in accordance with the socio-legal approach of this thesis which utilises a 'law in the streets' and not just 'law in the books' method – the analysis of the enforcement of the criminalising laws principally relies on findings from the semi-structured interviews with self-

identified gay, bisexual, or men who have sex with other men (MSM) (collectively referred to as 'respondents' or 'respondent community members' in the rest of this chapter) in four Nigerian cities: Abuja, Kaduna, Lagos, and Port Harcourt. Supporting evidence is also taken from media and organisational reports on the experiences of sexual and gender minorities in Nigeria.

This chapter discusses the process and findings from field research conducted between January and February 2019. The interviews and analysis were conducted with a focus on the context of hegemonic power dynamics in Nigeria, as contemplated under the theoretical frameworks of elite power, social exclusion, and political homophobia. In the second section of this chapter, I provide an overview of my field research experience, to situate the methodology, context and process of the interviews with respondent community members. In the third section, I review the demographic information of the research participants to aid an understanding of their diverse backgrounds and experiences. In the fourth section, I provide insight into my data analysis process and, using qualitative thematic analysis, the derivation of two themes from the interviews: police persecutions – dealing with the use of hegemonic law enforcement in the selective arrest and prosecution of sexual and gender minorities; and police protection – dealing with the use of hegemonic law enforcement in the selective protection of sexual and gender minorities. In the fifth section of the chapter, I discuss the interview findings under each of these themes as an empirical basis for exploring theories of power in the enforcement of the criminalising laws in Nigeria.

3.2 Setting the stage: the context of the field research

Interviews were conducted with 41 respondents between January and February 2019. Interview respondents comprised 24 community members who shared their experiences of engagement with law enforcement and 17 advocates who shared NGO responses to the criminalising laws. General information regarding research methods, data collection, and research ethics are provided in Chapter One under the 'Methodology' section. The process and findings from the advocate interviews are discussed in Chapter Four while the specific details for the interviews with respondent community members are provided in this and the following sections.

The field interviews were conducted on the premise that, to effectively explore power dynamics in the day-to-day enforcement of criminalising laws in Nigeria, it is imperative to engage with the persons most affected by these laws as a means to understand their experience of law enforcement individually and as a community. The purpose of the interviews is, therefore, to interrogate the role of dominant power dynamics in the enforcement of criminalising laws in Nigeria from the perspective of the respondent community members.

Principally, the interviews addressed the second research sub-question of this thesis: *Using the persecution and prosecution of self-identified gay men, bisexual men, and men who have sex with men (MSM) living in urban Nigeria as a focus, how are dominant power dynamics reflected in the enforcement of the criminalising laws?*

As explained in the 'Methodology' section of Chapter One, the interviews were conducted with respondent community members and advocates in the four cities of Abuja, Kaduna, Lagos, and Port Harcourt. The details of the respondent community members are provided in the next section of this chapter.

During the research planning phase, I had reached out to major community-based organisations and NGOs in the relevant cities and informed them of my research project and my interest in interviewing both community members and advocates. The organisations that responded promised to grant me access to their staff and also reach out to their community networks to connect me with community members who would volunteer in research, using both convenience and snowball sampling methods. With the exception of Kaduna, I was able to obtain permission to use NGO office premises for my interviews in each city. Each of the NGOs arranging access also informed me that I would have to refund transportation expenses for some of the community members. I agreed to refund this cost (through the organisation) at an approximated cost of 2000 naira (approximately US\$5) for each participant who required the reimbursement. Fortunately, I had a research budget for my travel and the money came from this fund – although it meant that I had to take road trips instead of flights between cities. The process of negotiating a transport refund with the NGOs for the community members and my own adjustment from air transport to road transport to accommodate those participants for whom US\$5 was an expense they could not afford to spare are both interesting aspects of doing research in Nigerian society that reflects on power dynamics in Nigerian society. As it turns out, the road trip also proved invaluable as it provided me an opportunity to observe the drastic differences in development levels between the major cities and the hundreds of small towns and villages along the interstate route. To put it simply, I observed a high level of poverty across the expanse of the country. It was very clear to me that, for a number of the population, having a decent socio-economic life is still a very serious struggle. I will return to the significance of this wider state of social exclusion in Chapter Five of this thesis.

And so, in mid-January 2019, I left Lagos and travelled to 'oil-rich' Port Harcourt in Nigeria's South-South region – a journey of about seven hours by road – where I met and interviewed six community members over a three-day period. Five of the interviews with community members were conducted in my contact organisation's office, while one interview was conducted at the hotel where I was lodged. I left Port Harcourt in the early hours of my fourth day and travelled by road to Abuja – Nigeria's centrally located federal capital. While in

Abuja, I met with five community members over the course of three days before departing for Kaduna (also the capital of Kaduna State) on the morning of the fourth day.

There is a newly refurbished railway service between Abuja and Kaduna and so I travelled by train to Kaduna, leaving the Idu station in Abuja around 11am and arriving at the Rigasa station in Kaduna just before noon. Up to this point, my travel had felt moderately safe but as soon as I set foot in Kaduna, I became extremely risk-conscious. My heightened sense of risk in Kaduna was for three reasons. First, Kaduna is located in the predominantly Muslim North of Nigeria and the state was governed by the Shari'a Penal Code Law, enacted in 2002 which, as discussed in Chapter Two, prescribes the death penalty for homosexuality. Second, for almost two decades, Kaduna has continued to be in a state of religious strife between the Christian and the Muslim populations on one hand, and between the Sunni and the Shia Muslims on the other hand, all of which have resulted in a general unease in social interactions. Third, and more personally, I had been a constant and vocal critic of the current state governor and I was not very well liked in the government offices. With all these in mind, and considering the governor had a habit of arresting or detaining his critics, I determined to keep a very low profile in Kaduna.

As with the previous cities, I spent three full days in Kaduna before travelling back to Lagos on the morning of the fourth day. While in Kaduna, I met with seven community members. Unlike in Abuja and Port Harcourt, there was no NGO office premise available for use, and I met with all interviewees (individually) in the relative safety of my hotel room, while also trying as much as possible not to arouse the curiosity of the hotel staff.

I finally returned to Lagos with – admittedly – some relief from the political tension. By that time, it had become clear to me how wrong it would be to lump all sexual and gender minorities in Nigeria as facing one common legal challenge. The challenges faced by community members in Kaduna, who lived within a predominantly conservative Muslim population, were very different from those faced by community members in Lagos who lived in a more secular metropolis. Even though I was only travelling around the country as a researcher, Lagos definitely felt freer to me than Kaduna. In Lagos, I waited some time until February before again starting with the interviews. Because of the endemic traffic congestion in the city, Lagos is often a more difficult place in which to organise meetings. However, I eventually met with six community members there before wrapping up the field research.

All the meetings were done in a single semi-structured, face-to-face interview of between 30 minutes and an hour. While I had a set of questions to guide me (provided in Appendix D of this thesis), I would often allow the interview to follow the train of thought of the respondent. I should point out that, in certain instances, when interviewing community members who had a limited grasp of standard English, I had to reframe my questions using

illustrative analogies (for example, by referring to well-known politicians or brands to concretise questions dealing with concepts of status).

In the next section, I provide a broad description of the respondents – not to provide statistical or quantitative information – but to give an insight into the diversity of persons with whom I spoke and how their aggregate identities also impact on their experiences with law enforcement in Nigeria.

3.3 Participant characteristics and background

As stated in Chapter One, one of the aims of the field research was to interview a diverse range of male community members to show how the experience of laws criminalising same-sex relationships in Nigeria differs from person to person within the community and, as such, mapping out the demographic information of each participant helped to indicate this diversity. To get a wider range of community members' perception of power dynamics the enforcement of the criminalising laws, I sampled for range in education level and employment status.

I interviewed 24 community members in total: 5 persons in Abuja, 7 persons in Kaduna, 6 persons in Port Harcourt and 6 persons in Lagos. In the following paragraphs, I summarise the characteristics and backgrounds of the respondent community members. Table 3.1 shows the anonymised names of respondents and their cities. In the course of the analysis below, I have tended to quote, more often, some of the participants (such as the respondent labelled 'P6') with whom I spent longer sessions or who had more experiences to share than the others.

Table 3.1 Respondents by city

City	Respondent	City	Respondent
Abuja	A1	Kaduna	K1
	A2		K2
	A3		K3
	A4		K4
	A5		K5
	K6		
	K7		
City	Respondent	City	Respondent
Port Harcourt	P1	Lagos	L1
	P2		L2

	P3		L3
	P4		L4
	P5		L5
	P6		L6

Age. As will be discussed in the analysis of the findings, age is often an important aspect in social status and identity in Nigeria. All of the respondent community members were ages between 20 to 37 years old, with an average age of 26. Table 3.2 below shows the distribution of the respondents' ages in each city.

Table 3.2 Age of respondents by city

	20	21	22	23	25	24	27	28	29	30	33	37
PH	0	0	3	0	0	0	0	0	2	1	0	0
Lagos	1	0	0	1	2	1	0	0	1	0	0	0
Kaduna	0	1	0	0	0	0	1	3	1	0	0	1
Abuja	0	0	2	0	1	0	0	0	1	0	1	0
Total	1	1	5	1	3	1	1	3	5	1	1	1

Education level. Education plays a critical role in the ability to navigate systems of power in Nigeria. I sampled for community members with varying levels of education, ranging from secondary school certificates to postgraduate degrees. In summary, 5 of the participants had only up to secondary level education, 9 were still schooling at an undergraduate level, 9 were graduates of tertiary institutions, while only 1 had postgraduate education. Table 3.3 below shows the education level of the respondents in each city.

Table 3.3 Education level of respondents by city

	Secondary school	Undergraduate	Graduate (Polytechnic)	Graduate (University)	Postgraduate
PH	3	0	1	2	0
Lagos	1	3	1	1	0
Kaduna	1	3	2	0	1
Abuja	0	3	0	2	0
Total	5	9	4	5	1

Employment status. As with education level, employment status is also a significant factor in how power dynamics are perceived, engaged, and navigated in Nigeria. Certain kinds of employment may ensure social respect while unemployment can be associated with criminality. 13 of the respondent community members were unemployed either because they were still in school or because they had not been able to find employment, 4 were self-employed, while 7 were employed professionally. Table 3.4 below shows the employment status of the respondents in each city.

Table 3.4 Employment status of respondents by city

	Unemployed	Self-employed	Professionally employed
PH	4	1	1
Lagos	3	1	2
Kaduna	3	2	2
Abuja	3	0	2
Total	13	4	7

Although the demographic characteristics of the respondents are not intended to be representative of wider distribution in the community, they help to provide a diversity of voices and experiences that paint a clearer picture of how the community experiences and perceives of the enforcement of the criminalising laws in Nigeria.

3.4 Data analysis process

As outlined in sub-section 1.8.5 of Chapter One, I used a thematic analysis approach¹ in the data analysis of the empirical research. Using the focus of the research sub-question, '*How is dominant power dynamics reflected in the enforcement of the criminalising laws?*' as a guide, I carried out the coding process for community member interviews in three stages. In the first stage, I used a structural coding approach² which yielded up to 30 possible codes based on key trends identified from the interview responses. In the second stage of coding, these key trends were grouped under conceptual elements of 'police persecution', 'economic ability', 'social status' and 'spatial location'. In the final stage, these conceptual elements were categorised into the two unique themes of 'police persecution' and 'police protection'. These two themes form the content of the research findings and are discussed in the next section.

¹ J Saldana *The coding manual for qualitative researchers* (2013) 177; V Braun & V Clarke 'Using thematic analysis in psychology' (2006) 3 *Qualitative Research in Psychology* 77 79.

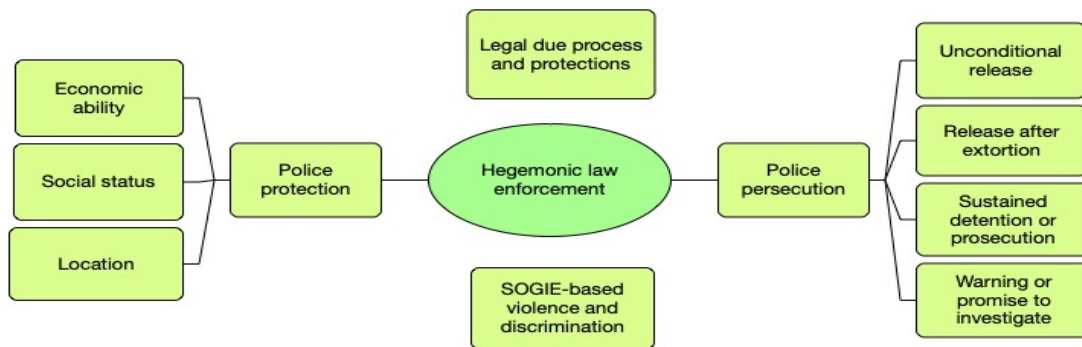
² Structural coding is a method that 'categorises the data corpus to examine comparable segments' commonalities, differences, and relationships'. Saldana (n 1 above) 84 - 87.

3.5 Persecution and protection: Policing sexual and gender minorities in Nigeria

In the analysis of the data, a broad picture of hegemonic law enforcement emerged. In summary, the hegemonic law enforcement ignores the legal due process (the actual content of the criminalising laws) and protections (constitutional rights) in enforcing the criminalising laws. It also ignores violence and discrimination on the basis of sexual orientation or gender identity, and even proceeds independently of social attitudes, including negative attitudes. Upon conclusion of the qualitative thematic analysis, two emergent themes arose from the analysis. These are: (i) police persecution which describes the 'method' to what is often referred to as arbitrary arrests of persons perceived to be sexual and gender minorities; and (ii) police protection, which considers the impact of hegemonic status signifiers in protection from law enforcement.

Both the themes of 'police persecution' and 'police protection' involve interlinking issues of economic factors, social factors, and location/privacy, all of which are related to the theories of social exclusion, elitism, and political homophobia reinforcing hegemonic power in the Nigerian society. The hegemonic law enforcement process, as shaped by its own participation in power dynamics, could either lead to the persecution of sexual and gender minorities (this issue is covered under Theme 1) or it could lead to some measure of protection for sexual and gender minorities (this issue is covered under Theme 2). In Figure 3.1 below, I construct a graphic summary of this dynamic, demonstrating how the hegemonic law enforcement process stands outside the scope of legal due process and protections, and how it is also a separate issue from negative social attitudes that manifest as SOGIE-based violence and discrimination. Instead, the hegemonic law enforcement process follows its own intrinsic rules that can result in either persecution (arrest and unconditional release, release after extortion, sustained detention or prosecution, or a warning/promise to investigate) or protection (based on overlapping criteria of the economic, social, and locational identity of the individual).

Figure 3.1 Hegemonic law enforcement in Nigeria



In the following sub-sections, I use supporting evidence from the data to examine the themes of Police Persecution and Police Protection in detail.

3.5.1 Theme 1: Police persecution: The method to ‘arbitrary’ arrests

Bosia and Weiss indicate that political homophobia is utilised as a tool for constructing or reinforcing ‘authoritative notions of national collective identity’ and for preventing alternative identities that may oppose this national collective identity, whether or not such other identities are related to sexuality.³ This perspective implies that, while the purported goal of legislation may be to impartially regulate sexual conduct, the actual enforcement is likely to focus on the adjudication of identities that challenge or threaten existing hegemonic values, particularly values around masculinity and gender, as a way of upholding the societal power structures derived from colonial values.

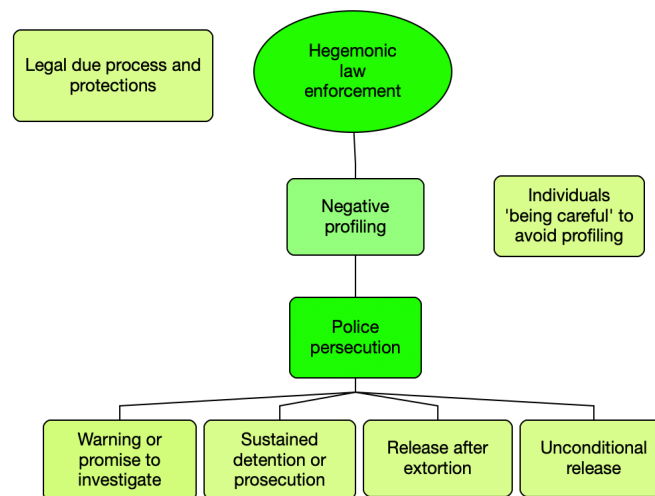
The interview data suggests that the focus on identities for the purpose of enforcing hegemonic values is a constant feature in Nigeria’s law enforcement process. From interviews with community members, it became apparent that ‘arbitrary arrests’ of sexual and gender minorities by law enforcement in Nigeria are anything but arbitrary. These arrests follow a definite and arguably predictable pattern that deploys the ideology of political homophobia in concrete terms. In this respect, the methodology to the process of arrests is often predictable and even considered by respondent community members as avoidable if they are ‘careful’.⁴ This issue of being careful is discussed further below.

In describing the hegemonic law enforcement process, respondents agreed that they experienced or observed few police persecutions that were based on an actual violation of criminalised sexual conduct as required in the laws but, instead, most persecution

³ MJ Bosia & ML Weiss ‘Political homophobia in comparative perspective’ in ML Weiss & MJ Bosia (eds) *Global homophobia: States, movements, and the politics of oppression* (2013) 3.
⁴ See the discussions on ‘respectability’ in Chapter Two and further below in this section.

experienced or observed was based on negative profiling by the police or by hostile members of the public. In Figure 3.2 below, I expand the ‘police persecution’ diagram in Figure 3.1 above by illustrating how the dynamics of hegemonic law enforcement (acting outside the scope of legal due process and protections) can result in police persecution if an individual is negatively profiled by the police. This outcome is also illustrated as a contrast against situations where the individual strives to present themselves as respectable by ‘being careful’ to avoid profiling.

Figure 3.1 The police persecution process



Before examining the hegemonic law enforcement process in Nigeria, it is useful to first understand the legal due process and protections. Nigeria has one police system – the Nigerian Police Force – run centrally under the command of a federal Inspector General of Police (IGP).⁵ Each state has a Commissioner of Police who is subject to the authority of the IGP.⁶ Generally, the police has the mandate of investigating and prosecuting criminal offences. Under the Police Act, the police have the duty to prevent and detect crime, apprehend offenders, preserve law and order, protect life and property, and duly enforce all laws and regulations with which they are directly charged.⁷ Section 24 of the Police Act also confers the police with the power to arrest, without warrant, any person an officer finds ‘committing any felony, misdemeanour or simple offence, or whom he reasonably suspects of having committed or of being about to commit any felony, misdemeanour or breach of the

⁵ Constitution of the Federal Republic of Nigeria (‘Nigerian Constitution’) secs 214 - 216.

⁶ Police Act of 1943 (‘Police Act’) sec 6. This Police Act was repealed in September 2020 and replaced with a new Nigeria Police Act of 2020. The new law restates constitutional protections on arrests and outlines processes for police observance of these. However, the entry into effect of the new law falls outside the timeframe of this research. As such, for the purpose of the analysis in this section, the operative law relevant at the time the research was conducted is the old Police Act of 1943.

⁷ Section 4 of the Police Act.

peace'. The section also empowers an officer to arrest a person whom any 'other person' charges with having, or suspects to have, committed a felony or misdemeanour. Before initiating a prosecution either directly or through the state prosecutors at the Ministry of Justice (depending on the level of the court at which the case will be initiated), the police are expected to obtain evidence sufficient to convict the suspect at trial.⁸ Also, while the police are generally allowed to search a person, it is clear that a search must be conducted only in order to retrieve evidence and not merely to harass or intimidate the person.⁹

The Nigeria police has jurisdiction over both federal and state crimes and its officers are, therefore, competent to arrest and detain a person based on any of the laws criminalising same-sex relationships across the different states in Nigeria. However, the Nigerian Constitution also provides due process protections to persons who have been arrested for or suspected of crimes. These include the rights to silence and not to self-incriminate, the right to written information on the reason for their arrest, and right of access to legal counsel of choice.¹⁰ These due process protections are provided in addition to substantive rights to privacy, freedom of thought, conscience and religion, freedom of expression, peaceful assembly and association, freedom of movement, and freedom from discrimination.¹¹

In a functional legal system, the balancing act between prosecuting the breach of criminal laws and enforcing constitutional rights and protections could provide opportunities through which advocates for sexual and gender minorities can engage the judicial process, particularly through strategic human rights litigation. However, in the practical enforcement of criminal laws in Nigeria, the respondent community members suggested that the police place little or no reliance on legal due process and protections. Ultimately, the outcome of any 'legal' engagement with the police, as discussed in the following paragraphs, will depend more on the economic and social power dynamics between the arresting officer and the alleged offender. This fact supports the theoretical discussion in Chapter Two, where I point to the hegemonic use of criminal law enforcement as a demonstration of Gore's position on social exclusion: 'an interrelationship between poverty and social identity'.¹² As such, laws will not be enforced uniformly but will be enforced through the lens of an aggregate of identities 'based

⁸ *Chief Gani Fawehinmi v Inspector General of Police* (2002) 7 Nigerian Weekly Law Reports (Part 767) 606 cited in OA Ladapo, 'Effective investigations, a pivot to efficient criminal justice administration: Challenges in Nigeria' (2011) 5 *African Journal of Criminology and Justice Studies* 79, 80.

⁹ Criminal Procedure Act of 1945 (CPA) sec 107; Criminal Procedure Code of 1960 (CPC) sec 74; Administration of Criminal Justice Act of 2015 (ACJA) sec 144; and Administration of Criminal Justice Law of Lagos of 2015 (ACJL) sec 104.

¹⁰ Nigerian Constitution sec 35.

¹¹ Nigerian Constitution secs 37 - 42.

¹² As above.

on multiple and overlapping criteria'.¹³ In this vein, the legal provisions governing the substance of criminalised sexual conduct and the procedure for law enforcement become meaningless in themselves. Instead, the extent to which any individual can claim legal protection or enjoy the benefit of due process becomes linked to their aggregate of identities and the extent to which this aggregate identity can successfully navigate and negotiate power dynamics. This understanding – unstated and unarticulated in the formal legal process – applies to the interactions of sexual and gender minorities who find themselves in the grip of a police stop order or arrest.

Under Nigerian criminal laws, the provisions criminalising same-sex acts typically require the offender to have committed acts of 'carnal knowledge', 'carnal intercourse', 'entering into a same-sex marriage contract' or similar *actus reus* language.¹⁴ Yet, in the experience of interview respondents, the police rarely bother with arresting people who commit these acts or even people who are found *in flagrante delicto* – the phrase commonly used by the respondents is 'caught in the act' – and instead they profile and then 'arbitrarily' arrest men whose dressing, gestures, and mannerisms are considered as effeminate or feminine.

According to a respondent community member in Abuja, this kind of profiling increased after the passing of the Same Sex Marriage (Prohibition) Act 2013. In his words:

The gay people that look feminine, ever since they passed the Same-Sex Bill into law, the police, the touts even use it against them because they look feminine even though they're not gay. Because of the way they are looking, they attack them unnecessarily. Even without them looking for their trouble, because of the way they look, because of the way they walk. Because of the way they dress, they attack them. – A1

Another respondent in Abuja described how two men were arrested by the police on suspicion of being homosexual but one of the men was released while the other was kept in detention because he was considered more effeminate:

I even have a very recent one that happened to a very close friend of mine. The person went to see his friend who has been a target from some neighbouring police people around and the two of them were locked up in a cell but because the person who went to visit this friend is even more girly and all of that, they released his friend who he went to visit (who was the main target) and held on to this other guy because they feel he is more gay-like, according to them. They said they need to do tests and all of that to see if he has been penetrated because he kept saying 'No, I'm not'. They said they would do medical tests to see if he is gay; that's if he's been penetrated and all of that, went through his phones to see the

¹³ C Gore 'Social exclusion and Africa south of the Sahara: A review of the literature' (1994) A report by the International Labour Organisation (Labour Institution and Development Programme DP/62/1994A) para 1.4 available on <http://agris.fao.org/agris-search/search.do?recordID=GB2013200767>.

¹⁴ Criminal Code sec 214 – 217; Penal Code sec 284 & 405; Same Sex Marriage (Prohibition) Act sec 5.

messages he has been sending, to see what's on his phone and all of that. Eventually, what they wanted was money, so they bailed the guy. – A3

Similar to Abuja, respondents in the other cities shared situations of arrests based on profiling rather than on actual sexual acts. The inclination towards detaining the person considered to be more effeminate in a dispute was narrated by P3, a respondent in Port Harcourt:

On the third of December, someone was coming from Imo state. So when he stopped at Rumokoro [in Port Harcourt], he's like, talking like a girl. So [one of] those [street thugs] there starts harassing him. From the process of harassing him, police came in and picked the both of them. Immediately they released the other one but arrested this one because he is like, talking like a girl. So they show him that he's a girl: 'Why is he talking like a girl? Why is he acting like a girl?' – P3

In this incident described by P3, the police not only arrested the man who was profiled as effeminate, but they also released the perpetrator who had originally accosted and harassed him. In Kaduna, one of the respondents narrated a case of a person who was detained 'for some hours' because he was 'dressed in a shabby way' and 'he's feminine a little bit'.¹⁵ A respondent in Lagos also tells of his experience with police who stopped him and a companion in the street:

This was around Hospital Road, around Lagos Island. So the man just ... I guess their police station is at that Obalende Lion Building. Immediately the man just sight us, he was just like 'Ah ah, why are you guys walking like this? You guys are gay'. And I was like 'Oga [boss], sorry, is there a way we should, like, walk on the streets or something?'. He was like 'Yes, you guys, you are putting on shorts and it's really short'. I was like 'Sorry? Is there a law that says I can't wear short stuffs?' But before we know it, he said: 'Ok, let me see you guys' phones'. So, we were about dragging the phone with him so they sha said— they sha must see the phone sha. The phone wasn't— actually, I don't put lock on my phone then— so the phone wasn't unlocked. They dragged the phone with me. They collected the phone and checked through my phone. So... and they found, they found stuffs on it. So that was how— they didn't even ask for my consent or anything— they just called my dad. Like, 'Your son is this, this, this, ...come and meet us at Lion Building' Like oh, really? And my dad just came. – L5

Another respondent in Lagos shared a similar incidence:

But, there was some time I, I wanted to travel, so I was on my way to the park, so I was stopped by the police – one or two. They were like: Why am I behaving so girlie? So, I was— I told them I'm a student, that I don't know anything about what they were trying to tell me. So they were like, 'Ok, from your appearance, we think you are a gay'. So, I told them, I pleaded because it's – the time is running late already so I had to get to where I was going to by that time. So, they searched phones, everything. So, they couldn't find anything, so they released me.– L3

¹⁵ Interview with K5.

In this scenario narrated by L3, he was immediately profiled and targeted on the basis of his appearance. This fact, combined with walking at a late hour of the day, made him suspicious to the police officers. Fortunately for him, there was nothing incriminating found after the (illegal) search of his phone.

In essence, profiling of sexual and gender minorities by the police does not directly target sexual conduct as described in the homophobic laws. Instead, profiling targets people who do not conform to broad hegemonic norms of presentation and appearance. This profiling is the subtle enforcement of hegemonic norms that dictate what is considered as 'respectable' or 'appropriate' dressing and mannerisms.¹⁶ This focus of law enforcement means that gender-nonconforming expressions or mannerisms are considered to be implicitly criminal. In essence, criminality is attached to the absence of social respectability.

As such, sexual and gender minorities who follow a fashion subculture were targeted for what was perceived as their 'implicit criminality'; for violating hegemonic codes of presentation and appearance rather than for having violated legal codes of sexual conduct. It is the idea of an implicit criminality that prompts the police to search phones for *any* incriminating evidence, including signs of engagement in online fraudulent activity (popularly called 'Yahoo-Yahoo' in Nigeria) or criminalised sexual acts. In this way, the experience of sexual and gender minorities who face profiling by the police is similar to the experiences of other young men who are detained for no clear reason by the police simply for wearing dreadlocks, having tattoos, or dressing in non-conforming ways.¹⁷ Their 'crime' often starts with noncompliance with hegemonic fashion norms. As A2 in Abuja explains:

With the information I gathered, I heard that they were actually looking for yahoo boys but because they know that these people [sexual and gender minorities] exist, so they use it [sexuality] to threaten them, so in the process of searching their phone [for online fraudulent activity], they see a porn or naked pictures, so they use it against them. – A2

¹⁶ Y Johshi 'Respectable queerness' (2012) 43 *Columbia Human Rights Law Review* 415; DZ Strolovitch & CY Crowder 'Respectability, anti-respectability, and intersectionally responsible representation' (2018) 51 *Politics Symposium, Political Science & Politics* 340.

¹⁷ Starting in 2017, there has been public outcry in Nigeria against the arbitrary use of force and unlawful arrests by the Special Anti-Robbery Squad (SARS) unit of the police, resulting in the #EndSARS online campaign to scrap this unit. According to one media report, the targets of SARS 'includes young men who bear laptops on the road. They say SARS men routinely stop them and order them to strip their backpack for clues about their activities.' See S Ogundipe '#EndSARS: Police mum as Nigerians recount atrocities of Special Anti-Robbery Squad' (3 December 2017) <https://www.premiumtimesng.com/news/headlines/251271-endsars-police-mum-nigerians-recount-atrocities-special-anti-robbery-squad.html> (accessed 31 July 2020); and A Salaudeen 'Nigerians want police's SARS force scrapped' (15 December 2017) <https://www.aljazeera.com/news/2017/12/nigerians-demand-police-sars-unit-171215153831230.html> (accessed 31 July 2020).

In Lagos, L4 describes having successfully navigated similar experiences:

I've been stopped by policemen and then once they give throw a question at me, I give them ten answers. So, by giving them these ten answers and not letting them know that I'm even scared of being stopped by them, so I guess most of the times they just feel 'Oh this person is just innocent, let us let him go.' ... Most times they stop you to know if you're even a 'yahoo' guy. So, they want to know if this person is a 'yahoo' guy or a cultist. Then, by the time they now get to see your chats and they find out you're gay, then they change topic immediately to that aspect. – L4

In essence, the police persecution of sexual and gender minorities often starts with law enforcement officers attaching criminality to particular 'types' of individuals and, in the course of searching for proof of criminal conduct to justify their suspicions, they often stumble on sexuality. Conversely, if an individual presents an appearance in accordance to hegemonic values of 'respectability' – for instance by dressing in a suit and tie – the suspicion of criminality – and the invasion of privacy – is unlikely to arise at all.¹⁸

Respondents who had not had any direct negative experience with the police would initially attribute this experience to luck. However, when I probed further, it became clearer that they had often adjusted their social behaviours to match hegemonic expectations which allows them to pass as 'respectable' regardless of their actual sexuality, a process that, during my thematic analysis, I coded under the phrase 'being careful'. The concept of 'governmentality', discussed in sub-section 2.2.2 of Chapter Two, explains how hegemonic social conduct is regulated through the internalised knowledge of individuals and not just through the coercive power of the state.¹⁹ The idea of 'being careful' as practiced by respondents is an example of this self-regulation of social conduct.

'Being careful' – a theme of respectability – could be concern for how one presents and expresses oneself, for example, presenting oneself in conventional heteronormative ways, to avoid profiling.²⁰ It could also be concern for spatial locations and environments where one has romantic or sexual engagements. Both of these aspects speak to hostility towards individuals who do not meet hegemonic criteria for social acceptability.²¹ It also implies tolerance for those who are able to perform and present themselves heteronormatively or have earned a measure of exceptionalism through economic ability or social status.²²

The general suggestion from interviewees was that 'being careful' is a necessary safeguard for sexual and gender minorities who: (i) have little or no economic ability or social

¹⁸ Johshi (n 16 above) 415.

¹⁹ S Nyanzi 'Unpacking the [govern] mentality of African sexualities' in S Tamale (ed) *African sexualities: A reader* (2011) 477.

²⁰ Johshi (n 16 above) 418.

²¹ As above.

²² As above.

status and are, therefore, extremely vulnerable to persecution; or (ii) have built their economic ability or social status around a perception of hegemonic respectability. For example, one of the interviewees was keenly aware of his status as a career professional and family man, and could lose it easily at the slightest change of perception. Otherwise, it was generally agreed by respondents that a high level of economic ability or social status was sufficient protection in itself, and could withstand 'careless' expression or presentation that did not conform to the ideology of respectability.

Respondents in Kaduna – the most religiously conservative of the cities visited – also described how they take measures to present or express their appearance and behaviour in ways that conform to hegemonic ideology of respectability and why this conformity is important to them. Here, K4 suggests that being conservative in his presentation was key to his relatively comfortable position in the city.

Let me speak for myself because I try as much as possible to mind my business. Sometimes I feel some people are a bit flamboyant or try to put themselves in risky positions but maybe that's how they want to express themselves, good for them if it works. To me I just look at it as: you are on your own anyway, you just have to deal with it.— K4

K1 agreed with this idea, and recounts a situation where he ran into police officers who had just arrested his friends for homosexual conduct and he successfully avoided being tagged as complicit simply by drawing attention to his conforming appearance:

Yes, the way I present myself, so yeah, I can be— you can only tell— okay what happened was I told the officers that I was kind of around the premises so I called a friend to come get his measurement and all that... So, based on how I look and how I present myself, they actually agreed and, you know, we had to bribe them with things to get everything settled but they seriously harassed... there were some people that had to pay serious money just to get out of the situation.— K1

On the same point, K6 reasoned that the norms on presentation and appearance were the norms of Nigerian society and should therefore be respected: 'We are different from the whites, that's the white people. So, the way they live their life is different from the way us, that's the Nigerians, live our lives'. K6 believed that if he respected these hegemonic norms on dressing, his sexuality would not constitute a hindrance to social inclusion:

Okay, there's a way a white guy would dress and me I can't dress that way, like panties or shorts, like tight trousers. Back then, before the law, everything was like fine, normal but still yet they do discriminate. So, I can dress – the way I dress defines me, defines everything about me, like presently, the way you dress, that's the way you will be addressed. I can dress, braid my hair, earring, somebody will just think like this guy is a gay, the way you talk, the way you walk, defines everything about you. So, for you to avoid all sort of discrimination, you mind the way you dress, the way you talk to people, the way act.— K6

Self-presentation in a way that conforms to hegemonic norms has to be complemented by hegemonic notions of masculine behaviour and mannerisms. As K6 noted, people immediately ascribe homosexuality to a man who 'catwalks':

Okay fine, some act bitchy outside, when they walk, like they catwalk, you'll just see this one and you'll just say he's gay. Like now in Nigeria once you act like a girl, you are gay, that's just it, so for someone to avoid such, you'll mind the way you behave, so I mind the way I behave when I'm out, so no one will discriminate me or I will involve myself into any problem that will lead to the police.— K6

K6 also noted that he not only applied these conservative values to his own dressing, appearance, and mannerism, but he also insisted that his friends do the same around him:

Most of my friends, if you act bitchy, I won't walk with you, I will like tell you if you won't act normally, stay but if you'll behave yourself, let's go, to avoid small talks from people. If you act bitchy, I can't take you to my house.— K6

Self-presentation is a key aspect of negotiating power dynamics in Nigeria: 'the way you dress, that's the way you will be addressed.' In the three statements quoted above, the respondents had a sense that they could continue having 'normal' and even very productive lives as long as they were not 'flamboyant' or 'bitchy' in the expression of their sexuality.

It is important to emphasise that these instances of profiling by the police are derived from, but still independent of, the laws criminalising same-sex relationships. Other than a provision in the Northern Penal Code on trans-dressing,²³ Nigerian law does not criminalise fashion styles or gender mannerisms across the country. In any case, profiling is not dependent on legal provisions. The suspicion of criminal conduct based on profiling is, instead, based on the subjective moral philosophy of law enforcement agents or on their deliberate or inadvertent misinterpretation of law. There is a higher probability that the police will enforce a wrong interpretation of the law against a person they perceive as implicitly criminal than enforce the right interpretation of the law against a person they perceive as conforming to hegemonic respectability. Political homophobia is not so much concerned with sexual acts as it is with the ways in which homosexuality poses a visible threat to established hegemonic norms that prop up the political system.

In cases where a person has failed this first test of implicit criminality, the consequences of a successful profiling could either be a short stay in the police station or a long detention and criminal charge, followed by a prosecution process. The difference

²³ Penal Code sec 405(2)(e) defines 'vagabond' as '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'.

between these two consequences often depends on the extent to which the individual is able to negotiate aspects of the hegemonic power dynamics at play in a particular situation.

Following from that premise, the respondent community members described three general consequences of a police arrest: (i) immediate release after an extortion (generally called 'bail'); (ii) unconditional release; and (iii) sustained detention and eventual prosecution. Where a public tip off has been received, there is also a fourth possibility: the police issuing a warning or promising to investigate. Nevertheless, none of these consequences were described by respondents as being dependent on the gravity of the offence or the position of the law. Instead, they are often experienced as a consequence of the power dynamics between the alleged offender and the police. As L5 in Lagos explains: 'It depends on the kind of policeman you meet.'²⁴ However, as other respondents noted, it also easily depends on the status and attitude of the alleged offender. In the following paragraphs, I examine the four possible outcomes of a police arrest and the circumstances around each.

Immediate release after extortion: Under the provisions of the Criminal Procedure Act, in offences that are not capital offences, the police have the duty to release a person on bail (with or without a surety for 'a reasonable amount') if the person cannot be charged before a court within 24 hours, or if further investigation is required and no charge can be brought yet, 'or release the person 'forthwith' if they are satisfied that 'there is no sufficient reason to believe that the person has committed any offence'.²⁵ In each case, there is no requirement that the person in question should pay any sum of money to the police before being released. The legal process of police bail does not require a payment and any cash deposit, if at all, is recoverable if the accused is available for trial. As the sign in almost all Nigerian police stations state: 'BAIL IS FREE'. Only if a person granted bail does not appear in court can the surety be made responsible to pay any amount guaranteed. Otherwise, only a court, after a detained person has been charged, is competent to impose a monetary deposit or other terms as a precondition for granting bail.

²⁴ Interview with L5.

²⁵ Criminal Procedure Act of 1945 secs 17 - 18. Section 17 of the Criminal Procedure Act provides: 'When any person has been taken into custody without a warrant for an offence other than an offence punishable with death, any officer in charge of a police station may, in any case, and shall, if it will not be practicable to bring such person before a magistrate or justice of the peace having jurisdiction with respect to the offence charged within twenty-four hours after he was so taken into custody, inquire into the case, and, unless the offence appears to such officer to be of a serious nature, discharge the person upon his entering into a *recognisance with or without sureties for a reasonable amount* to appear before a court at the time and place named in the recognisance but where such person is retained in custody he shall be brought before a court or justice of the peace having jurisdiction with respect to the offence or empowered to deal with such person by section 484 of this Act as soon as practicable whether or not the police inquiries are completed.' (Emphasis mine). In these instances, the person acting as surety is only expected to pay money if the suspect fails to show up in court. Similar provisions are contained in the Administration of Criminal Justice Act of 2015 sec 30 (which is the applicable criminal procedure law for federal offences).

In practice, however, it is common that the police extract a non-refundable sum of money as the ‘fee’ for their bail from alleged offenders before releasing them either pending a trial or fully.²⁶ This process of extortion also extends to interactions between the police and sexual and gender minorities in Nigeria. Extortion of this nature is independent of the commission of an actual crime. It is sufficient that: (i) the victim has violated hegemonic norms of conduct or dressing and is therefore at risk of implicit criminality; and (ii) the person has the means of paying the extortion amount. In the incident narrated by A3 above, the victim was extorted even though he had not committed any crime. His offence was being ‘girly’ or ‘gay like’ (implicit criminality) and as A3 states: ‘Eventually, what they wanted was money, so they bailed the guy’. The ability to produce money on the spot can guarantee instant release while – even for exactly the same conduct – not having money can lead to a trip to the police station or even sustained detention.

If they know you can't fight back definitely they will collect something from you. Not even something, they will tell you to go and bring so and so amount. If you don't have it, they will take you to the court and maybe imprison you. – K7

In any case, the outcome of the process is independent of the actions of the persons involved or the provisions of the law. In the case of A3's friend, his crime was being ‘girly’, yet, in another case described by K6 in Kaduna, the alleged offenders were ‘caught’ while having sex and then taken to the police station. Ordinarily, this scenario would be an ‘open and shut’ case under the legal provisions. However, the same pattern of extortion was followed. K6 describes a distinction between those who had money and were ‘bailed’ and those who did not have the money and against whom formal charges were brought:

They were caught in the act, they were taken to the station and they were bailed out, like, I know most of my friends were caught in the act and they were bailed out.what I want you to know is that, Nigeria today, things are done easily with money, I can't really say or mention like my friend was arrested and taken to the court for being gay, ... they'll call me like ‘Them don catch this person o’. We'll be like okay they'll bail the person out. Once you are caught, you'll be bailed out and they won't take you to court... But one thing I want you to know is that, despite with the law, even though you are being caught in the act, like I know some of my friends that are being caught in the act, your leg won't take you to the court, talk less of any body.— K6

²⁶ Human Rights Watch (HRW) “‘Everyone’s in on the game’: Corruption and human rights abuses by the Nigeria Police Force (2010) 24 available at <https://www.hrw.org/sites/default/files/reports/nigeria0810webwcover.pdf>.

L5 in Lagos also described how, despite the police finding photographs in his phone of men in same-sex acts, a situation that ordinarily would have led to police detention, he was able to successfully negotiate his way out of the criminal process.

They went through my WhatsApp. They saw my naughty chats and everything so...coz me, I'm so naughty when it comes to chatting. Like I send nudes, they send nudes. You get. So... they sha found stuffs on my phone sha. So, my dad sha came. So, when my dad came sha, they explained everything to him. Showed him my phone and everything. And, later, they said that he...that they should bail. My dad said he can't bail, so I had to bail myself. 40k [naira]. So, I had to bail myself and leave the place. So, getting home, my dad just had his own drama. Everybody is just fine now. They didn't charge me or anything. They just said that for me to bail myself. – L5

However, the distribution of power within the police is not homogenous. As such, there are different levels of power to navigate in the criminal law enforcement process. L1, in Lagos, explains that due to the different levels of power, the amount that will be demanded for 'bail' by a junior ranking patrol officer will be lesser than that demanded by a superior officer. For alleged offenders, the fear of being confronted by a higher level of dominant power within the criminal law enforcement process is, in itself, an incentive to negotiate at the lowest level rather than delay. L1 in Lagos shed some light on this level of interplay of status and power:

If you meet the common police officer on the road and then you show them that you have a certain exposure, they will leave you but once you get to the station and then theirwhat do you call it? Is it CP, DPO, CPO, their head of the police station comes; him too is almost as enlightened as you are. So he would...he would... that's a different ball game. Even in a normal situation, if you drive recklessly on the road and the police catches you, if you are able to settle them on the road, give them 2k, 3k that's good. But once they take you to the police station and then their.... Is it DPO? Yes, the DPO of the station comes; it'sit's a different ballgame. It's much more [costly] to go away from him than others. ... He doesn't earn one thousand naira like the others so if you want to settle him, you need to settle him well.–
- L1

Unconditional release: Despite the propensity for extortion by the police, there are also instances where the aggregate identity of an alleged offender is sufficient to fully negotiate an unconditional release. These instances are generally the case where the arresting officer perceives that their own aggregate identity is subordinate to the aggregate identity of the alleged perpetrator. In this context, the victim need not be socially or politically powerful, but they may be related to someone else who is, thereby deriving some measure of power from that relationship. As K5 in Kaduna states: 'The people that are more influential will not be detained, whereas you that is nobody, you will be detained and then before you know, you'll

even be like charged to the high court.²⁷ He then describes an incident where three men had been discovered in a sexual act but only two ended up being detained while their host (who had a wealthier family background) was released unconditionally, with the police providing the rationale that the host was unaware and the other two had merely used his house as a meeting place. According to K5, the other two men were detained for about 3 days until they paid some money to the police.

In Lagos, L5 who had previously been arrested and extorted once when the police searched and discovered suggestive messages and photos on his phone was, again, confronted by another set of officers on a different occasion:

It happened at Yaba bus stop ... so, we sha dragged it. When I now started saying I can't open my phone until my lawyer is here. So, they took me from that Yaba to this place, Mile 2. So, getting to Mile 2, I was just like: 'You guys are just disturbing me, I have work to do and everything'. So, one man among them was like, 'Ah, this one is troublesome o. Leave this one. Let him go.' And that was how they just let me go. They didn't collect any money from me, that day. ... The rest were adamant like they want to see what's on that phone. But the man was just like, 'Wo, let him go; let him go. His wahala [troublemaking] is too much.' That he is making the rest of the people they arrested prove stubborn to them. Something like that ok ... but I am sure that they are going to collect money from the rest of the people because those people weren't even talking. They were just sitting and looking at them.— L5

In this second instance of police interaction, L5 was able to escape detention and possible persecution simply by asserting his due process rights and resisting the illegal attempt to search his phone. The police let him go unconditionally, not because L5 was right and they were wrong, but because L5 was 'troublesome'. This idea of being 'troublesome' signified that the police officers considered L5 to have a higher level of power dynamics than their average victims.

Sustained detention or eventual prosecution: In the most unfortunate cases, the police could detain alleged offenders without access to a lawyer or relatives for days or weeks, or follow up immediately on the case and directly prosecute the person at a Magistrate Court or refer them to the state prosecutors, if the charge is before a High Court. While the public perception of these cases may be that they represent a functional policing system carrying out the task of indicting 'deviant' sexuality, these cases are – in reality – the outcome of a hegemonic law enforcement process that sieves between sexual and gender minorities who are, in some way, part of the dominant hegemonic system and others who fall outside the spectrum of power. In this way, it is often the most defenceless and vulnerable people, or people in political

²⁷ Interview with K5.

opposition groups who are direct threats to established political power, who end up in sustained detention or prosecution.

One unfortunate incident described by A1 in Abuja, and similarly recalled by another interviewee, involved two men who were discovered during a sexual act. One of the men was the son of a high-ranking local government official. The government official secured the release of his son from police custody by paying a bail 'fee' while the other person was detained for six months as his case was being concluded in court.

We have a scenario like that. A case in the community whereby a child of is gay. Anyway, they caught him in the act. They went to the police, before the case move to the court, the guy's father came to the police and bailed him and left the partner. The partner had to go to the court alone and they charged him to prison. Though, the case lasted for like 6 months before they closed it. But why didn't they close the case or release the two of them on bail immediately, why one person?— A1

In other experiences described by respondents, court prosecution could be a result of circumstances when 'things have gotten out of hand', for instance through the involvement of high-level government officials interested in the incident. L4 describes an example of this situation during a prolonged ordeal with the police:

Last year, August 27, precisely. I went for a birthday party on the 26th night. That was on a Saturday. Then at about 1.40 in the early hours of the 27th of August, which is on a Sunday, the policemen invaded the hotel premise...at Egbeda [on the Lagos mainland], so took everyone – all the guys in the hotel – then we got to the police station. We kept asking them why, what was the reason for our arrest. They never said anything until like some hours. So, they told us that, ok that we were being arrested for being gays. And another time, they said we were being arrested for being cultists. So, from then it went on, then we were locked up for 48 hours in the police custody, not just in one police station – like three different police stations.... So, in the space of three days, we were on detention. We went to see the Commissioner of Police of Lagos state for an interview which made the whole thing - went viral because the TV stations were around on that day. So, at that point I knew it has gotten out of hand. So, there was nothing our money or our lawyer could do at that point than for us to just go through the process.— L4

L4 was part of the infamous arrest of 57 men in Lagos in August 2018.²⁸ In that case, the involvement of a third party who provided the tip (the Commissioner of Police refused to disclose whom) and the opportunity to stage a 'show trial' for the press resulted in prolonged detention and the absurdity of prosecuting a case where none of the alleged offenders had been arrested for the actual commission of any prohibited conduct. L4 also believes that, in their own case, the economic ability or social status of the respondents would not have

²⁸ 'Police storm hotel in Lagos, arrest at least 57 suspected of homosexuality' (29 August 2018) <https://www.news24.com/news24/Africa/News/police-storm-hotel-in-lagos-arrest-at-least-57-suspected-of-homosexuality-20180829> (accessed 31 July 2020).

mattered because of the existence of the anonymous third party who put pressure on the police – all the way to the Commissioner of Police – to raid the party.²⁹ This involvement of the top police hierarchy implied that there was sufficient ‘orders from above’ to empower the arresting officers in their operation and impeded the usual process of negotiating power dynamics with the alleged offenders. A similar situation occurred in the Bobrisky incident, discussed in sub-section 3.5.3 below.

Mass arrests and prosecution, such as the one described in the preceding paragraph, help to foment moral panics and provide opportunity for ‘show trials’. Such ‘show trials’ are a usual tactic in the political homophobia process.³⁰ As Bosia notes:³¹

[H]omosexuality on trial provides a public forum to define a surrogate foreign menace embodied by the accused, and behind whom lurk the international pressures on state sovereignty. The accused can then stand in for the foreign danger the state is attempting to resist, or for the disorder threatened by domestic opposition to the structural adjustments the government has embraced. ... So it is not the accused that is paramount in the proceeding, but the way homosexuality is constructed, from scratch and with significant improvisation, as a danger to national integrity.

In essence, when the police ultimately prosecute a person for homosexuality or other same-sex activity, the public is presented with a visible and sensational embodiment of the ‘threat’ to social order, thus fomenting even more moral panics and empowering the state (through the police) to proceed on more crackdowns. For instance, in 2007, the police arrested 18 men at a private party in a hotel in Bauchi and charged them with vagrancy, cross-dressing, and sodomy under Bauchi state’s Shari’a criminal law.³² In reality, other than cross-dressing, the men had not been caught engaging in any prohibited sexual acts. However, when a local court struck down the charge of sodomy and released 5 of the men on bail, the moral panic in the local community had reached such levels that the population rioted. Their moral panic, already stoked by political rhetoric, resulted in a protest against what seemed to them to be a judicially lenient legal attitude to what they considered as a threat to Islamic injunctions.³³

Warning or promise to investigate: As is discussed further below on the theme of Police Protection, the police is not always hostile to sexual and gender minorities and may even assist in protecting communities. In some instances, police protection can arise *after* the police persecution process has commenced, such as when a privileged person has already been

²⁹ Interview with L4.

³⁰ MJ Bosia ‘Why states act: Homophobia and crisis’ in in Weiss & Bosia (n 3 above) 41.

³¹ As above.

³² BBC.co.uk ‘Clash over Nigeria cross-dressing’ (28 August 2007) <http://news.bbc.co.uk/2/hi/africa/6956848.stm> (accessed 31 July 2020).

³³ As above.

reported to or (inadvertently) arrested by the police. In such instances, the respondent community members generally agreed that the approach by the police, after discovering the economic or social status of the individual, would be less based on brute force and more refined. A4, for instance, felt that the police would not just storm into a top politician's home after a tip-off, instead they would 'ask questions first, confirm things first'.³⁴ A3 agreed with this view and narrated a situation where a friend and his partner were visited by the police and given a warning after a tip from neighbours that they were gay:

Not the usual barbaric raid. Yeah, they picked them up responsibly and all of that and they did all the questioning; did all the 'Don't leave town' and all of that... The person is a working class [professionally employed] person, which is why I think the police did well not to come with a raid approach, they just came to pick up the person and the other friend in the house for questioning and said they would still be doing some other investigations, just to clear what has been going on. – A3

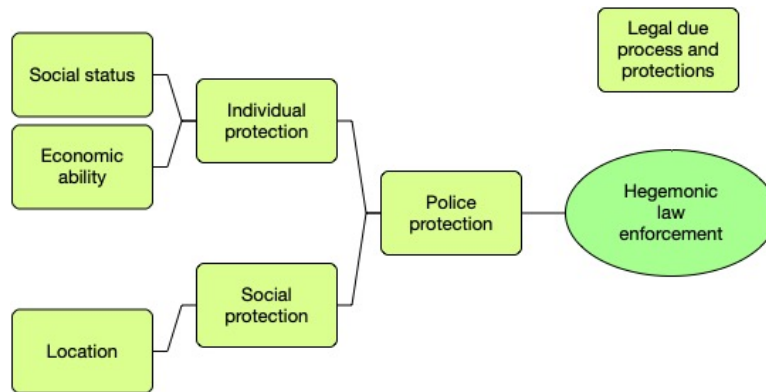
In the incident narrated by A3, the individuals involved were subjected to the police persecution process. However, their social and economic status earned them respectful treatment from the police and, eventually, they were left alone. Nevertheless, the respondent community members agreed that such instances of privileged people being arrested by the police on the basis of sexuality or gender are rare. Instead, privileged members of the community were generally under some kind of police protection. The dynamics of this protection is discussed in the next sub-section.

3.5.2 Theme 2: Police protection: economic ability, social status, and spatial location

Figure 3.3 expands on the 'police protection' process of Figure 3.1 above and illustrates the dynamics of police protection of sexual and gender minorities under the hegemonic law enforcement process. As with the case of police persecution, this process is outside the scope of legal due process and protections. Under this dynamic, protection can be based on an individual's economic ability and social status or it can be social, in the sense that the protection is not specific to an individual or based on an individual's status. Instead, the protection is derived socially, from privileges attached to people working or living in certain neighbourhoods and spatial locations.

³⁴ Interview with BA.

Figure 2.3 Police protection of sexual and gender minorities



3.5.2.1 Economic ability: The significance of money

“Yeah, the crime in Nigeria is poverty, really. If I have money— what is the hippest bar right now in Port Harcourt— I can close down the bar. I can pay everybody in the bar and have my way. I can tell them, oh, ok so "m going to have a party with my friends and I don't want anybody judging us. This is what I want. And as long as I have enough money, Nigerians are going to take your money and look the other way" – P6

The above quote from the interview with P6 summarily captures the existence of Nigeria as a hegemonic society where power dynamics – and not law – determine the extent of rights and obligations of citizens, and consequently, despite the existence of laws criminalising same-sex relationships in Nigeria, sexual and gender minorities can still negotiate and obtain police protection. However, this kind of protection should not be conflated with constitutional due process rights and other forms of protection. Police protection within the ambit of hegemonic law enforcement is not based on the recognition of constitutional rights to liberty, fair hearing, freedom of expression or freedom of assembly. Instead, these protections are based on hegemonic recognition of economic ability, social status, and spatial location as illustrated in Figure 3.3. Although these factors are interwoven in practical terms, in this section, I examine examples of how hegemonic law enforcement in Nigeria engages with economic ability before then considering social status and spatial location in subsequent sections.

Some of the respondent community members informed me of their awareness of, or participation in, situations where the police had been hired or otherwise engaged to protect events organised by the community. The protection in these instances could be protection against hostile members of the public or protection against other police officers. For instance, where a party is being held by the community members with the knowledge of the police, the probability of that party being raided by other police officers becomes almost zero. As A4 explains, if a party is being held without police involvement, it will likely be raided and disbanded:

Even in Abuja here, when they see a gay gathering...if you don't have maybe the [police] force people to even guard that place at that time, my God, it is either the police will raid the place or get everybody there arrested. It has happened severally in Abuja here; some *tibi* [gay] parties I have attended, sometimes I play DJ for them. I have seen lots of when police coming and they see that these are gays, they get all of them arrested... Because, at first, you need to— even— you need to bring in the force people. – A4

As such, some community members in Abuja have learned how to involve the police in their parties. Rather than hide their events and risk a raid, they approach the police and get security. This confidence to approach the police, of course, requires a level of economic ability. A4 suggests that if one does not have this economic ability, one should not bother hosting an event for other gay people:

But now sometimes when they hold parties now, things like that don't happen anymore because everybody are now conscious of themselves and whenever they want to hold a party, maybe a gay gathering – you understand – they make sure there are security around... So that's why whenever you want to throw a party, maybe gay party, at least there must be money for you to do things. If there's not, you just leave am like that, just dey your own [just don't participate], no be by force to do party. If you want to do it, you organise yourself well.— A4

In Kaduna, this negotiation with the police for security is the same for community members who have the means. According to K6, 'money matters a lot':

They do hold parties and the police do secure there. The thing is that the money matters a lot, that's just the key point there. If I have my money, I'll go to the station like, 'I want to have a party and this is the kind of people that will come'. Simple. But, if the police were not informed, they will come, they will arrest you and they will press charges and ... huge amount of money for you to be bailed out. – K6

K6 also explains that community members do not have to be vague when negotiating with police officers, and they may expressly state that it would involve gender-nonconforming situations. However, in most instances, the police may not be aware of the nature of the party and are simply 'outside the gate, securing'.

Yeah, you'll be like, you want to organise party. Boys that do act like girls will come, stuff like that and you just want them to secure there for you. But, most at times, they don't get aware of things going on because they are outside the gate, securing. So, most of the guys just bring their stuff, when they go in, they will dress. – K6

In Lagos, the capacity to negotiate police protection is highly correlated to spatial location. With the exception of a few places on the Lagos mainland, it is on the Lagos islands that police

protection is more easily obtained. L6 describes his astonishment when he found out that there were gay clubs in the Lagos islands that enjoyed police protection:

I was talking to a friend of mine, he has travelled right now, we were having this discussion about parties ... We were talking about those things and he was telling me about, I think it was during the case of the 57, last year, we had this discussion and he told me that there are places in Lagos, clubs in Lagos that you as a gay person can go to and they don't discriminate and even the police guard those clubs and I'm like 'The police guard those clubs?' He said 'Yes, they will sort the police out and you know have your parties normally and like nothing is happening and if anything happens, the police are there to settle or quell the whole thing.' But, that's partial because those on the mainland do not get these kind of privileges.
– L6

Significantly, this episode narrated by L6 emphasises the point that the police are not ignorant about the existence of underground gay-friendly clubs. Instead, the police merely choose which events to protect and which events to raid and subsequently conduct a mass arrest. The difference between these two situations can depend on the location of the club.

However, L6 agrees that in equally affluent areas on the Lagos mainland, private hosts can also organise events with security provided by the police:

In fact...even the mainland people will tell you that they settle these police officers so they turn a blind to the parties. The only time it's going to be an issue is when the monies they asked for is not commiserate to what they receive or if one inspector of police is interested in the case, then he starts to look for how to get culprits, other than that, life goes on as usual.– L6

This point was also confirmed by L5 who had first-hand experience of 'renting' police officers who 'know what's going on inside' to provide security for an event in Magodo, a relatively affluent suburb on the Lagos mainland:

There are some parties we would do...we would do parties and still rent policemen to come and do security there... I've had a party at Magodo; a friend organised a party at Magodo. And it was all these policemen that they called for their security. And they know what's going on inside. – L5

In other instances, personal relationships with members of the police could be a means of protection. This situation came up in the interview with P5 in Port Harcourt who explained that he was having an affair with a police officer: 'He used to tell me that if I have any problems with people I should just call him. That this thing is a normal lifestyle.'³⁵ Other forms of economic ability can also trigger police protection. For instance, because the capacity to enforce legal rights often involves access to economic resources to hire lawyers and initiate a

³⁵ Interview with P5.

case, the police can become less hostile and more cooperative where a person demonstrates willingness to involve lawyers or litigate an arrest. Also, one's mode of transportation could turn otherwise hostile police officers into allies. This is because, in Nigeria's cash-based economy, ownership of a car signifies middle to upper class economic status, which in turn can mean access to legal and political protections. It is, therefore, not surprising that all respondent community members who reported negative experiences with law enforcement officers had been commuting on foot or public transport when they were stopped or arrested. However, L1, who was stopped while in a taxi told of how he was immediately allowed to proceed by the police after he mentioned that he was meeting with his father at The Sheraton Hotel:

I was in a taxi one day on the mainland and ... like I said it mostly happens on the mainland, and they stopped me asking me what was in my bag. I said my clothes. They opened it and they saw my clothes. And then my phone was in my pocket. I think a message came in and... it lit up and they said they wanted to see my phone. I am like 'Sorry, why do you want to see my phone?' I think the only reason they left me that night was they... they felt I was an elite. This was like around 1am. And I said 'Sorry, why are you stopping me? I am only going to see my father who came into Nigeria and stays at Sheraton'. And once they heard that, they were like 'Ha, oga [boss] come and be going o. This one fit be big man pikin [rich man's child].' One said it, I heard it, say 'This one fit be big man pikin o, make you allow am go o.' So, I think when they perceive that you are some sort of elite or you are exposed, they are also scared too.—

L1

All of these situations reinforce the hegemonic considerations discussed in Chapter Two of who gets to be socially included and who gets excluded. In general, law enforcement prioritises those who have or are able to demonstrate links to the upper levels of the hegemonic hierarchy. Still, this idea does not mean there is an automatic pass for everyone with economic ability. Instead, economic ability forms just one of the aggregates of identity that can ensure police protection. As is discussed in the next section, economic ability has to be complemented by commensurate social status. Merely offering money to the police is not necessarily sufficient and, in a case where an individual's economic ability is not complemented by other aspects of identity, the law enforcement process may generate a hostile outcome that ensures a firmer entrenchment of hegemonic power in the society.

3.5.2.2 Social factors: Aggregate identity and law enforcement

I think yes, the law may be for everyone but then the persons enforcing it are not really going for everyone. They are looking for persons that they can do whatever with and get away with. So, they don't really go for the big wigs in society. – P1

It's not fair. I know I said the police would still go to the high class but it's not always like that, most times why they go to the high class is just to get the tip, money from them and then they just relax or fall back but when it comes down to where the people in the middle or lower class, who they know they can't get something very reasonable from, they'll just want to use them as scapegoats, which is not easily the case with the big people. – A3

The above quotes illustrate the overall significance of social status in hegemonic law enforcement. In a dysfunctional legal system, police extortion and 'protection for money' rackets are merely fringe benefits for law enforcement. In fact, the main purpose of the hegemonic law enforcement process is to maintain systems of elite power and social exclusion, using tools such as political homophobia. To effectively maintain these systems, there has to be a conscious or subconscious but systemic process for ensuring that discriminatory or criminalising laws and negative social attitudes do not affect the 'wrong' class of people in society.³⁶ For instance, by the social assignation of value to the status of different aspects of an individual's identity and assigning rights and obligations accordingly. And so, in determining the extent to which sexual and gender minorities will be affected by discriminatory or criminalising laws or negative social attitudes, the hegemonic system considers different aspects of their identity including family background, age, education level, religious affiliation, employment type, political influence, cultural influence, and gender. Where, in relation to law enforcement officers or another member of society, the outcome of this process ranks the individual higher on the social scale, then they may be able to avoid the more overt aspects of discrimination against sexual and gender minorities.

In Port Harcourt, P6 gave a detailed explanation of how his aggregate identity – including his profession with a comfortable middle-class income – ensures that he has little or no fear of police persecution:

You see there is something me and my friends often say that the real crime in Nigeria is poverty, regardless of anything. If you are poor that is the worst possible crime you can commit. So, if you have some privileges, there are some crimes you cannot be found guilty of or there are some crimes that may not be accused of committing. And, I don't mean to come out as privileged or condescending or as classed, but because of my position, because of my education, because of the information I have and because of my occupation, it kind of shields me from a lot of things.— P6

Nevertheless, P6 admitted that his freedom is not as absolute as the freedoms enjoyed in a heterosexual relationship: 'There are things I can't do outside. I can't go on a romantic lunch with my boyfriend. I can't go to the movies and hold hands with him. I can't go to the club and

³⁶ WJ Chambliss, 'Toward a political economy of crime' (1975) 2 *Theory and Society* 166.

dance with each other.³⁷ What hegemonic power dynamics conferred on him was insulation from the adverse effects of discriminatory or criminalising laws and not an absolute freedom to express himself. Instead, the limitations on his freedom were mitigated by the ability to access and use spatial locations that ensured privacy – a factor discussed in the next section.

In very exceptional circumstances, the strength of a person's aggregate identity may give even more freedom to express in a non-heteronormative or gender non-conforming way. For example, popular musicians and celebrities dress in gender-nonconforming fashion without provoking public outrage³⁸ and an openly gay celebrity visiting from a western country may walk freely around the country without fear of arrest or social violence.³⁹ As A4 explains it, in these cases involving someone with an influential status, rather than start a power tussle they might not be able to win, the law enforcement officers often withdraw:

In Nigeria, a rich gay man can wear his skirt and move along the streets, no one cares. But, still in the same Nigeria, in the same street, a low-class gay person can still wear the same skirt and get himself into trouble. Nigeria, they respect wealth. They respect wealth. I think a high-profile gay person can easily get away with ... anything ... but a lower-class person cannot get away with it because: one, even the so-called general population or the so-called law enforcement people, they believe that those that have money can easily defend themselves ... they believe even if the person is not educated, they believe that, two, they still have some information up there, at least to defend themselves ... So instead of them to start a fight they might not finish they better withdraw. But, when they see the lower-class gay person, they feel, one, he is not economically empowered, he doesn't have anything to write home about. Even though we attack or confront him, we are going to win the case. It gives them that power to go for the lower-class ones and it puts them at a higher risk than a rich gay person. – A4

This understanding of the situation by A4 demonstrates a feature of hegemonic power dynamics: the tendency of law enforcement to weigh the 'power' costs of persecuting an individual. In the absence of a functional litigation system where rights and obligations are determined by formal legal rules and processes, the costs of undertaking a persecution are determined by socially assigned values within the hegemonic system. In the examples above, the average police officer understands that they do not have the sufficient social power to arrest and prosecute an extremely popular and well-connected musician, a visiting international journalist, or an internationally known LGBT activist. Without the proper level of

³⁷ Interview with P6.

³⁸ See A Tayo 'An emerging culture in Nigeria's society' (19 September 2016) <https://www.pulse.ng/gist/cross-dressing-an-emerging-culture-in-nigerias-society/87gs0ct> (accessed 31 July 2020), a positive report on crossdressing celebrities in Nigeria.

³⁹ See T Olufinlua 'Nigerians: Gays, as long as they're not our gays, are okay' (7 October 2017) <https://africasacountry.com/2017/07/nigerians-gays-as-long-as-theyre-not-our-gays-are-okay> (accessed 31 July 2020).

power, a police officer who hastily initiates a persecution process may find themselves out of a job. As P1 explains:

If you ask me, I would say they react the way they do with those persons because to them they feel like those persons have strings they can pull, probably get them off their jobs. So, that's why I think they give them that preferential treatment.— P1

However, if a police officer is given an order from 'higher up' to persecute an individual, then this order strengthens their position of power and they can proceed accordingly. The case of Bobrisky is a good example of both sides of these power dynamics. Bobrisky is a Nigerian internet celebrity who has been both celebrated and condemned in the media as a transwoman. She⁴⁰ has been described in various media reports as 'Africa's Male Barbie'⁴¹ and as 'the most popular Nigerian on Snapchat'.⁴² While there is no clear rationale explaining why Bobrisky gained popularity in Nigeria despite the renewed enactment of laws criminalising same-sex relationships and a prevalence of negative social attitudes, there is a clear indication that she exhibited economic ability and social status symbols. For example, one media report suggests that she makes millions of naira from her cosmetic sales and that she holds up to N75,000,000 (over US\$200,000) in one bank account.⁴³ If wealth – or the appearance of it – plays a critical role in an individual's aggregate of identities, then Bobrisky is, by Nigerian standards, simply a wealthy internet celebrity. And so, up till 2019, law enforcement officers had ignored Bobrisky. In one instance, a senior police officer implied that nobody had brought forward 'any evidence and/or exhibits that can establish the case against him/her'.⁴⁴ In summary, the reluctance of the police to attack or prosecute Bobrisky at that point demonstrated an aspect of the power dynamics in which Bobrisky seemed to hold sufficient power to self-express without the interference of law enforcement.

⁴⁰ In an Instagram post, Bobrisky stated her preference for the feminine pronouns. See A Odunayo 'If you don't want to be unfortunate, don't call me bro - Bobrisky warns' (8 May 2019) available at <https://www.legit.ng/1237437-dont-call-bro-i-a-baby-girl-bobrisky.html> (accessed 31 July 2020).

⁴¹ 'Bobrisky, "Africa's male Barbie" dominates Google trend' (2 November 2016) available at <https://www.vanguardngr.com/2016/11/bobrisky-africas-male-barbie-dominates-google-trend/> (accessed 31 July 2020).

⁴² H Sanusi 'Meet Bobrisky, the most popular Nigerian on Snapchat' (30 August 2016) available at <https://web.archive.org/web/20161102164921/http://thenet.ng/2016/08/meet-bobrisky-the-most-popular-nigerian-on-snapchat/> (accessed 31 July 2020).

⁴³ JiveNaija.com 'Bobrisky brags about making N8 million in two weeks from eyelash business' (4 June 2019) available at <https://www.jivenaija.com/people-places/news/bobrisky-brags-about-making-n8-million-in-two-weeks-from-eyelash-business> (accessed 31 July 2020).

⁴⁴ Instagram post of 17 January 2019 by Dolapo Badmos (@opetodolapo), a Zonal Public Relations Officer for the Nigerian Police, available at <https://www.instagram.com/p/Bsv665mBlxj/?igshid=13wl6itxkc1n5> (accessed 31 July 2020).

However, in late 2019 the attitude of law enforcement towards Bobrisky changed suddenly after the Director-General (DG) of Nigeria's National Council for Arts and Culture, Segun Runsewe, for no clear legal reason and without any apparent change in public opinion, began a campaign of public criticism against Bobrisky.⁴⁵ It is arguable, however, that Runsewe's onslaught was an attempt by the state to reassert its hegemonic control over the situation. This argument is supported by the fact that, within a few weeks of these criticisms, the police raided the venues of Bobrisky's birthday party in the Lagos islands and, according to one media report, deployed 100 police officers to arrest her.⁴⁶ According to the media report, the police were concerned with preventing 'breach of public peace' and ensuring that 'no immoral act should take place':⁴⁷

'The popular celebrity and self-acclaimed male Barbie Okunlola Idris AKA Bobrisky is expected to celebrate his birthday as indicated below on Saturday 31/08/2019 at 1000HRS at the Pearls Gardens, Wole Olateju Crescent, off Admiralty Way, Lekki Phase 1,' the message read.... Considering the pedigree of the celebrant, the event may likely cause breach of public peace and it is expected that no immoral display should be allowed,' it read. 'Note, Area commanders/DPOs are to personally lead the men to the locations and ensure no immoral act should take place while the locations should be shut down if necessary all to ensure strict compliance please,' the statement added.

Bobrisky escaped – or was allowed to escape – arrest during the raid but five other people were arrested 'for breach of public peace and indecency'.⁴⁸ Nevertheless, public opinion on social media was outspoken against the police operation, which was considered to be a wasteful deployment of security personnel against one individual.⁴⁹ In response it seems, so far, that law enforcement authorities have quietly returned to their previous attitude.

Other social factors such as age, family background and religion are also described as relevant by the respondents. From both media reports and the narratives of persecution provided by the respondent community members, there seems to be a general association of criminality with able-bodied young men in Nigeria. When this association with criminality is combined with both nonconforming dressing or appearance and an absence of recognisable

⁴⁵ L Opoola 'Bobrisky is not a cultural ambassador, Runsewe warns youths' (14 June 2019) available at <https://www.dailytrust.com.ng/bobrisky-is-not-a-cultural-ambassador-runsewe-warns-youths.html> (accessed 31 July 2020).

⁴⁶ SC Kenechukwu 'Lagos CP deploys 100 operatives to venues of Bobrisky's birthday' (31 August 2019) available at <https://lifestyle.thecable.ng/lagos-cp-orders-tight-security-ahead-of-bobriskys-birthday/> (accessed 31 July 2020).

⁴⁷ As above.

⁴⁸ J Augoye 'Why we shut down Bobrisky's birthday party venue — Police' (31 August 2019) available at <https://www.premiumtimesng.com/entertainment/naija-fashion/349818-why-we-shut-down-bobriskys-birthday-party-venue-police.html> (accessed 31 July 2020).

⁴⁹ W Oloworekende 'Nigerians condemn police shutting down Bobrisky's 28th birthday party in Lagos' (31 August 2019) available at <https://www.ged.ng/nigerians-condemn-police-shutting-down-bobriskys-28th-birthday-party-in-lagos/> (accessed 31 July 2020).

economic activity, youthful age becomes a threat to the dominant hegemony. From the experiences of respondents, this ‘threat’ of being an unemployed and non-conforming young adult can be mitigated by the presence of an older person who takes responsibility for them.⁵⁰ In this case, the presence of a seemingly stable family background effectively renders the person harmless to the system. Arguably, this positive outcome may either be because the family unit is considered a source for instilling hegemonic values and reducing threats to the hegemonic system or it may be that the existence of ties to other people who were compliant with hegemonic values allowed the police a more favourable perception of the individual in question. In any case, it is not unusual for detained young men to be instructed to make a call to their parents or older family relative and then released when they are able to do this – after an extortion.⁵¹ Conversely, respondents also indicated that family members can insist that the police detain their relative. Speaking of his experiences while he was in Abuja, K6 provided an instance of how parents often use the police as an external ‘disciplinary’ measure for their gay sons:

That’s why I told you earlier that the connection matters a lot, some of my friends were caught in Abuja, that should be two to three months ago, they [the police] were like, ‘Call so and so person’ to talk to the police and they released them. So, the money you have, the connection you have determines where you will go. Some [were] like, if their parents find out they’ll be like ‘Keep my son there’. Most of them, it’s their parents, they’ll be like ‘Keep him there for him to learn his lesson’. – K6

In Kaduna, religious affiliation adds an extra dimension to identity and plays a similar role to age and family background. K1 explained that non-Muslims were more likely to face persecution publicly while Muslims were more likely to be protected:

They take very high note of religion because they don’t want to expose their religion and all that, so they try to cover it up... If a Muslim policeman catches a Muslim, there’s a way everything is going to be squashed, but if a Muslim policeman catches a Christian community member, there’s a way the thing is going to go.— K1

In a highly divisive religious environment like Kaduna where there is ongoing conflict between Christians and Muslims and also between different Muslim denominations, the level of religious affinity between the alleged offender and the arresting officer can be critical to whether the offender is protected or persecuted.

⁵⁰ Interviews with K6, L5, L1, and P3.

⁵¹ As above.

3.5.2.3 Location: Individual privacy and classism in the community

Now, I've had gay parties in my house. I've had two gay parties in my house and nothing came of it. The closest issue we had was one of my neighbours made a complaint to somebody who told the landlord, and the landlord called somebody, and somebody called my brother, and my brother called me to say that somebody— a lot of people – had made a lot of calls to say that we were having gay parties and they were not comfortable with it. And that's the worst that has come out of it. The gay parties had happened twice and this call came after the second party. Some people may not be as fortunate. ... People have been arrested while having gay parties here in Nigeria whether it is private residences or in hotels.... I am not rich. I am not from the upper-class, I am from the middle-class. But most of my friends are from the middle-class. So, we have that luxury. There are some things we can afford and, to be honest [not having] money is the real crime.— P6

Despite the police protections on offer, as discussed in the previous sub-section, there is no indication of a desire by either the hegemonic law enforcement process, nor by the political elite to change discriminatory or criminalising laws and social attitudes for the benefit of sexual and gender minorities. Instead, there is real value for the political elite to ensure and maintain the continuation of political homophobia. As expected, the use of political homophobia, as discussed in Chapter Two, continues to keep the majority of the Nigerian population focused on the supposed 'threat' against cultural and religious values while helping to distract societal concerns away from the issue of mass social exclusion in the access to social goods. However, as discussed in the preceding sections, police protection can be obtained for sexual and gender minorities who are able to demonstrate that their aggregate identity is compatible with hegemonic power. In effect, only the poorest sexual and gender minorities, or those who are unable to demonstrate the socio-political value of their aggregate identity, are susceptible to persecution by law enforcement.

The protection of some sexual and gender minorities discussed here, however, often occur in the process of an individual's physical interaction with police officers. This process provides the officers with an opportunity for an assessment of the individual's signifiers of status and power. However, an individual can also receive protection, socially, by being located in the 'right' area, a consequence of the spatial demarcation of society into either a policed location or a secure location.

The view that social exclusion can 'create acute forms of exclusion that find a spatial manifestation in particular neighbourhoods'⁵² is fully demonstrated by this aspect of the interview findings. In all four cities, respondents agreed that there were areas that were heavily policed and, therefore, led to more frequent police persecution and arrests; there were also

⁵² J Allen, G Cars, & A Madanipour 'Introduction' in A Madanipour, G Cars, & J Allen (eds) *Social exclusion in European cities* (1998) 22.

other areas that were secure from this kind of policing and had restricted public access. Within this latter kind of spatial locations, sexual and gender minorities who had the means of access could enjoy a measure of protection from both persecution by law enforcement and from exposure to negative social attitudes.

Respondents in Kaduna⁵³ suggested that, in general, arrests often occur in the city's metropolitan areas, particularly areas like Sabo and Barnawa while safer areas include Gamji Gate and Malali. In Abuja, respondents⁵⁴ suggested areas such as Nyanya, Bwari, and Gwagwalada as being prone to policing and arrests while the central areas – inhabited by government officials were safer. For Port Harcourt, respondents⁵⁵ described vulnerable locations to include Diobu, Mile 1, Mile 2, Mile 3 while the more secure areas included Old GRA and New GRA. Lagos has the peculiarity of having a straight divide between the generally 'unsafe' mainland and the generally 'safe' islands. On the mainland, the most notorious places for arrests were Yaba, Egbeda, and Ojuelegba while, on the islands, the safest places from policing were Victoria Island, Ikoyi, Lekki, and Ajah.

Respondents who had never had a negative interaction with the police agreed that they had been very cautious in their movements within the city. There were areas within the city where they would not go whether or not the purpose of the journey involved their sexuality. As P6 notes, such areas are 'unsafe for everybody' and as with the case of an implicit criminality attached to nonconforming dress and appearance – discussed in Theme 1 above – there is also an implicit criminality attached to residents and commuters in those areas, resulting in heavy 'stop and search' policing and its consequences:

Even during the day, it's not just for LGBT people, It's unsafe for everybody. So, you can get robbed, you can get mugged during the day, during the night. Your pocket can be picked while you're walking along the road. The police there are also notorious for being – for doing useless stop and search. They can stop you and ... ask to go through your phones around that Diobu axis. Now, there's a running joke I have with some of my friends that when you are trying to hook up with someone and the person says 'Mile' that is it. You don't want to hear which of the Miles, whether its Mile 1, Mile 2. You don't want to know which of the Miles. Because once you start heading towards that axis' it's really not safe. That's not to say that queer people do not inhabit those places, they do; but it's a very high-risk game. And so, we'd really rather not take the chance – P6

In Lagos, L6 describes his experience of living in one of the less-policed but more secure areas of the city.

⁵³ Interviews with K3 and K1.

⁵⁴ Interview with A2.

⁵⁵ Interviews with P2, P4, P6, and P5.

My location, broadly speaking guarantees a certain measure of privacy. I live in Ajah, in an estate, a very prominent estate in Ajah. It's not an estate that you can just access if you are not a resident or you don't know anyone in there; you need to have someone in there to be able to access the estate and I think, to an extent, most people there are enlightened too. If I am cat walking or giving effeminate hand gestures or anything like that, I am not at least scared that I will be harassed or intimidated by anybody, which would not be the case if I was living with my parents on the mainland where I know someone would just shout one homophobic slur or try to just stop me down or something. - L6

As L6's description shows, structural features, such as gated estates or fenced houses secured by private guards or the police, ensured that the average law enforcement official – or hostile members of the public – cannot get easy access to residents in these neighbourhoods. Also, because of the absence of policing checkpoints that 'stop and search' residents and commuters, the risk of hostile police interactions or confrontation is minimal. A police officer who intends to effect an arrest in this area will necessarily have to either rely on an order from higher up in the command chain, or proceed through the legal due process mechanisms – a journey that is unlikely to yield any result where the affected person has access to competent lawyers. Also, in general, the respondents agreed that these locations are often inhabited by a liberally inclined public or, at least, people who are able to mind their business and not meddle in the affairs of their neighbours.⁵⁶

And so, for a sexual or gender minority person who has schooled and worked in such a location all their life, there will be little or no sense of an oppressive and discriminatory legal regime. A typical example of this scenario is captured by a media report, published just before the SSMPA was passed, of 'gay professionals' living in Victoria Island, a location in Lagos that the report describes as 'an accepting bubble' and a 'fairly tolerant bubble'.⁵⁷ In that report, the gay interviewees admitted their privilege in being able to afford housing around 'people who understand these things, who are accommodating, who understand, are very enlightened and don't judge'.⁵⁸ One of the interviewees in the report, who had lived on the Lagos islands all her life, recalls being 'shocked' by the 'poverty and chaos of the mainland' after a visit to a friend's home: 'It was her first exposure to what locals call "the real Nigeria"'.⁵⁹

As with the other factors, access to secured spatial location is not an independent characteristic of hegemonic police protection. Instead, this factor also requires a level of economic ability and a measure of social status by the affected individual, directly or indirectly, for example through relatives and associates. In essence, what ought to be the right to privacy

⁵⁶ Interviews with A4, A5, L4, LA5, L2, and CHP.

⁵⁷ CA Sheets 'Gay in Nigeria: LGBT life in one of the world's most homophobic nations' (13 September 2013) available at <https://www.ibtimes.com/gay-nigeria-lgbt-life-one-worlds-most-homophobic-nations-1405130> (accessed 31 July 2020).

⁵⁸ As above.

⁵⁹ As above.

is monetised, and the degree of privacy any individual has will correlate with the person's economic ability.

In Lagos, at least, there seems to be growing public awareness of these significant differences in persecution of sexual and gender minorities who reside in the mainland and the islands. For instance, one media report accuses the police of 'prosecution by class'.⁶⁰

The only times the Nigerian Police Force has deemed it fit [to] storm gay parties, it's been on mainland, Lagos, where the less than affluent members of the social hierarchy live. There, nobody has anybody in the upper echelons of power. Basically, it seems the Nigerian Police Force only storm gay parties where they have no prior stake.

The consequence of these spatial divide between sexual and gender minorities in Nigeria is a sort of classism in the community. One on hand, there is the general effect where – as P6 describes in the quote above – individuals with higher economic ability or social status are often reluctant to 'cross' over and visit potential partners or associates who live in areas that are considered unsafe. On the other hand, there is also the inhibition of community mobilisation as the wealthier part of the community are often aware of their own status and do not readily identify or engage with the poorer. This awareness of class divide is explained by L6 in his interview:

It's not one big family. The thing is this, being privileged to be where I am now, I tend to see things from a different perspective. Because, when I got there, I didn't go there with the notion that I was going to meet one big man, that my dreams will come true, I went with the notion that, hey, this is an opportunity to meet other people of my sexuality on the [Lagos] island and hopefully make friendship here. But that has not been the case. I've seen much more resistance on the upper-class people to interact with the lower class or the middle class... It's like us versus them. The lower class are trying to 'up' their game, to catch the big fishes; and the big fishes are trying to be, 'Hey, no, you are not part of us, you have to be this certain way to be a part of us'. And if you don't measure to this – in fact, you can never measure to the standard – so there's that class game that's always going around in this community. But, to say that there is a hatred or resentment, I'm not sure. It's just that class, 'You not in my class, you can't be in this party because you're not in my class–'. - L6

By dividing society into spatial locations, community members discover that although they are all considered as sexual and gender minorities, their aggregate identities differ and some have more protection than others. Awareness of difference in identity means that community social gatherings where there is a diversity of people can become very awkward:

⁶⁰ M Alake 'It is time for Nigerian Police to revise its policies on arresting gay people' (29 August 2018) available at <https://www.pulse.ng/gist/pop-culture/nigerian-police-only-arrest-alleged-gay-men-on-the-mainland-id8786505.html> (accessed 31 July 2020).

So, I've heard of a party that you go to and you'll see divided in two lines, these ones are here looking miserable, wanting to communicate with these guys that of the lower class but they are of the sense that 'I'm too big for these people', so they are there looking miserable in the party and the guys that are in the middle class are enjoying their lives.

This divide within the community also ensures that the kind of information and resources accessible to the privileged part of the community that can propel effective advocacy is not readily accessible to the oppressed part of the community who need it. Even within the sexual and gender minorities community, there is continuing social exclusion. In Chapter Four and Chapter Five, I come back to this issue and examine how it intersects with wider social exclusion in Nigeria.

3.6 Summary and conclusion

The general trend of using a doctrinal formal-legal approach to advocate against the enforcement of criminalising laws assumes a consistency and impartiality in the enforcement of the laws. By examining the experiences of respondent community members in four cities in Nigeria, this chapter demonstrates that, in reality, there is little or no reliance by law enforcement on the actual content of the criminalising laws. Instead, sexual and gender minorities who face police persecution are targeted for their vulnerability or the threat they pose to existing hegemonic power dynamics, while those who receive protection obtain it on the basis of their status and abilities. In general, the findings in this chapter are summarised in the following paragraphs.

Based on the experiences of the respondent community members, enforcement of the criminalising laws in Nigeria follows a process determined and shaped by hegemonic power dynamics rather than by the black letter text of legal statutes and documents. However, this hegemonic law enforcement process is not necessarily a clear case of hostility towards sexual and gender minorities in Nigeria. Although in many instances, the process results in the persecution and prosecution of sexual and gender minorities, there are also instances where it results in the 'protection' of sexual and gender minorities.

With regard to police persecution, the respondent community members indicated that the persecution of sexual and gender minorities in Nigeria by the police or other law enforcement officers is independent of the commission of any of the actual crimes recognised under the criminalising laws. In many instances experienced and observed by the respondents, the criminality of a victim is rarely based on the commission of prohibited sexual conduct but instead is often implied by their contravention of hegemonic standards of respectability, including not having a 'respectable' dressing, or other expression or presentation of appearance.

Similarly, with regard to police protection, the protection of some individuals by the police is independent of the available human rights and other due process constitutional or legal protections. Protection is also independent of the commission or otherwise of any of the prohibited and criminalised sexual conduct by the affected person. For instance, being discovered in a same-sex activity will not automatically result in prosecution. Instead, the protection of any sexual and gender minorities person is often dependent on the aggregate of the identities of the person, including factors such as their economic ability, their social status, and the location in which they reside or commute. Where the person's aggregate identity indicates a privileged status within Nigeria's hegemonic values, then near-total immunity from hegemonic police persecution is guaranteed.

From the experiences and observations of the respondent community members, the community of sexual and gender minorities in Nigeria are aware of, and intuitively understand, the hegemonic law enforcement process, including the dimensions of persecutions and protections. As such, community members across different parts of the country more often concern themselves with fitting into the hegemonic system to obtain protective privileges or immunity than to concern themselves with unifying to seek changes to the legal position.

These conclusions based on the experiences and observations of respondent community members demonstrate that there is little or no reliance by law enforcement on the actual content of the criminalising laws. Instead, the interaction of power dynamics determines who is persecuted and who is protected, thus supporting the discussion in Chapter Two that, contrary to the political rhetoric that these laws are about institutionalising cultural and religious values, the criminalising laws – along with other criminal laws – were enacted as a tool of hegemonic social control for the benefit of elite members of the society. Given that the criminalising laws are not deployed in an impartial formal legal way, it follows that an impartial formal legal method of advocacy will not be as effective as it could be under a more functional legal system. In the next chapter, I proceed to discuss the extent to which advocate response to the criminalising laws and their enforcement have addressed the existence of hegemonic power in Nigerian society and determine if they utilise their understanding of these power dynamics in shaping their activities and programmes.

CHAPTER FOUR: INTERROGATING ADVOCACY RESPONSES TO CRIMINALISING LAWS AND TO POWER DYNAMICS

4.1 Introduction

As proposed in the first chapter of this thesis, advocacy in support of sexual and gender minorities in Nigeria should go beyond strategies that seek changes to the text of the law (legal reform) and instead, must complement this approach with strategies that seek social transformation, particularly by engaging with the nuances of power and social control, if advocacy efforts really seek to guarantee substantive protections for the most excluded members of the community.¹ This issue of power and control in the *enforcement* of the law is discussed in Chapter Three of this thesis, where I identified and examined the dynamics of hegemonic power systems in Nigeria in the enforcement of the relevant laws criminalising or discriminating against same-sex relationships and non-heteronormative sexuality and gender identity ('the criminalising laws'). The findings discussed in Chapter Three provide an enforcement context of power dynamics. This enforcement context is supported by the backdrop of hegemonic power inherent in the process of *enacting* discriminatory and criminalising laws – discussed in Chapter Two of this thesis.

However, the aim of this research is not only to showcase the dysfunctional nature of the Nigerian legal system or how this dysfunction affects vulnerable persons and communities, but also to stimulate (and propose) strategies to strengthen and complement existing advocacy for the protection of sexual and gender minorities in Nigeria. Therefore, it is an important point in this research to first understand the extent to which sexual and gender minority rights advocates in Nigeria (referred to as 'advocates' in the rest of this chapter) have an awareness of the existence of these hegemonic power dynamics in the enactment and enforcement of discriminatory or criminalising laws, both discussed in the two previous chapters of this thesis. It is also important to identify the extent to which advocates have been able to design contextually effective measures against power dynamics, through their programming and other responses, for the protection of their community members. And finally, it is also important to understand the existing challenges to and potential issues that will arise from current advocacy measures that engage power dynamics. The discussion on these points, and the concerns advocates may have regarding how to address these will be the focus of this chapter, thereby helping to set up the analysis in Chapter Five which highlights

¹ C Ake 'The African context of human rights' (1987) 34 *Africa Today* 6.

how advocacy efforts may be strengthened through further adoption of strategies designed to engage with power dynamics.

This chapter reflects on and discusses the findings from field research as well as from media and organisational reports. As with the preceding chapter, the interviews and analysis in this chapter focus on hegemonic power dynamics in Nigeria and are framed by theories of elite power, social exclusion, and political homophobia discussed in Chapter Two. In the second section of this chapter, I provide a brief overview of the field research process and in the third section, I describe the backgrounds of the research participants. In the fourth section, I review the data analysis process and the derivation of three themes from the interviews: awareness of power dynamics; responses and programming by advocates; and challenges to programming. In the fifth section of this chapter, I discuss the findings from the interview data under each theme before finally concluding the chapter.

4.2 Setting the stage: Meeting with advocates in Nigeria

I conducted interviews with 17 advocates during the same time period in which I interviewed community members (discussed and analysed in the previous chapter). The experience of my journey across Nigeria and how I met with the research subjects has been fully narrated in Chapter Three. However, unlike the questions posed to community members, which focused on their experiences as gay men, bisexual men, and MSM, the interviews with advocates focused more on their experiences as advocates – who, in some cases were also gay men, bisexual men, and MSM. In particular, the interview questions dealt with their work after the enactment of the SSMPA. The questions also dealt with their understanding of, and their programmatic responses to, the enforcement of the criminalising laws as experienced through their advocacy interactions with community members.

By designing the research to first interview community member and then advocates, I was able to shape interview questions for advocates based on some of the feedback from the community members. In essence, the interviews with advocates further interrogated the role of dominant power dynamics in the enforcement of criminalising laws in Nigeria. Combined with other sources, such as media reports and NGO statements, the interviews addressed the third research sub-question of this thesis: *What are the responses (by advocates, human rights bodies, and the international community) to the criminalising laws and in what ways have these addressed the role of power dynamics?*

As in the case of my interview with community members, I previously connected with executive directors and programme officers of relevant NGOs during my research design stage and they had agreed to notify their staff who may want to speak with me. They also promised me the use of their offices. Except in the case of Kaduna (where the interviews with

both advocates and community members were conducted in my hotel for security reasons) and one interview in Abuja (conducted in my hotel), all other interviews with advocates were conducted in the relevant organisation's office. In a couple of cases, staff from other organisations came to meet me at my host premises. Unlike in the case of community members, where I had to compensate participants for their expenses at a fixed cost of N2000 (approximately five US dollars) each, I did not need to compensate the advocates who participated in the interviews.

The interviews were all semi-structured, face-to-face interviews based on a set of standard questions that I had prepared. All the advocates I interviewed were educated up to university first degree level or equivalent, which facilitated a more nuanced discussion of the legal and political issues. In the next section, I provide a broad description of the respondents – not to provide statistical or quantitative information – but to give an insight into the nature of the persons with whom I spoke and their spread across the Nigerian cities.

4.3 Participant characteristics and background

The overall aim of this aspect of the field research is to provide insight into the extent of awareness of Nigerian power dynamics by advocates working on the protection of sexual and gender minorities' rights in Nigeria, and to also understand the extent to which advocates programme for power dynamics in their responses to the criminalising laws. I interviewed 17 advocates in total: 5 persons in Abuja, 3 people in Kaduna, 5 persons in Lagos and 4 persons in Port Harcourt. Regarding their positions, the interviews were conducted with four executive directors and twelve programme officers² across seven organisations in Abuja, Kaduna, Lagos, and Port Harcourt, all of whom were working on the protection of the rights of sexual and gender minorities in Nigeria. The work of the organisations had either a sexual and reproductive health focus or a human rights focus, or a combination of both. In Kaduna, I also interviewed a lawyer who worked with several organisations.

These organisations had all either been in existence since before the SSMPA was passed in 2014 or had founders who had been working on the protection of sexual and gender minorities with other organisations prior to 2014. Similarly, with the exception of two respondents, the advocates I interviewed had been working on the protection of the rights of sexual and gender minorities prior to the passing of the SSMPA. Table 4.1 shows the anonymised names of respondents in each city while Table 4.2 shows the distribution of respondents by city and work description.

² Although I use the term 'programme officers' as a generic label, the actual job descriptions include: case manager, public health officer, outreach coordinator, case manager, director of advocacy, monitoring and evaluation coordinator, and human rights programming officer.

Table 4.1: Respondents by city

City	Respondent	City	Respondent
Abuja	AA1	Kaduna	KA1
	AA2		KA2
	AA3		KA3
	AA4		
	AA5		
City	Respondent	City	Respondent
Port Harcourt	PA1	Lagos	LA1
	PA2		LA2
	PA3		LA3
	PA4		LA4
			LA5

Table 4.2: Respondents by city and work description

	Executive Director	Programme Officer	Freelance
Lagos	0	5	0
Kaduna	2	0	1
Port Harcourt	0	4	0
Abuja	2	3	0
Total	4	12	1

4.4 Data analysis process

In analysing the interview data, I implemented the same thematic analysis approach previously described in detail in section 1.8.5 of Chapter One. The coding process itself relied on the research sub-question: '*What are the responses by advocates to the criminalising laws and in what ways have these addressed the role of power dynamics?*' to identify relevant information. Essentially, this process required me to critically assess the data that dealt with

or related to advocacy responses to the criminalising laws, advocacy responses to and awareness of power dynamics, and advocacy programming that touched on power dynamics. At the end of the three stages of coding (as described in section 3.4 of Chapter Three), I constructed three overall themes from the interview data: awareness of power dynamics, responses and programming by advocates, and challenges to programming. These three themes address the research question and constitute the essence of the research findings and these findings are discussed in the next section.

4.5 Advocacy in the midst of power: awareness, responses, and challenges

Analysis of interview data, litigation cases, media reports and organisational statements and reports identified three themes in response to the question: “*What are the responses by advocates to the criminalising laws and in what ways have these addressed the role of power dynamics?*” The first theme, *awareness of power dynamics*, examines the extent to which advocates are aware of and understand power dynamics in the enforcement of criminalising laws as confirmed by the experiences of community members, discussed in Chapter Three. The discussion here elucidates the ways in which power dynamics are experienced by advocates themselves in the course of their work, particularly focusing on the kind of experiences they have had with police officers since the enactment of the SSMPA. Following from this, the second theme, *responses and programming by advocates*, explores the responses of advocates to the criminalising laws and the extent to which these responses have touched on or addressed power dynamics in the enactment and enforcement of the criminalising laws. As such, these responses are considered from the perspective of ‘*default*’ responses, that is responses that merely confront or seek to avoid the breach of international human rights norms in the text of the criminalising laws (for example, issuing a policy paper on human rights violations or starting a rights-awareness social media campaign); and ‘*material*’ responses, that is responses that seek to confront or avoid the underlying power dynamics especially within the hegemonic context (for example, empowering community members with financial resources). Finally, the third thematic area, *challenges to programming*, broadly considers the challenges that prevent or limit engagement with these power dynamics in the advocacy responses and campaigns by advocates. Also, to the extent that this chapter considers the challenge of utilising the linkages between the criminalisation of same-sex relationships and wider social exclusions in Nigeria as a method of advocacy, it serves as a pivot into Chapter Five which provides a discussion of the value of interrogating power dynamics as the underpinning driving force of advocacy efforts.

The broad picture presented by these themes is that while advocates are aware of, and also understand the power dynamics inherent to the enforcement of criminalising laws,

there has been no coordinated effort or movement around these issues. The importance of this kind of approach has been a consistent theme in Critical Legal Studies. As Gabel and Harris recommend, advocacy must 'subordinate the goal of getting people their rights to the goal of building an authentic or unalienated political consciousness' through methods that expands political consciousness.³ Nevertheless, there have been some strategies and programmes deployed to address power dynamics by some of the organisations interviewed for this chapter. However, the limit of their effectiveness in addressing power dynamics is worth examining.

4.5.1 Theme 1: Awareness of power dynamics

As a Critical Legal Studies examination of advocacy and the protection of sexual and gender minorities in Nigeria, this thesis is concerned with, as Anderson states, 'identified social interests and social conflicts'⁴ in designing a more nuanced approach to advocacy. However, before prescribing such a design, it is expedient to understand how advocates in Nigeria understand these interests and conflicts. Generally, all the advocates interviewed indicated their awareness of the role of hegemonic power in the enforcement of the criminalising laws. This finding supports the analysis in Chapter Three, which uncovered how individual (economic, social and spatial) characteristics influence the enforcement process of criminalising laws.

Additionally, the discussion in Chapter Three indicates that police profiling of criminality often targets people who appear not to conform to broad hegemonic norms of presentation and appearance, including gender-nonconforming expressions or mannerisms. LA1, a programme director in Lagos, noted that the actions of the police were more akin to 'witch-hunting' and 'all it just takes for you be arrested is if you just show any feminine traits, anything that doesn't conform to what you are supposed to portray by virtue of your birth assigned gender.'⁵ In essence, the police are prejudiced against people who do not meet standards of respectability and, consequently, in searching for proof of criminal behaviour to justify their prejudices, the police often stumble on the issue of sexuality, which is then exploited. LA3, another Lagos advocacy worker, describes a police checkpoint scenario involving this kind of filtering for respectability:

At checkpoints, they were not stopping people regularly or they were just stopping boys. They would stop and search the car in the name of they were looking for weed or drugs. When they did not find any of

³ P Gabel & P Harris 'Building power and breaking images: Critical legal theory and the practice of law' (1982) 11 *New York University Review of Law and Social Change* 376.

⁴ T Anderson 'The political economy of human rights' (2002) 50 *Journal of Australian Political Economy* 202.

⁵ Interview with LA1.

those, they would proceed to request for phones and, most of the times, these boys would present their phones, even unlock them for police to go through ... It wasn't a case of they were stopping everybody. I think you can establish a trend in appearance: very flamboyant people, people who have dreadlocks. About three of the boys I'm talking about, one had coloured hair, one had dreadlocks, I think one said the day he was going, he was wearing a 'net' shirt so; it was see-through. So, I think they identified them based on what they wear or how fashionable they look like. Maybe they've deduced ... gay people like to dress a certain way and they are just rolling with that. – LA3

These incidences of arbitrary arrests and detention are not limited to areas of sexuality and the protection of sexual and gender minorities. Instead, they are very familiar issues to mainstream human rights workers in Nigeria.⁶ A review of reports by mainstream human rights organisations indicates that, while it is often very clear to them that power is a key determinant in who gets 'arbitrarily' arrested, their usual recommendations on this issue have always focused on technical aspects of policing, such as human rights training and ensuring accountability in police processes. For example, in a comprehensive 2008 report by CLEEN Foundation on 'police reforms in Nigeria,'⁷ the report identified 'practices as brutality, unlawful arrest and detention, and incivility to members of the public' as a cause of public dissatisfaction with the Nigerian police. The report then observes that: 'In addition, unlawful arrest and detention are sometimes due to directives by the government and the manipulation of the Police by *influential people in society*' (emphasis added). This observation correctly acknowledges the systemic power dynamics inherent in Nigerian society and the use of elite power to control public goods and socially exclude a majority of the population. However, in its recommendations on addressing this issue, the report focuses almost exclusively on an insistence on the respect for human rights and due process without considering power dynamics in Nigerian society and how it shapes the ability to claim rights.⁸

Ordinarily, these technical recommendations by mainstream human rights organisations may be considered as adequate recommendations for instances where the

⁶ Amnesty International "'Welcome to hell": Torture and other ill-treatment in Nigeria' (2014) 26 available at <https://www.amnesty.org/download/Documents/4000/afr440112014en.pdf>; Human Rights Watch (HRW) "'Everyone's in on the game": Corruption and human rights abuses by the Nigeria Police Force (2010) 31 available at <https://www.hrw.org/sites/default/files/reports/nigeria0810webwcover.pdf>.

⁷ I Chukwuma 'Motions without movement: Report of the Presidential Committees on Police Reforms in Nigeria' (2008) 127.

⁸ As above. Recommendations in that report include: 'Government should ensure that the constitutional rights of citizens are respected and protected by all agencies of government. Police and security officers involved in the violation of the rights of citizens should be severely punished – through both administrative and judicial processes' and 'Police training curriculum should include effective instruction in human rights provisions and observance. In particular, Police should observe constitutional provisions on civil rights, including the rights of the accused with regards to arrest, detention, bail and treatment of accused persons and offenders.' However, as interviews with respondent community members show, the police know and understand 'human rights' and 'due process' etiquette when confronted by a superior show of power. The problem is not that there are no rights, the problem is that the Nigerian socio-political system is structured such that rights are only enforceable through power dynamics.

police arrest legally innocent people. However, the situation is more complicated when dealing with legally culpable but human rights protected people, such as sexual and gender minorities in Nigeria. If the recommendations in these reports are implemented, the result would be a seemingly more 'efficient' policing system in Nigeria, and a more 'legal' due process that would likely result in the arrest of even more sexual and gender minorities under the current legal system and political homophobia environment. Fortunately— as demonstrated in Chapter Three – the negotiation of power dynamics in Nigeria means that the police have been usually lenient with – or even dismissive of a complaint against – sexual and gender minorities who have the sufficient mix of economic, social, and spatial power. In essence, the problem for people who are victims of arbitrary arrests is not just an issue of inefficiency on the part of the police, it is more an issue of inadequate social power on the part of the victim – it is a wider social problem, not just a narrow law enforcement problem.

LA1, who works as a programme director for a national LGBT-focused organisation based in Lagos, explains his understanding of the social element of these dynamics:

People would tend to want to overlook your sexuality if you are highly placed in society.... But for someone who's just struggling or trying to make ends meet, it then becomes an issue. They'll be like: 'You're not even settled, you don't have the job, you want to be flamboyant, you don't even have, you're not well to do in the society, you're not making any reasonable impact, you want to identify as, you know, well rub your sexuality or be proud of who you are.' But if they notice someone who is well placed in society who has stuff going for him or her, they just generally have a way of, you know, soft pedalling about their sexuality and then just you know, focus on their achievement. – LA1

The fact that there is an 'easier' way of protecting one's rights by asserting some form of power as opposed to the lengthier and arguably more traumatising legal process means that few people will be willing to dismantle this dynamic and many people will take advantage of it where possible. For instance, in one case where the victim's aunt was also a police officer, the process became a simple one of calling his aunt to show up and meet the arresting officers whereby he was immediately released.⁹ The willingness to utilise privilege rather than rights is a practical consequence of living in Nigeria¹⁰ that makes broader advocacy to change legal norms and social attitudes even more complicated, especially because the beneficiaries of power dynamics are also community members.

As elaborated in Chapter Three, the interactions of social status, economic ability and location play a great role in these dynamics. AA5, who has worked on the protection of the rights of sexual and gender minorities in Nigeria for 12 years, shared this perspective:

⁹ Interview with LA3.

¹⁰ WJ Chambliss, 'Toward a political economy of crime' (1975) 2 *Theory and Society* 160; O Marenin 'Policing Nigeria: Control and autonomy in the exercise of coercion' (1985) 28 *African Studies Review* 80.

Number one, lower educational level. Number two, lower economic status, and even social status and even the area. Because you hardly – I stay in Gwarinpa and you hardly find police having to stop people unnecessarily and start asking them those kind of questions. I have friends in other upscale areas in Abuja and they hardly stop people for that. But, in other outskirts of town and other lower level in terms of economic status really. Yes, you have that stop and search and things like that happens.... You have two categories those who are less at risk, who are more affluent in terms of level of education, economic status and those who are lower who have, it might be higher level of education but in terms of economic status, it's still lower like that. – AA5

This negotiation of power dynamics is even more glaring where two same-sex persons are discovered in a sexual act but one of them has a high social status, as happened in one case narrated by AA2, a project officer in Abuja:

One Alhaji [that is, a Muslim who has made the Hajj pilgrimage to Mecca but colloquially used as a title of respect for wealthy Muslims] was caught with one of our community member having sex. The Alhaji, when [the neighbours] called the police, he did not even get to the police station. He paid the police off, and took off. They arrested the [other] guy, jailed him, he was even HIV positive and was on [antiretroviral] drugs, we had to be finding ways of going to deliver drugs to him to ensure that he is okay and followed up until he was bailed. - AA2

The element of Islamic hegemony – discussed in Chapter Two – adds a layer of religion to power dynamics in Northern Nigeria. In Kaduna, advocates confirmed the experiences of community members around the influence of religion in negotiating power dynamics.¹¹ As such, in Northern Nigeria, a relatively poorer but Muslim indigene is more likely to escape prosecution for same-sex acts than a richer but migrant Christian resident. And so, while advocates across Nigeria are aware of the existence of power dynamics, they have to deal with its manifestations in different ways.

A curious paradox emerging from all these is the issue of the police cooperating with advocates while at the same time persecuting their community members. The 2014 case of *Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board*,¹² provides an insight into the nature of the relationship between the police and advocates working on the rights of sexual and gender minorities in Nigeria. Ifeanyi, then the Executive Director of International Centre for Advocacy on the Rights to Health (ICARH), was arrested at his birthday party in Abuja.¹³ In the court affidavit, Ifeanyi explained that about fifteen police

¹¹ Interview with KA3.

¹² Suit No. FHC/ABJ/CS/799/2014.

¹³ 'Nigerian human rights activist brings lawsuit after unlawful detention' (3 November 2014) <http://oblogdeeeoblogda.me/2014/11/03/nigerian-human-rights-activist-brings-lawsuit-after-unlawful-detention/> (accessed 30 April 2020).

officers, armed with guns, raided the office premises, and arrested him allegedly on the orders of the Commissioner of Police.

While in transit following the arrest of Ifeanyi, the police officers also arrested alleged sex workers on the road and they were all taken, not to a police station, but to the offices of the Abuja Environmental Protection Board. Throughout this period, Ifeanyi was not informed of the reasons for his arrest. He would later learn that the police searched and wrecked the office – without a warrant – and removed office equipment and programme materials. After the police officers unsuccessfully tried to extort him for money, he was then assaulted and knocked to the ground where he was forced to remain. Eventually, he was released that same day and, within a few weeks, he initiated a human rights action against the police and the environmental board at the Federal High Court. In 2016, the court gave a judgement 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 a public apology to Ifeanyi.

This case is an example of a direct situation where the victim not only called the bluff of the police's threat to prosecute him, but then proceeded to initiate the legal process against the police. However, while it looks like a clear 'open and shut' human rights case, there are underlying power dynamics that were at play. First, the victim was no ordinary community member; instead he was an educated and nationally recognised human rights advocate who worked with global partners such as the United States Agency for International Development (USAID) and therefore had the relevant networks to resist the process of an 'arbitrary' arrest. Second, the victim openly worked for the sexual and gender minorities community and was therefore not affected by the usual fear of social stigma that allowed the police to blackmail and extort people who – for personal safety, economic opportunities, or other reasons – needed to keep their association with the sexual and gender minorities community private.

All of these, in summary, meant that that the police picked 'the wrong person' to arrest and attempt to extort, and consequently the state paid for it in damages to the victim. However, given almost the same set of facts but a different victim, the situation is likely to have ended very differently – as it often does – including, the possibility of the police parading the alleged offender and everyone else at the party before the media as having been caught holding 'a gay party'.¹⁴ And so, while the human rights situation is still the same for vulnerable people as it was in 2014 (pre-SSMPA), the balance of power between advocates and the police has

¹⁴ Mass arrests of this nature happen frequently as reported in these news items: 'Mass Nigerian arrests for "homosexual acts" in Lagos State' (31 July 2017) <https://www.bbc.com/news/world-africa-40774930> (accessed 31 July 2020); 'Police storm hotel in Lagos, arrest at least 57 suspected of homosexuality' (29 August 2018) <https://www.news24.com/news24/Africa/News/police-storm-hotel-in-lagos-arrest-at-least-57-suspected-of-homosexuality-20180829> (accessed 31 July 2020); 'Nigeria: Police arrest over 100 alleged gays and lesbians' (11 June 2018) <https://76crimes.com/2018/06/11/nigeria-police-arrest-over-50-alleged-gay-and-lesbians/> (accessed 31 July 2020).

adjusted over this period. The police have learned their lesson in power dynamics: which is to avoid arresting or prosecuting advocates who have verifiable organisational profiles. This is illustrated in an incident narrated by AA5:

They were arrested in a gay party and it was alleged that they were doing gay initiation, so I was called. I went there with our Access to Justice Officer and I happened to have met the Area Commander before, and while we were trying to negotiate for the release of the boys, I now asked jokingly, I said " how come you don't arrest me?". ... he said "We can't arrest people like you because there'll be more problem." - AA5

As the police officer in this incident described by AA5 observed, the police avoid arresting 'people like you', meaning advocacy workers. In turn, advocates for the rights of sexual and gender minorities in Nigeria are aware of this edge over the police. This is especially true for those who are lawyers or have been trained by their organisations as paralegals. For instance, PA3, a programme officer in Port Harcourt, explains that the police often act with more care when dealing with advocates who have some knowledge of law:

When they [the police] hear 'Oh, these ones na lawyers', they pipe down. They behave themselves and then when they hear you talk, talk reasonably, they kind of, you know, they know that 'Ah these ones, we have to be careful oh'. You see that carefulness in them and then the next, it boils down in "Oya now, give us money" and all that. – PA3

In Abuja, AA2, narrates how the police almost arrested one of their organisation's paralegal staff who had gone to the station to bail out some community members, until he asserted his knowledge of law:

There've been instances where we went to do outreach, some of our community members who were to attend that outreach, on their way to the venue they were nabbed by the police and locked up. Someone from this office went there. Already before we got there, they forced the guys to dress as females, walk on heels, called a cameraman and snapped them, making jest of them and things like that. When the guy from here got there, they now started saying 'Oh you're their Oga, the one that has been sleeping with them and you've come to bail them.' The guy said, 'I think the law does not say if you're gay, you should be arrested. The law states that if you're caught in the act, so I can decide to tell you that I'm gay, you don't have any right to arrest me'. On the long run, they didn't do anything to him because they felt he knows his right and he knows what he's saying and he can defend himself anywhere. – AA2

Despite AA2's reasoning that the police let the staff member in this scenario carry out his work because 'he knows his right', it is important to emphasise that this show of respect for advocates has more to do with the acknowledgment of power dynamics by the police and less to do with a respect for the rule of law or for human rights values. As such, where an

organisation does not convey the impression of having the relevant indications of power, the likelihood of the police proceeding on the basis of due process reduces.

Just as the status of individuals as lawyers or staff of verifiable organisations can influence police attitude, the location of an office can also determine how the police – and the general public – engage an advocacy NGO. AA3, who once worked for The Initiative for Equal Rights (TIERS) in Lagos, explains the effects of class divisions between the mainland and island office locations:

When I used to work in TIERS, we have two different offices and the comparison was the fact that one was on the mainland, the other was on the island. The perception or the interference with the offices varied because the mainland, kind of, was like the low-class environment, which kind of, gave people ... room to invade people's privacy for no just cause. But, on the island, where the office was situated in the highbrow area, people tend to kind of mind their business. – AA3

The summary of these perceptions and state of awareness is that, just like the use of economic, social, and spatial factors in the protection or prosecution of community members (as discussed in the previous chapter), advocates working on the rights of sexual and gender minorities in Nigeria are also aware of the existence of power dynamics in the country and engage these dynamics in their activities with both law enforcement and their communities. Similarly, the experiences of community members in their engagement with the police also form part of the general knowledge of advocates. Advocates understand that the economic location of a person or an organisation can determine their level of privacy and safety from prosecution. Similarly, they know that the availability of economic resources or access to networks with resources can determine the extent of police interference with advocacy work, particularly where there are no superior political authorities providing support for the interference of the police. The question is, therefore, to what extent has this awareness and knowledge been reflected in the responses of advocates to the criminalising laws and in advocacy programming to protect the rights of sexual and gender minorities? This issue is considered under Theme 2: Responses and programming by advocates (Or, Advocate response and programming).

4.5.2 Theme 2: Responses and programming by advocates

Broadly, individual and organisational work for the protection of sexual and gender minorities in Nigeria was initiated in response to sexual health issues, particularly the HIV epidemic of

the 1990s.¹⁵ Only relatively recently did this type of work start to encompass broader human rights and policy issues. More specifically, since the proposal and eventual enactment of the SSMPA, the direction of the sexual and gender minorities movement in Nigeria has leaned towards the international human rights paradigm and the use of petitions, policy papers, strategic litigation, and awareness campaigns to emphasise the human rights obligations of Nigeria towards sexual and gender minorities. However, advocates have also started formulating other approaches that do not necessarily fit snugly into the human rights framework, but address the socio-political realities of power dynamics and hegemonic power in the Nigerian context. The difference in focus between these two approaches is referred to here as 'default' and 'material' responses.

The 'default' approach is identified as such not because it has no significant value towards the protection of sexual and gender minorities in Nigeria, but rather – from a Critical Legal Studies perspective – the responses under this approach are an automated 'reified' formula that deal with the issues of sexual and gender minorities in Nigeria in one single and simplified category, based on 'LGBTIQ+' labels and roles, under the banner of a standard international human rights framework.¹⁶ These 'default' responses are based on the premise that, in a criminalised context, 'everyone' who falls under the 'LGBTIQ+' label has been stripped of their rights and so should be supported as equal victims of human rights violations. These responses are also premised on the idea that legal systems are either functionally protective of or discriminatory against a reified community. As Gabel notes in his criticism of reification in legal reasoning, 'One is never, or almost never, a person; instead one is successively a "husband", "bus passenger", "small businessman", "consumer" and so on.'¹⁷ Those assumptions of group discriminations can be contrasted against the argument in this

¹⁵ 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.

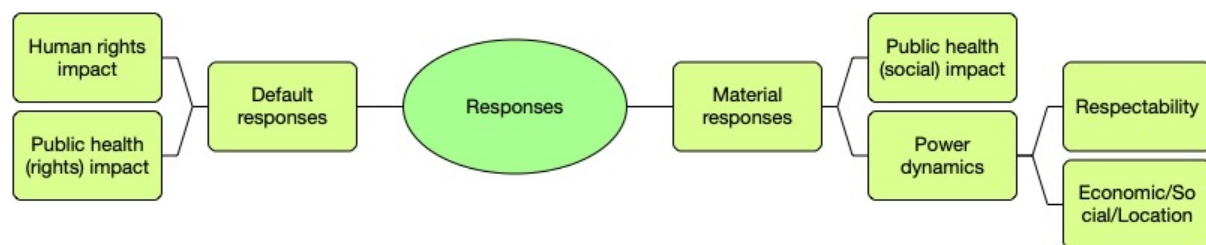
¹⁶ P Gabel 'Reification in legal reasoning' (1980) 3 *Research in Law and Sociology* 25-51. Gabel defines reification as 'a certain sort of distortion of meaning that occurs within communication ... when we "reify" we draw an abstraction from a concrete milieu and then mistake the abstraction for the concrete More specifically, in a reified communication the speaker: (1) misunderstands by asserting that an abstraction is concrete; (2) understands that he misunderstands or knows that the communication is "false"; and (3) denies both to himself and the listener that he knows either of these by the implied assertion that the communication is "true", or concrete. Thus, reification is not simply a form of distortion, but also a form of unconscious coercion, which, on the one hand, separates the *communicated or socially apparent reality* from the reality of the experience and, on the other hand, denies that this separation is taking place.' As such, in the human rights discourse, labels like 'LGBTIQ+' or terms like 'sexual and gender minorities' are reified legal ideas that inevitably separate the reality of the composite identities of the real humans from the roles these legal terms play in. This aspect of CLS is discussed at length in Chapter One.

¹⁷ As above. See also C Lennox & M Waites 'Comparative analysis of decriminalisation and change across the Commonwealth: Understanding contexts and discerning strategies' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth* (2013) 534 – 536 on the importance of contextual practicalities in advocacy and 'wariness of the consequences of decriminalisations that have been narrowly conceived in terms of privacy'.

thesis that people (of a similarly categorised label) experience law enforcement differently, often in shaded and nuanced ways that are dependent on the aggregate identity of the individual person. Accordingly, these ‘default’ responses do not distinguish between the difference in realities of poorer sexual and gender minority persons and richer persons; or the difference in realities between sexual and gender minority person who is a Muslim living in Northern Nigeria and one who is non-Muslim also living in Northern Nigeria; or the outcomes of differences in employment status, living arrangements, and similar other shades of status and identity that contribute to the aggregate identity of an individual within a social fabric.¹⁸

‘Material’ responses are those that focus more realistically on these issues and on the role of power dynamics in the lived experiences of community members and less on a ‘one-size-fits-all’ human rights approach to social issues. Figure 4.1 below illustrates the ramifications of both the default responses (which focus on human rights obligations of states and the public health obligations of states) and the material responses which focus also on public health, from a social perspective, as well as on power dynamics (including how power dynamics influence respectability and law enforcement attitudes to economic ability, social status, and spatial location). These two approaches have manifested and evolved in advocacy responses and programmes in Nigeria and are discussed in the following sub-sections.

Figure 4.1 Advocacy responses to the criminalising laws



4.5.2.1 Default responses: human rights impact of criminalising laws

Prior to, and also following the passing of the SSMPA, a number of organisations working on the protection of sexual and gender minorities in Nigeria responded to criminalising laws through default responses. These default responses concentrated on issuing policy papers on the human rights effects of the criminalising laws and their effects on sexual and reproductive

¹⁸ Gabel (n 17 above) 25-51; T Anderson ‘The political economy of human rights’ (2002) 50 *Journal of Australian Political Economy* 202.

health rights;¹⁹ and using media and popular culture to raise public awareness on the dangerous impact these criminalising laws have on human rights in a democratic society.²⁰

However, based on the imposed exclusion of sexual and gender minorities under the criminalising laws, advocacy responses adopted the position that *all* sexual and gender minorities and organisations working on their behalf in Nigeria were socially excluded from the enjoyment of their rights. This position, therefore, led to human rights programmes that advocated for the equal rights of sexual and gender minorities in Nigerian society.²¹ In particular, the default responses focused on educating the state and the public on the application of constitutionally guaranteed rights such as the freedom of expression of all sexual and gender minorities, the right to privacy, and the right to association. These default responses are also buttressed by the Yogyakarta Principles which confirm the universal application of human rights law regardless of a person's sexual orientation and gender identity.²² Navi Pillay, the then United Nations High Commissioner for Human Rights, for instance, described the SSMPA as a 'draconian new law' that made 'an already-bad situation much worse'. Focusing on the human rights implications, she noted:²³

Rarely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights. Rights to privacy and non-discrimination, rights to freedom of expression, association and assembly, rights to freedom from arbitrary arrest and detention: this law undermines all of them. In addition, the law risks reinforcing existing prejudices towards members of the LGBT community, and may provoke an upsurge in violence and discrimination.

¹⁹ These papers were often distributed in hardcopy or delivered at relevant forums and legislative hearings. The researcher has on file some of the statements delivered between 2011 and 2014 by groups such as Changing Attitude of Nigeria, International Centre for Advocacy on the Rights to Health; Coalition for the Defense of Sexual Rights in Nigeria; House of Rainbow, Nigerian Humanist Movement, and Queer Alliance. Not all of these groups are registered or still functional at the time of this writing. Also, of note is the 'Joint submission by LGBTI organisations in Nigeria to the second Universal Periodic Review of Nigeria' prepared by four Nigerian organisations and presented at the Human Rights Council session in October 2013.

²⁰ For example, the audio-visual resource website, <https://www.whereloveisacrime.org/>, which was developed and is maintained by The Initiative for Equal Rights (TIERs) has a collection of these responses. TIERs has also produced short and full-length films on human rights issues, some of which are available on YouTube.

²¹ n 15 above.

²² The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (the 'Yogyakarta Principles') are a set of legal principles applying existing international human rights law norms to issues of sexual orientation and gender identity. They were formulated in 2006 by human rights experts and jurists and have been also adopted by the United Nations Human Rights Council. They are, therefore, considered as 'soft law'. A text of the Yogyakarta Principles is available at http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

²³ 'UN human rights chief denounces new anti-homosexuality law in Nigeria' (14 January 2014) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14169&LangID=E> (accessed 4 May 2020).

Within the next few years, at least three cases were instituted before the courts challenging the human rights impact of the SSMPA.²⁴ All of these cases were unsuccessful and, despite the often-repeated assertion of rights, there has been no indication of progress in denting the legal framework since the enactment of the SSMPA in 2014. Kollman and Waites, discussing the global spread of the human rights framework in LGBT advocacy, note:²⁵

Relatedly, concepts of 'rights' have sometimes been advanced in local contexts where poor individuals lack the education, language or resources to claim and operationalize them, contributing to feelings of disempowerment unless individuals are assisted in developing a sense of ownership of such rights. This sense has to emerge from the relational context of families and communities, in which people live interdependent lives, since an abstract individualistic approach will not resonate.

What Kollman and Waites describe as 'a sense of ownership of such rights' is, arguably, in the Nigerian context, the day-to-day capacity of individuals to negotiate hegemonic power dynamics and increase the extent of their social inclusion. As the historical discussion in Chapter Two shows, since the enjoyment of citizenship rights in Nigerian society does not operate using the currency of human rights, a state of disempowerment and social exclusion can best be understood and approached – at least at the initial stages of advocacy – in terms of power, rather than in terms of rights.

As such, since the enactment of the SSMPA, not *all* sexual and gender minorities have suffered the anticipated and project negative impact of the law. Instead, as the interviews discussed in Chapter Three illustrated, it is often sexual and gender minorities who were already vulnerable in some other way prior to the enactment of the SSMPA that continued to be affected by the enforcement of the criminalising laws. The Nigerian context, clearly, has more to do with the social exclusion of vulnerable people under the historical and existing power dynamics of the country than it has to do with the denial of rights to sexual and gender minorities persons. While it is true that privileged sexual and gender minorities in Nigeria do not have the same level of freedoms as their counterparts in more liberal democracies, their

²⁴ *Robert Igbinedion v Nigeria* (2012); *Teriah Joseph Ebah v Nigeria* (2014) (Suit No FHC/ABJ/CS/197/2014); *Pamela Adie v Corporate Affairs Commission* (2018) (Suit No FHC/ABJ/CS/827/2018). *Igbinedion* and *Ebah's* cases were based on the broad unconstitutionality of the SSMPA under the fundamental rights provisions of the Nigerian Constitution. The court dismissed both cases for lacking *locus standi*. In *Ebah's* case, the court noted that the applicant had '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 (LGBTI) community.' For a full discussion on *Ebah's* case, see AC Onuora-Oguno 'Protecting same-sex rights in Nigeria: Case note on *Teriah Joseph Ebah v Federal Government of Nigeria*' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 240. *Adie's* case focused on the freedom of association and right to register an organisation, but the court dismissed it on the grounds that the SSMPA was an existing limitation on those rights – without assessing the constitutionality of the SSMPA itself.

²⁵ K Kollman & M Waites 'The global politics of lesbian, gay, bisexual and transgender human rights: An introduction' (2009) 15 *Contemporary Politics* 7.

insulation from the adverse enforcement of criminalising laws is a kind of reward for their sustenance and membership of the hegemony. As is discussed later in this chapter, some privileged sexual and gender minorities do not even want to identify with the community or with advocacy causes – particularly when advocacy efforts are unlikely to improve their current positions within the existing hegemony. This reluctance is understandable if we consider that, in the Nigerian context, social power confers more protection from adverse laws and circumstances than does human rights. In the words of Claude Ake:²⁶

The Western notion of human rights lacks concreteness. It ascribes abstract rights to abstract beings. There is not enough concern for the historical conditions in which human rights can actually be realized. As it turns out, only a few people are in a position to exercise the rights which society allows. The few who have the resources to exercise these rights do not need a bill of rights. Their power secures them. The many who do not have the resources to exercise their rights are not helped any by the existence of these rights. Their powerlessness dooms them.

4.5.2.2 Mixed default and material responses: emphasising public health

Other responses to the law focus less on the human rights implications, and instead emphasise 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 public health as a focus, advocates could begin to strengthen their position with the government and law enforcement in the post-SSMPA society. As AA4 recalls:

What we did was, initially we were scared when we heard that this law had been passed, we were scared. A lot of community members went into hiding, which including us, especially us that work for the community. So, because we believe that we are going to be the first point of target. So, we went into hiding, we had to slow a bit in our HIV testing and counselling work, outreaches, you know, mobilisation of community members at the grassroots level, we had to slow down a bit. But, afterwards little by little, with a lot of advocacy being done, we had to start coping, coming out, letting people to know that we actually exist, even though you can't come out and say 'Okay, I'm an MSM, this is what I do, this is what we do as an organisation and all that'. But when you go for advocacy, you're not just advocating for the LGBTI community, you're also advocating for the girl child rights, we are also advocating for vulnerable women and all of that, there's a way they call it and you arrive at LGBTI community, so that it wouldn't be like you are just coming here for the LGBTI persons alone. So, with that, little by little, our work has been going smoothly even collaborating with the government; the NACA, the federal agency for the control of AIDS. – AA4

It is noteworthy that despite wider human rights issues violated by the SSMPA, the African Commission on Human and Peoples' Rights (African Commission) opted to adopt the law's

²⁶ C Ake 'The African context of human rights' (1987) 34 *Africa Today* 6.

effect on public health as a principal rationale when admonishing the Nigerian government for the passing of the SSMPA:²⁷

The enactment of a law criminalizing homosexuality has the potential to engender violence against persons on grounds of their actual or imputed sexual orientation, and also to drive this group of persons vulnerable to HIV/AIDS underground, thereby creating an environment which makes it impossible to effectively address the HIV pandemic in the State.

And so, advocates in Nigeria began to engage the reality of power dynamics in society by using the issue of HIV/AIDS and public health – and not just the insistence on rights such as expression and association – as a focal point against the criminalising laws. For instance, interview respondent AA4 notes that the programming model in his organisation required staff to emphasise to societal leaders that their work focused on HIV and STI prevention and treatment when engaging with them in the field:

It's very important, even if it's in a local community that you want to go and work, you need to go and meet the Chief and tell them that this is who we are; we believe that HIV virus ... is actually increasing on a daily basis among the community members in this environment or at the grassroots level. So this is what we do, we are coming here to offer help to these person because one way or the other, even if your child is not a gay, your family members are not gay, whether you like it or not this same gay people also relate with the general population and in one way or the other, the virus can actually be spread, so we need to put heads together to make sure or find a way to solve it and that is the reason why we are coming with condoms, lubricants and we have peer educators' manual we use in messaging. - AA4

Initial engagements with the police also followed this same pattern of emphasising healthcare rather than the rights of individuals. In an example narrated by AA1, the police were going to arrest some staff members at the NGO until they were convinced their work focused on healthcare, even skimming through the programme manuals used by the workers:

So, I met with them. I first of all presented my ID Card, told them ... we are into HIV intervention and prevention, we educate people on how to use condom, how to prevent HIV and other STI transmission and all of that but I didn't go into details to tell them about our target. I didn't tell them all that. So, they were like 'Okay, why is it only guys around?' I said 'We are focusing, we are targeting out-of-school youths, and for me, I control the guys, there are other people control the girls'. So, they started searching each one of us to see if they can see anything incriminating. Unfortunately for them, they didn't see anything, so they left. They went through our manual, this our manual here, but unfortunately, they didn't see any

²⁷ African Commission on Human and Peoples' Rights (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)' 4 - 18 November 2015, para 81.

of those incriminating parts, you know. They didn't go through it very well, so they just slide and left and saw that it was about health, so they let us be. – AA1

As indicated in the foregoing narrative, this redirection of emphasis from rights to healthcare has resulted in a less hostile reaction from a police force that has been historically indifferent to the protection of rights. In Lagos, LA2, who works close to a police station, explains that this focus on healthcare also helped to protect community members from prying investigations by the police:

You don't go out to tell people I'm working with the LGBT community. No. When you are asked 'What do you do?' You tell them you're into human rights and sexual health. You don't go specific to what that service is, or who it's tailored to. – LA2

An actual incident of an inquisitive investigation in Abuja is narrated by AA4, where a Divisional Police Officer who oversaw the visit to his NGO was perplexed by the fact that the investigation did not yield any 'homosexual' activities but only healthcare activities:

They [the police] had to come to the organisation, they want to see who is the ED [executive director]. I had been coming to the station with the lawyer but they didn't know I was the one. ... They came to the office, they saw me, they were looking through ... things that were pasted on the wall. They want to see what we do, they want to see the organisational profile and all of that. We showed them, they saw condoms and lubricants and they were like 'What are these things for?' and we actually told them. So afterwards, they left to do their own report because they were taking notes while they were doing that. So, they had to call me, the DPO called me in the station and asked me: 'Is it true that we promote homosexuality in Nigeria?' I now asked him 'Where in the organisation profile I gave you, did you by any chance see anything of such?' So, he now said No, he didn't really see it. I said 'Okay fine, I think that answers your question'. So, they have come to the office to interview one or two persons and I also thank God that the day they came, they didn't just meet the MSM community, we have this organisation we partner with which is the sex workers organisation, so some of the ladies were actually in the office that day. - AA4

The initial focus on healthcare by advocacy organisations allowed advocates to fit their programming into one of the ostensible goals of the hegemonic state, that is the desire for nominal public safety and healthcare for all. As long as organisations claimed to be carrying out this goal, they did not upset the existing balance of hegemonic power. Just as importantly, organisations that focused on the goal of healthcare contributed to the sustenance and use of public institutions, such as the Ministries of Health and the National Agency for the Control of AIDS, who in turn relied on the grassroots and community work of the organisations to access

or report on foreign aid.²⁸ In an ironic statement of the partnership between advocates for the protection of sexual and gender minorities and the hegemonic state, the programme manuals, brochures and other documents used by the advocates bore the national coat of arms to indicate their partnership status.²⁹ In short, the early focus on healthcare activities by advocates in Nigeria assisted the government in looking efficient without the government having to expressly protect counter-normative sexuality. As AA3 explains:

Part of the conversation that went on with the Ministry of Health in resolving the situation was to ensure that no activity that required same-sex persons be done out in the public or in spaces that were not security approved by organisations, meaning the likes of support group programmes that literally involved gay men coming together to talk about issues of HIV and healthy living and you know, provision of support with commodities, safer sex commodities, and the likes of them for them and their family. These kinds of activities were cancelled, were nullified and co-op sessions by peer educators and peer education sessions were literally put to a halt but the idea at the strategy was to now have all of these sessions hold within the office space. - AA3

The meeting with officials of the Ministry of Health described in this extract occurred after a mass arrest had taken place in Lagos. In that meeting, the advocates were advised by officials of the Ministry to be more careful about meeting in public spaces to prevent police interference. To be clear, these accommodations by government officials, societal leaders, and even law enforcement authorities exists despite section 4(1) of the SSMPA which states: 'The Registration of gay clubs, societies and organisations, their sustenance, processions and meetings is prohibited.' While the scope (and constitutionality) of this provision has not been clarified by the courts, it is still important to note that the government works quietly with advocacy groups and organisations on the healthcare issues of sexual and gender minorities while publicly denouncing advocacy for sexual and gender minorities on issues of human rights.

The major problem with this focus on public health advocacy is that the statements by the African Commission and advocacy organisations are founded on a reasonable assumption that political actors in Nigeria are interested in the protection of the health and welfare of all citizens. However, as discussed in Chapter Two, this assumption is not necessarily true in the Nigerian context. Instead, considering the continuing hostility to wider advocacy for sexual and gender minorities, it is a more realistic assumption that the current partnership exists because political actors are interested in their own hegemonic relevance by the provision of public health services. But, as soon as government officials can implement some other means

²⁸ Interviews with LA1, PA3, AA4, and AA3.

²⁹ I was shown examples of this by advocates during the field interviews.

of achieving this perception without partnering with advocates, the existing political homophobia will begin to permeate and limit this aspect of advocacy. Nevertheless, the current scenario illustrates the mixed responses of using a standard public health issue as a means of engaging political authorities and negotiating hegemonic power dynamics in Nigeria in the protection of sexual and gender minorities.

4.5.2.3 Material responses: programming for power dynamics

Analysis of interviews revealed that while advocates for sexual and gender minorities in Nigeria were initially social excluded by virtue of the criminalising laws, the nature of their interactions with the government and the police meant that they have come to increasingly experience the 'positive side' of social dynamics. On the one hand, advocates enjoy a relatively higher protection of rights than the community members they fight for, and on the other hand advocates are witness to the sharp differences in the experiences of persecution by community members across the country, with many being arrested or detained and some being ignored or even celebrated in the media. For those who are consciously aware of these situations, there has been an interest in focusing more on what I term as 'material' responses, that is programmes that empower community members who were vulnerable in other ways within the society, particularly economically and educationally. These programmes were, in essence, directed at improving the balance of individual power within the existing legal system and social structure rather than directly seeking legal changes in the protection of individual rights. Based on the interviews with advocates, these programmes are intended to: (i) navigate power through respectability; (ii) navigate power through economic ability; (iii) navigate power through social status and self-esteem; and (iv) navigate power through spatial locations.

Navigate power through respectability: As discussed in detail in section 3.3 of Chapter Three, interactions with law enforcement authorities in the Nigerian context engages power rather than rights, and a most visible representation of an individual's power is the individual's performance of respectability.³⁰ As such, in dealing with the risk of police persecution and 'arbitrary arrests', some advocates noted that they designed and implemented projects to advise community members and their staff on how to conform to hegemonic notions of 'respectability', thus enhancing their appearance of power. According to AA1, he advises his team to 'comport' and 'dress well' when in the field:

³⁰ Y Johshi 'Respectable queerness' (2012) 43 *Columbia Human Rights Law Review* 419.

So when you're in public you behave yourself so that nobody will, even if you're gay... You shouldn't wear tight trousers, and they shouldn't wear all those bum shots, all those stomach opening t-shirts, you know what I'm talking about, they like all those skimpy things for the girly ones though, so we try as much as we can to tell them to dress well, put on a good cloth, a good shirt, plain trouser, good jeans that is normal and you don't behave funny. You can do anything you want in here, in the community centre, if you come here, you're free to do anything but the moment you are out of that gate, behave yourself, be a man because you don't cause a self-inflicted violation on yourself. – AA1

By suggesting that community members should fit themselves into the hegemonic notion of respectability, this form of Nigerian advocacy is a material response in its recognition of how power, or the perception of it, shapes social attitudes in Nigerian society, and thereby helps to confer legitimacy on identities that would otherwise have been considered discordant to the social fabric. In the Nigerian context, there is a dilemma between emphasising rights for individuals who are outside the protection of the existing hegemony and emphasising the protection of an individual within the existing hegemony. The former can lead to backlash and de-legitimisation of advocacy while the latter has been used as a method of advancing advocacy. According to KA3, in Kaduna, advocates have to be careful not to be labelled, 'because when you get labelled then your advocacy is ... watered down.'³¹ In Port Harcourt, PA2 expressed a similar sentiment about advocates going to the police to bail out victims of arbitrary arrests. They have to go to the station with the appearance of people the police are accustomed to showing deference: 'If you look like the person they've arrested, they will just profile you. But when you look different from the person that is arrested, I think you'll have an audience'.³²

Arguably, while this kind of material response, in its approach to power dynamics may extend 'protection' and thereby social inclusion to persons who would have otherwise been excluded, it does not actually affect the structure of power within the society. As such, this material response to power is problematic in three ways: (i) it leaves the structure of the dominant hegemony intact; (ii) it is only capable of including a few people at any time and so does not truly diminish social exclusion; and (iii) it also carries the risk of erasing self-actualising, but non-heteronormative, values of individual persons who have to conform to 'respectability' symbols.³³

Navigate power through economic ability: As the discussion in the preceding chapters has shown, economic ability plays an important role in the socio-political fabric of Nigeria. As such, in a society where social attitude is influenced by economic status, advocates who recognise

³¹ Interview with KA3.

³² Interview with PA2.

³³ Johshi (n 30 above) 419.

this fact are focusing on implementation of programmes designed to boost the economic potential and ability of their community members. In Abuja, AA3 explained that some organisations implemented skill acquisition training programmes or even provided soft loans to community members.³⁴ PA1, in Port Harcourt, describes some of the activities they had undertaken, including helping community members to establish and register businesses:

We've trained a lot of persons here in their vocational centres where they've been able to start-up businesses on their own and they are doing very well. Most of them even have registered business with the [company registry]. – PA1

PA3, also in Port Harcourt, explains that they had to think beyond the immediate educational and awareness raising human rights projects and think about what happens after the project ends, especially for the poorer community members and those who already have a fatalistic resignation to social discrimination:

So, what about empowering them? So, when this project comes to an end, they too can fend for themselves; they too can take good care of themselves; they too can stand for themselves.... This is what we want to do, we want you to empower the community members, we want you to empower them not just in financial aspect but for them to understand the law, for them to know that they can stand for themselves. Scholarships, you understand, to build their careers, to build themselves, and I think when you do that a lot of people will see the need to live. In our community, some people are so down there that they don't even care, they don't care what they do with their life, they just want to keep having sex, want to keep going for parties. – PA3

While having a job or a business does not automatically guarantee freedom or the protection of rights, it is understood that a job provides a pathway to social inclusion, and inclusion in one aspect of society enhances the power dynamics of the individual within the Nigerian context. In particular, having a verifiable job or business can make a significant difference in police attitude to and treatment of sexual and gender minorities. In view of this fact, community members have expressed their view that the typical human rights projects and campaigns do not equip them enough to deal with the realities of a society that engages with power rather than with rights. In Lagos, LA2 narrates an incident where participants at an event stated that what they needed in Nigeria was money, or knowledge on how to get it:

I could remember when we had one life skill training. So, we're teaching them skills on assertiveness and stuff and then before the whole training, we were like what are your interests? What's like your goal? What do you want to ... if you're asked one thing, what do you love? ... The questions most of them answered tended towards achieving money, were like wealth and power and then after the whole life skill, we asked

³⁴ Interview with AA3.

why is it that everybody is so concerned about wealth and power? They say: 'Ah when you are in Nigeria, it's either you are wealthy and be free'. So, some of them will be like: 'If I was wealthy, I'm sure police won't come and be searching my phone on the road' and some will say - they will give instances of Bobrisky - that does the police molest him? No. So because he has money. – LA2

This economic approach to power dynamics is a direct confrontation to the power structures of the Nigerian context, and is thus a material response. This kind of material response has also proven to be an effective route to countering social exclusion and political homophobia. However, for this approach to be nationally effective, the majority of community members in Nigeria have to be economically empowered and at a scale that matches or is able to counter the economic power of the political elite. But this scenario is unrealistic for two reasons. First, as discussed in Theme 3 below, advocates for the protection of sexual and gender minorities in Nigeria do not have the kind of economic or financial resources to radically upgrade the economic ability of a majority of community members across the country. Second, the idea of a sudden growth of sexual and gender minorities in the middle to upper class of society is inherently incompatible with the existence of a small political elite that controls all aspects of the Nigerian economy. As will be discussed in the next chapter, the alternatively viable economic approach is a widespread and intersectional socio-economic growth for *all* vulnerable groups in the country – which requires constitutional level reforms to the nature of the political system and the distribution of socio-economic power across society.

Navigate power through social status and self-esteem: Advocates working on the rights of sexual and gender minorities in Nigeria have also adopted responses aimed at improving the self-esteem of community members. On the assumption that the negotiation of power dynamics also has a lot to do with perception, community members with a relatively higher sense of self-esteem may be able to navigate society more successfully even without the direct enforcement of legal rights. In Abuja, AA5 explains how they designed programmes 'not just about condoms and lubes' but also to build esteem by inviting more affluent community members to interact with and mentor less affluent community members.³⁵

AA3 explained that they focused on educational programmes that boosted self-esteem and gave community members 'a sense of belonging and a sense to demand for certain things'.³⁶ He also noted that one approach was to find a way of merging human rights issues with issues of power and by teaching people both the law and the dysfunctionality of the legal

³⁵ Interview with AA5.

³⁶ Interview with AA3.

system so that they can avoid being victims of the law.³⁷ Nevertheless, he admits that the human rights paradigm made this goal a bit difficult:

I don't think there's literally anybody who looks at it from that point of view when it comes to human right issues, because human rights have no classist way of looking at things. It's a broad way, it's a straight direct way, the human rights way. – AA3

Just as with the material response targeting economic ability, discussed above, social status and self-esteem is difficult to scale up across all sexual and gender minorities in Nigeria without a more radical and more intersectional approach to power dynamics at a constitutional level. The possibility of this approach is discussed in the next chapter.

Navigate power through spatial locations: One of the conclusions developed in Chapter Three is the significance of location in increasing or reducing the risk of social and police persecution. This theme was reiterated by advocates, some of whom are aware of this issue and have taken steps to improve the location of their offices by relocating to more upscale areas of their city.³⁸ Such decisions serve the dual function of acting as a deterrence to intrusion into their work by general society and the police, and as a safe space for events held by community members who, otherwise, do not have the economic or social capacity to afford their own protected spatial locations.³⁹ For instance, LA5 in Lagos notes how the mainland office of his organisation was in a 'market area' and how this location made office business risky and potentially dangerous.⁴⁰

Naturally, the overall effectiveness of this approach to power dynamics in the Nigerian context is limited. To reiterate the points above, advocates do not have the resources or capacity to provide protected spatial locations for all less-privileged community members. And, while less privileged sexual and gender minorities in Nigeria can temporarily enjoy the protection of 'safe spaces' organised by advocates for some events, they still have to confront the daily realities of their own neighbourhoods without any protection.

In summary, advocacy responses to the criminalising laws and to power dynamics have come in two broad approaches: a 'default' approach that adopts strategies to challenge or reform discrimination against *all* sexual and gender minorities in Nigeria using tools such as strategic litigation cases and public education, and a 'material' approach that focuses on the individual

³⁷ Interview with AA3.

³⁸ Interviews with AA2, AA4, AA5, AA3, LA3, LA2, and LA5.

³⁹ Interview with AA2, AA5, and AA3.

⁴⁰ Interview with LA5.

and commonly shared differences within the community of sexual and gender minorities in Nigeria. Between these two approaches, the material approach has attempted to address power dynamics, particularly by empowering the most vulnerable members of the community with tools to navigate power through ‘respectability’, as well as economic and social programmes. However, while advocates have had some successes with these responses, they are also either problematic or have only been implemented on a small scale due to lack of funding and support, and some of these challenges will be considered in the next subsection.

4.5.3 Theme 3: Challenges to programming for power dynamics

Analysis of advocate interviews indicates that advocate awareness of power dynamics in Nigeria has not fully translated into organised and strategic programming to address power dynamics. It is clear that while advocates have implemented some responses – as discussed in Theme 2 above – they are aware of limitations and acknowledged that there was still a lot more to be done in terms of adopting strategies to engage and confront power dynamics. However, they were also clear that there are challenges inherent to the design and effective implementation of such strategies such as classism within the LGBTIQ+ community, engaging with mainstream advocacy networks, and the availability of funding and similar resources. These are discussed in turn below.

4.5.3.1 Classism within the LGBTIQ+ community

Classism within the gay community in Nigeria exacerbates the sense of inequality experienced by the less privileged; a conclusion drawn in Chapter Three based on the experiences of community members. This classism perpetuates the use of power as the currency for accessing social goods and also prevents effective programming to empower the most vulnerable members of the community. While more privileged members of society who identify as sexual and gender minorities may privately support the work of advocates in Nigeria, others do not. And so, as AA5 explains, the difficulty is in accessing wealthy and influential non-heteronormative Nigerians to use their status to empower others. According to him, it would have been ideal if the more privileged members of the community were able to use their influence to support and uplift the more vulnerable members of the community.⁴¹ For instance, in a situation where a vulnerable member of the community has been arrested by the police, the ideal response would be for the influential members of the community to rally around and bail out the person, and even take steps to ‘sensitise’ the police on the issues. However,

⁴¹ Interview with AA5.

despite this hope for such an ideal scenario, AA5 acknowledges that there is still a fear within the rank of the more privileged members of the community that, if they are perceived by their social and economic peers to be serious threats to the hegemonic norms that have enabled their privileges, their extant social status and economic ability alone may not be sufficient to insulate them from the effects of serious antagonism and hostility.

However, beyond the general possibility of backlash from negative social attitudes, privileged members of the community whose sexual orientation or gender identity is not known or disclosed to the general public are also hesitant about the possibility of being blackmailed or financially leaned on by other members of the community who may have less to lose by exposure. As AA5 explains, 'the issue of reputation is also at stake' and that has made it difficult to have conversations around addressing power dynamics within the community:

Very few of them have been bold enough to, like, say that we need to really talk about the economic and the social status of the community... These other ones who are affluent are afraid of mixing with the ones who are not affluent because of one common theme; sexuality, fear of being exposed. – AA5

In Lagos, LA1 also expresses how broad class divisions and stigmatising between community members who live on the Lagos mainland and those who live on the island makes it difficult for advocates to have discussions on a unified advocacy strategy:

There's this classism: if you're on the island, you don't roll with the mainland people, the mainland people wouldn't want to roll with island people. So, there's that clash and ... when we have, like, dialogue sessions or when we have, like, engagements where we have them all present, we try to make them understand that we are all members of the same LGBT community, regardless of your socio-economic status or where you live... I think it's going to be a huge problem, it's even worse that the stigma is coming from within, if it's from outside, it's something we can all handle, but when it's coming from same members of the same community then it becomes a major problem. - LA1

This difficulty is made even worse by the awareness of more privileged community members that they are safer from arbitrary arrests and the usual discriminations and threats that more vulnerable community members have to deal with, almost daily. Eventually, this segregation can lead to resentment within the community against the more privileged community members. According to LA1, this resentment is a situation that is common in the Lagos communities:

Those who are on the island – or who are of higher socio-economic status – would want to believe that, because of how far they've gone or the level they've attained, they would pull some stunts in the street and get away with it; society wouldn't really frown at them. And then those who are not well-to-do would feel cheated because, if they try to do that, they get caught up by the law. And then we get to hear things

... from those who are well to do, say: 'When bigger people talk or when we express ourselves, lesser people should sit down'. And then you sort of have this sense of divide between the community members like, 'Okay, you are supposed to, like, have our backs if there's any attack on any member of the LGBT community who is on the lower class', [but instead] they get even more stigmatised by those who are of the upper class. - LA1

To avoid these confrontations and expectations from the community, more privileged members of the community are less likely to access legal or advocacy services provided by the NGOs and other community-based organisations, preferring to use private means to handle encounters with the law – if any. LA2, who works for an organisation in Lagos, explains that he found it puzzling that the services the NGO provided were generally accessed by middle and lower classes and not wealthier citizens. This situation prompted him to wonder: 'Is it that there is no LGBT person who is actually wealthy?' or if there were, then where do they get their legal advisory or reproductive health services?⁴² He then reflects that, in any case, he had never 'seen any wealthy personality being really like raided or molested in public.' Other than their desire to avoid class confrontations, it is also arguable that, for these more privileged community members, it is understood that the work of advocates will not give them any more significant protection than that already conferred on them by virtue of their status and influence.

Similar concerns are noted by the advocates in Port Harcourt. According to PA3, the classism within the community is 'inevitable' and 'whether you like it or not' the advocacy programmes are often just accessed and promoted by 'young ones that don't have anything doing'.⁴³ The workaround in PA3's organisation is to go with the dynamics of class rather than fight against it:

In our own organisation, what we try to do is, we try as much as we can to get peer educators in that world and we also get peer educators in this other world. You can't get a peer educator that is selling pepper in the streets to go and meet a peer that is a banker. Or you get a peer educator that lives in slum and... you expect him to meet peers that are working in Shell [petroleum company]. It's not possible. What we do is, we try to get peer educators in that class because that's the only way you can reach them. – PA3

Classism within the sexual and gender minorities community in Nigeria is not exceptional. It is, in fact, a mirror of the larger classism in the Nigerian society. As such, class identity has more potency than sexual identity, and it is not unusual for a wealthy gay person to feel they have more in common with – and feel more affinity towards – heteronormative members of the upper class, than with other gay persons of a poorer economic status. As PA2 notes, some

⁴² Interview with LA2.

⁴³ Interview with PA3.

of his middle-class gay friends would not 'come around any other person that they believe is not of their class' and could not understand how he coped with working with people from poorer backgrounds.⁴⁴

4.5.3.2 Engaging mainstream advocacy networks

Programming for power dynamics in human rights advocacy requires bridging the chasm created by heteronormativity and engaging with other human rights advocates who also face the challenges caused by power dynamics in their work for the rights of other vulnerable Nigerians. On both sides of the divide, the construction and execution of the Nigerian socio-political system means that the poorest heterosexual and homosexual persons suffer the most severe social exclusions while the richest enjoy the most constant access to social goods. Some advocates for sexual and gender minorities recognise this common ground and have suggested the idea of making their programmes more mainstream in focus; for instance, by engaging broader political issues such as land rights, election reforms, and public corruption.⁴⁵ As AA5 notes, advocates for sexual and gender minorities have to move out from silos and start networking with other concerns:

So, as advocates within the community, we need to start building allies and not start working in silos. If they are discussing politics, what are those things that we are looking at? Are we also organising town hall forums for candidates in order to elicit their opinion and their policies towards minorities within the community? If they are discussing issues about housing, housing for all, do we see ourselves within those spaces and talk about: what does housing mean for an LGBT person? If they are discussing about water, what does water, access to water mean for an LGBT person and how do we also enforce that? So, looking at things holistically and building allies that can form a movement, so that, it's not just an LGBT person talking about LGBT issues, you're talking about people who better understand your issue and that can put it in perspective in their own issues. – AA5

AA3 shares MAA's sentiments on mainstreaming and recommends a broader advocacy role:

I think there have been activist movements who have realised that, and believe that the best way they can actually garner support is by mainstreaming their advocacy issues, like instances of rape against girl-child or any kind of abuse against children or women; rights for drug users or persons who inject drugs and the likes. – AA3

However, while the need for this kind of networking and coalition building may be clear in principle, it is much more difficult to realise in practice. For one thing, many organisations –

⁴⁴ Interview with PA2.

⁴⁵ Interview with AA3 and KA3.

and their donors – working for the rights of sexual and gender minorities are still focused on the narrow understanding of that goal, meaning the issues they deal with should be issues that primarily affect sexual and gender minorities in Nigeria as sexual and gender minorities, rather than issues that affect them in any other capacity or identity. And so, from AA3's perspective, the first step is for organisations to abandon the narrow understanding of advocacy and 'come out' to the broader society:

I think first of all, it starts with this LGBT activist movement, coming out to the society. I think we exist to a certain extent in a vacuum. We exist just for the purpose of advancing LGBT issues in Nigeria. But then we forget that there are other issues that, if we decide to latch onto, can help achieve this aim. - AA3

AA3 argued that it was necessary for advocates for sexual and gender minorities to engage other public issues such as constitutional political reforms, corruption, and terrorism. This point on engaging broader social issues is one that will be further discussed in Chapter Five of this thesis. In any case, AA3 noted that organisations like TIERS had started taking early steps towards this broader advocacy:

For example, now, I know TIERS is doing something about inclusiveness in regards to education and general diversity when they did this in collaboration with University of Lagos. They had a symposium of inclusiveness, talking about LGBT at the academic level, invited stakeholders from the University and other persons within the space just so that they can talk about issues that affect LGBT persons and intersectionality of it within the general sphere. – AA3

The converse – and arguable more intractable challenge – is that of getting mainstream advocacy organisations to accept the need for this form of coalition building. While mainstream advocates may recognise the effect of power dynamics within their respective areas of focus, it may be more difficult to get them to recognise the common ground they have with advocacy for sexual and gender minorities and the social exclusion of vulnerable individuals regardless of their gender and sexuality the existing hegemony. This challenge is worsened by the perception that advocacy for sexual and gender minorities is mainly about protecting a right to what is perceived as deviant sexual conduct, rather than about ensuring unfettered access to equal citizenship. According to LA2, one way to start building allies in mainstream advocacy is by teaching them about sexuality and humanising the issues:

A friend asked me once 'Why do you even work in an LGBT organisation? Are you gay?'" I said, 'The truth is I don't necessarily need to be gay to work where I work'. That it's all about humans here that we are talking about' ... The truth is when it comes to sexuality in Nigeria, ... the mainstream doesn't even have that knowledge. ... So, it's until they come to a point of knowledge, then you will now start having allies who can help fight that battle. But, for now, the interest should be more focused on spreading that

knowledge, getting those allies ... So, I think one is: the mainstream first has to be equipped with proper understanding about what sexuality is all about and stop seeing this issue as being demonic. - LA2

4.5.3.3 Funding and availability of resources

Advocates also mentioned the challenge of sourcing for resources to fund 'empowerment' programmes that will boost the relative social and economic status of community members.⁴⁶ Similarly, it was unlikely that donors – especially international donors – would want to fund projects that went out of the general human rights framework and into issues of power, especially in situations where governments are likely to accuse foreign organisations of financing political parties or domestic terrorism. And so, donors are unlikely to fund projects that will involve soft loans or cash transfers to community members for commercial or political use. According to KA2, in Kaduna, at some point the local organisation was compelled to focus on the work the international donor wanted to see, and funding was suspended when the local organisation wanted to implement different ideas of how money should be used to protect the community:

We had to work under them because they provided for us, funding us, and all that. So, we were the ones to do things, but we could not – because we didn't have the funds to go on projects like that. Projects that we wanted to actually embark on, before their funding stopped coming, was just skill acquisition programmes. That was what we wanted to embark on as an organisation for community members.

This situation is made worse by the fact that Nigeria lacks an expressly justiciable⁴⁷ socio-economic human rights framework that could serve as a gateway for social empowerment work by advocacy groups. Instead, one way of mitigating this challenge is for advocates to design programmes that broadly interpret the conventional human rights framework in project

⁴⁶ Interviews with PA3, CK, and AA3.

⁴⁷ The Nigerian Constitution outlines what is generally considered as the basis for socio-economic rights in certain provisions under the heading 'Fundamental Objectives and Directive Principles of State Policy.' Some of the identifiable socio-economic in those provisions include the duties of the government to: provide housing, food, social security (sec 16), ensure work opportunities and satisfactory working conditions, universal healthcare; welfare for the unemployed, young persons and the aged (sec 17), and provide universal education for young persons and literacy programme for adults (sec 18). However, section 6(6)(c) of the Nigerian Constitution limits the courts, 'except as otherwise provided by this Constitution' from examining any 'issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy.' It is, however, arguable that, despite the limiting provision of section 6(6)(c), socio-economic rights are indirectly enforceable in Nigeria on the basis of: (i) an expansive interpretation of the limitation clause - *Olafisoye v Federal Republic of Nigeria* (2004) 4 Nigerian Weekly Law Reports (Part 864) 580 (ii) legislative interventions that trigger justiciability, for instance under compulsory education laws *Attorney-General of Ondo State v Attorney-General of the Federation* (2002) 9 Nigerian Weekly Law Reports (Part 772) 222; and (iii) the incorporation of the African Charter into Nigerian domestic law - *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

designs and pitches to donors. For instance, in considering healthcare services, AA5 notes that the NGO he works for attempts to construct 'health' holistically:

So, for example, if you are talking about health, you are not just talking about health alone, you are talking of the holistic person, the well-being of that person, whether social, whether economic, whether mental, whether physical or any other aspect of that person. You are looking at it holistically and it's more than policy. - AA5

4.6 Summary and conclusion

As noted in Chapter Three, this research seeks to advance a more nuanced advocacy for the protection of sexual and gender minorities in Nigeria, particularly by engaging the realities of hegemonic power dynamics in the Nigerian context. To this end, this chapter discusses and analyses the perception of Nigerian advocates on power dynamics in the enactment and enforcement of the criminalising laws. The chapter also examines how they have responded to it, particularly in their advocacy strategies and programming. In general, the findings in this chapter can be summarised under the following points.

Regarding awareness of power dynamics in the enactment and enforcement of the laws, advocates for the rights for sexual and gender minorities in Nigeria are broadly aware of power dynamics. Their understanding of power dynamics in enforcement of the criminalising laws broadly mirrors the experiences of community members as described in Chapter Three. However, default coordinated responses to the criminalising laws have generally followed the international human rights framework and focused more on the broad – and often abstracted – human rights impact of the laws.⁴⁸

Some of the responses by advocates to the criminalising laws have been concerned with the issue of HIV/AIDS public health and the impact of criminalisation on healthcare. In the process of engaging this aspect, some organisations have been able to obtain cooperation and financial support from the government – and, in some cases, from societal leaders and law enforcement authorities – for their work with sexual and gender minorities, despite the existence of the criminalising provisions. Through this process, they have been able to

⁴⁸ To be clear, this finding does not seek to diminish the role that international human rights laws have played in broadening international jurisprudence in favour of sexual and gender minorities or in promoting and protecting the rights of the community. For example, the early cases of *Toonen v Australia* Communication 488/1992, UN Doc CPR/C/50/D/488/1992 (1994) and *Young v Australia* Communication 941/2000, UN Doc CPR/C/78/D/941/2000 (2003) at the Human Rights Committee (HRC) broadened the anti-discrimination provisions of the ICCPR to include discrimination on the basis of sexual orientation. Similarly, the adoption of Resolution 275 in 2014 by the African Commission on Human and Peoples' Rights has led to a rapid inclusion of LGBTIQ+ issues in the commission's concluding observations, general comments, guidelines and other documents. See African Men for Sexual Health and Rights & Synergia Initiative for Human Rights 'Application of Resolution 275 by the African Commission on Human and People's Rights: A six-year assessment' (2020).

leverage the aims of the state to appear functional as a means of resisting the intention of the state to repress non-hegemonic values. However, while this focus on public health has helped to further advocacy, it is still based on an assumption that political actors are interested in the protection of the health of all citizens rather than on the more realistic assumption that political actors are interested in the sustenance of the existing hegemony through the appearance of public service.

There have been efforts by advocates to address power dynamics by guiding staff and community members on issues of 'respectability', and by implementing programmes to address economic, social, and locational aspects of hegemonic power dynamics in the enforcement of the criminalising laws. However, these responses to power dynamics are, as recognised by the advocates, limited in their capacity and reach. Also, some of the responses are problematic to the extent that they bear the risk of erasing the identities of individuals by fitting them within the hegemonic value system as the price for social inclusion. At the time of this research, there is no evidence of a clear contextual and intersectional strategy on addressing power dynamics on a national scale and the responses so far that attempt to negotiate power dynamics are intuitive and ad-hoc rather than strategic and planned. As such, there is no concrete way of measuring the long-term efficiency of these responses.

Considering the conclusions drawn from this chapter, the next chapter focuses on opportunities for designing strategies that address power dynamics, to complement existing advocacy. These strategies principally focus on linkages between the experience of vulnerable members of the sexual and gender minorities community and the experiences of vulnerable members of the wider society, and how these linkages can help mobilise collective advocacy for the redistribution of social power, and ultimately lead to more protections for sexual and gender minorities in Nigeria.

CHAPTER FIVE: ADVANCING ADVOCACY FOR THE PROTECTION OF SEXUAL AND GENDER MINORITIES IN NIGERIA

5.1 Introduction

In the previous chapters, I examined the history of hegemonic power dynamics in Nigeria from colonial until contemporary times and showed how – at various stages of Nigerian history – the legal system, through the enactment of laws criminalising same-sex relationships, has been used to sustain elite power, promote political homophobia, and reinforce the experience of social exclusion by vulnerable Nigerians. Through these discussions I have illustrated how the concepts of social exclusion, political homophobia, and elite power are reflected in both the enactment of, and the enforcement of laws criminalising sexual and gender minorities. The thesis has also emphasised that while those who fit into the broad identity of sexual and gender minorities are criminalised and discriminated against in the text of the law, in reality, it is often only people who are already socially and economically vulnerable members of society – and who lack the protection of hegemonic power – who suffer the impact of these laws in the expression of their sexuality and gender. I have also discussed how, on the one hand, the human rights advocates' 'default' responses are insufficient in a context where proximity to elite power, and not rights, is the currency of social inclusion and how, on the other hand, the 'material' responses that attempt to engage power dynamics have also proven to be limited or even problematic.

The actual work of engaging power dynamics requires the replacement of abstract and generic human rights language with the concreteness of the 'real' experiences of individuals with composite identities in a society and that this process, therefore, calls for some kind of firmer social and political action. This process is important to the Nigerian context because the dysfunctionality of the Nigerian state would filter the benefit of legal changes to only those who already have some measure of power, and not to marginalised persons, if there are no corresponding changes to the social and political structures. I understand that this pivot to political issues may seem radical in a human rights context in that it veers away from the formal structures of human rights law and discourse, especially where it invokes dangerous ideas of revolutionary conflict, unconstitutional change, and social anarchy. However, in this chapter, I suggest that there are democratic ways in which to engage power dynamics without compromising the safety and welfare of vulnerable individuals and society as a whole. To quote Boyle: 'Social change is not a matter of clever legal argument deployed by elite lawyers,

but rather a process of democratic organisation and mobilisation in which law will play a necessary part'.¹

With this understanding in mind, this chapter answers the research sub-question: *What are the linkages between dominant power in the criminalising laws and wider social exclusions in Nigeria and how can awareness of these linkages improve advocacy for sexual and gender minorities?* To answer this question, this chapter draws out linkages between the criminalisation of same-sex relationships, the overall entrenchment of dominant power systems, and the existence of wider social exclusions in Nigeria. It formulates ideas of how advocacy in Nigeria can utilise these intersections for the better protection of sexual and gender minorities.

Furthermore, this chapter considers the possibility of democratic organisation and intersectional mobilisation in Nigeria as the most effective way of protecting sexual and gender minorities in Nigeria – that is, through the protection of every other vulnerable group currently excluded from social goods under the current hegemony. This chapter makes the argument that there is a significant correlation between overall economic welfare of society and increased protection for sexual and gender minorities. The chapter also suggests that by intersecting their work with the marginalisation of other identities in Nigeria, advocates for the rights of sexual and gender minorities in Nigeria can help to create or accelerate this democratic organisation and mobilisation.

This chapter first examines the linkages between the criminalisation of same-sex relationships and wider social exclusion in Nigeria, and draws parallels between the treatment of vulnerable sexual and gender minorities and the treatment of other vulnerable Nigerians. Further to this, I subsequently examine correlations between wider social equality and protection of sexual and gender minorities. The chapter concludes by proposing a number of opportunities for complementing existing advocacy strategies and suggests how these will accelerate and better ensure the protection of sexual and gender minorities in Nigeria.

5.2 Linkages between the criminalisation of same-sex relationships and wider social exclusion in Nigeria

The experiences of self-identified gay men, bisexual men, and men who have sex with men (MSM) in Nigeria, as described in Chapter Three, are an indicator of how power dynamics in the country interact with and have an impact on law enforcement. However, these experiences are not unique to sexual and gender minorities and are, in fact, common to the everyday existence of other Nigerians who have been criminalised under other kinds of laws. In

¹ J Boyle *Critical legal studies* (1992) xix, quoted in MDA Freeman *Lloyd's introduction to jurisprudence* (2008) 1219.

essence, vulnerable people living under the laws criminalising same-sex relationships in Nigeria have the same socio-economic, political, and legal challenges as vulnerable people who live under other laws designed to criminalise their identities and behaviours.

As discussed in Chapters One and Two, contemporary hegemonic power dynamics in Nigeria are a legacy of colonial rule. The principal aim of colonial rule was to ensure that society is stable enough for the territories to be a continuing source of raw materials and cheap labour, hence the use of criminalisation as a default tool of social control.² Over the years, colonial rule has mutated into elite rule, but the philosophy has not changed.³ Just as it would have been ineffective to ask the colonial governments to simply respect and protect human rights without delegitimising the nature and distribution of power in the colonial state itself, it is ineffective now to advocate for the governing elite to respect human rights without first delegitimising the current elite-based hegemony.

From the discussions in Chapters Two and Three, it is evident from the enactment and enforcement of the federal and state laws criminalising or discriminating against same-sex relationships and non-heteronormative sexuality and gender identity ('the criminalising laws') in Nigeria that these criminalising laws are used to achieve social control in three ways. First, criminal law serves as a tool of political homophobia to distract from actual issues of legitimacy, particularly during times of transition. This use of criminal law is also reflected in the wider use of moral panics to justify the criminalisation of certain types of 'petty offences' as will be discussed below. Second, through policing, criminal law serves as a filter for keeping under control people below a certain economic and social status. This filtration system applies to sexual and gender minorities as well as the wider population. This use of policing also provides law enforcement officials with self-enriching opportunities to extort the most vulnerable members of society. Third, also through policing, criminal law serves as a measure of hegemonic morality by keeping in check those who do not meet the requirements of 'respectability'. The impact of this kind of policing applies also to sexual and gender minorities as well as the wider population. In essence, criminalisation continues to be a tool of social control and, ultimately, social exclusion in modern Nigeria.

As such, the criminalising laws – as they currently exist in Nigeria – should be approached by advocates for sexual and gender minorities as tools of social control by a dominant class imposing their idea of social order for the ease of exploiting the economy. The criminalising laws should not be mistaken as the misguided outcome of a democratic process

² A Osita-Njoku 'The political economy of development in Nigeria: From the colonial to post-colonial eras' (2016) 21 *IOSR Journal of Humanities and Social Science* 11.

³ RL Sklar 'The nature of class domination in Africa' (1979) 17 *Journal of Modern African Studies* 531; L Diamond *Class, ethnicity and democracy in Nigeria* (2015) 31; C Ake 'The African context of human rights' (1987) 34 *Africa Today* 6.

expressing the will of a general population. Beyond the criminalisation of sexual and gender minorities in Nigeria, the broad use of criminal law as a tool of hegemonic social control is also evident in the enactment of victimless crimes and petty offences and in the use of serious criminal laws. As is discussed in this section, the former creates a system of moral panic and social segregation and the latter targets the social and economically vulnerable while protecting the privileged. In the following sub-sections, I discuss these two linkages between wider social exclusions and laws criminalising same-sex relationships in more detail.

5.2.1 The enactment and enforcement of petty offences laws

The laws criminalising same-sex relationships in Nigeria are similar in philosophy, enactment, and enforcement to the 'petty offences' laws in Nigeria. They are both used to spread and enforce wider moral panics and reinforce social segregation. This point is captured by the African Commission on Human and Peoples' Rights (African Commission) definition of 'petty offences' in its 'Principles on the decriminalisation of petty offences in Africa':⁴

[M]inor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment, often for failure to pay the fine. Examples include, but are not limited to, offences such as being a rogue and vagabond, being an idle or disorderly person, loitering, begging, being a vagrant, failure to pay debts, being a common nuisance and disobedience to parents; offences created through by-laws aimed at controlling public nuisances on public roads and in public places such as urinating in public and washing clothes in public; and laws criminalising informal commercial activities, such as hawking and vending. Petty offences are entrenched in national legislation and, in most countries, fall within the broader category of minor offences, misdemeanours, summary offences or regulatory offences.

In Nigeria, section 404(e) of the Penal Code and sections 249-250 of the Criminal Code⁵ broadly criminalise: 'common prostitute'; 'every person' for various conduct or activities including being 'vagabonds'; 'behaving in a disorderly or indecent manner'; 'loitering and persistently importuning or soliciting'; 'wandering ... to beg or gather alms'; and 'playing at any game of chance for money ... in any public place'. Also, all persons engaged in these acts can be deemed by an arresting officer to be 'idle and disorderly persons' or deemed 'to be a rogue and vagabond'.⁶ By using such broad terms that are dependent on the subjective

⁴ 'Principles on the decriminalisation of petty offences in Africa' (2017) 9 available at https://www.achpr.org/public/Document/file/English/principles_on_the_decriminalisation_of_petty_offences_efpa.pdf.

⁵ Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004 ('Criminal Code') sec 249 - 250; Penal Code (Northern States) Federal Provisions Act Cap P3 Laws of the Federation of Nigeria 2004 ('Penal Code') sec 404(e).

⁶ In 1989, the then military government enacted a military decree, now the Minor Offences (Miscellaneous Provisions) Act of 1989, abolishing 'the offence of wandering (by whatever name called)' and 'any other offence by reason only of his being found wandering'. However, under the current democratic constitution, military laws

perception of an arresting officer, these laws confer wide discretionary powers on the police to monitor and assess citizens, thus cementing the function of the police as the gatekeepers of hegemonic values and, implicitly, criminalising a vague and amorphous aggregate of *conduct and identities* that are socially considered disrespectful.⁷

For instance, according to a media report, on the night of 19 April 2019, municipal officials in Abuja arrested 34 women for allegedly working as strip club dancers – even though this activity was not a specified crime under any law – two weeks after arresting up to 70 women from different locations in Abuja on similar charges.⁸ However, the petty offences in the Criminal and Penal Codes are wide enough to cover any kind of action and persons deemed undesirable by law enforcement authorities. As such, these kinds of raids are a common practice in Abuja and in many parts of Nigeria. In most instances, just as with the case of profiled sexual and gender minorities, the victims simply pay the extortion amount and they are released. However, in this particular incident, some of the victims sued the police and the municipal officials for a violation of their human rights and the court awarded damages in their favour.⁹

Similar to the incident described above, in May 2019, the Nigerian secret police – Department of State Security (DSS) – arrested 59 alleged sex workers in Calabar, including 43 women and 16 men, during a midnight raid.¹⁰ Even though the DSS claimed that the raid was meant to rescue underaged girls from a sex-trafficking cartel, these alleged victims of the cartel were treated as criminals and charged to court.¹¹ Despite the fundamental rights provisions of the Nigerian Constitution,¹² the police and other law enforcement continue to use these laws in the secure knowledge that: (i) courts are ultimately powerless to enforce decisions that do not meet executive government approval; and (ii) the greater majority of

are subject to constitutional division of powers, and military laws that once applied across the country are now limited to federal jurisdictions only while states can now legislate their own criminal laws. In reality, however, both the state and federal government continue to prosecute ‘minor offences’ under the Criminal and Penal Codes.

⁷ A Gupta ‘This alien legacy: The origins of “sodomy” laws in British colonialism’ (2008) 26 – 27.

⁸ ‘Officials raid Abuja night club, arrest 34 strippers’ (19 April 2019) <https://www.premiumtimesng.com/regional/north-central/326152-officials-raid-abuja-night-club-arrest-34-strippers.html> (accessed 8 May 2020); ‘Again, police raid Abuja clubs, arrest 70 women’ (28 April 2019) <https://www.premiumtimesng.com/news/headlines/327355-again-police-raid-abuja-clubs-arrest-70-women.html> (accessed 8 May 2020).

⁹ ‘Nigerian court rules against arrest of sex workers’ <https://pettyoffences.org/nigerian-court-rules-against-arrest-of-sex-workers/> (accessed 8 May 2020).

¹⁰ ‘DSS arrests 59 commercial sex workers in Calabar’ (4 May 2019) <https://punchng.com/dss-arrest-59-commercial-sex-workers-in-calabar/> (accessed 8 May 2020).

¹¹ As above.

¹² Nigerian Constitution sec 40 provides for the right to peaceful assembly and association and sec 41 provides for the right to freedom of movement.

victims do not have the economic ability or social status required to pursue litigation as an option.¹³

The inevitable conclusion from this criminalisation of vulnerable identities is the deliberate social control of vulnerable people, that is, people who are already socially excluded in some other ways. As such, the African Commission defines people vulnerable to petty offence laws as:¹⁴

persons who are marginalised in society and the criminal justice system because of their status, or an intersection of one or more statuses. This includes, but is not limited to, the economically or socially marginalised, including persons living in poverty, homeless persons, street children, beggars, older persons, persons marginalised on the basis of sexual orientation or gender identity, key populations, persons with disabilities, street traders and vendors.

This definition captures a fundamental aspect of this research: that 'sexual orientation or gender identity' is one of the several statuses that is used as a basis for criminalising people. In fact, the common denominator between all these statuses is that it applies to people who are 'economically or socially marginalised' – a pointer to power dynamics within a society.¹⁵

To understand the gravity of petty offences and the overwhelming impact of their existence, it must be understood that the 'economically or socially marginalised' in Nigeria are not a small fraction of the population but are an overwhelming majority. As of 2020, over 50% of the population lived in extreme poverty while over 77% lived below the 'Lower Middle-Income Class' poverty line,¹⁶ that is, people living below an amount of \$3.20 per day.¹⁷ As at the third quarter of 2018, Nigeria had a general unemployment rate of 23.1% and a youth unemployment rate of 55.4%.¹⁸ It is hard to imagine that, in a truly democratic country, the majority of the population would support or vote for laws that disproportionately have a negative impact on them in comparison to a minority.

¹³ United States Department of State, 'Country reports on human rights practices for 2016 – Nigeria' (2016) 10. This report concluded that: 'political leaders influenced the judiciary, particularly at the state and local levels...there was a widespread public perception that judges were easily bribed and litigants could not rely on the courts to render impartial judgments. Citizens encountered long delays and received requests from judicial officials for bribes to expedite cases or obtain favorable rulings.'

¹⁴ 'Principles on the decriminalisation of petty offences in Africa' (n 4 above) 10.

¹⁵ 'Principles on the decriminalisation of petty offences in Africa' (n 4 above) 5. Although the African Commission still frames the issue as a rights discourse, rather than an issue of power dynamics, it notes that petty offences 'have a disproportionate impact on the poor and other key populations within the criminal justice system.'

¹⁶ World Bank Group 'Poverty & equity brief – Nigeria' (2020) available at https://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_NGA.pdf (accessed 8 May 2020).

¹⁷ F Ferreira and C Sánchez-Páramo 'A richer array of international poverty lines' (13 October 2017) <https://blogs.worldbank.org/developmenttalk/richer-array-international-poverty-lines> (accessed 8 May 2020).

¹⁸ Nigeria National Bureau of Statistics <https://nigerianstat.gov.ng/> (accessed 8 May 2020).

Petty offences are not a merely a feature of contemporary Nigeria. Instead, they are one of the many colonial legacies that reinforced elite rule in colonial and post-colonial Nigeria. As discussed in Chapter Two, the colonial project established hegemonic principles that resulted in the repression of a poor majority and the protection of an elite. As Gupta wrote: ¹⁹

Vagrancy laws target people whom officials see as wandering or loitering with no purpose. Beyond that, though, they help to rid the public sphere of people not wanted there: to 'alleviate a condition defined by the lawmakers as undesirable,' as one commentator observes. They do not require a 'proscribed action or inaction,' another writes, but depend on a 'certain personal condition or being a person of a specified character.' They make people criminals for what they are, not what they do. And not every 'wanderer' qualifies as a target. Enforcement usually aims selectively at despised groups such as migrant laborers, the poor, the homeless, beggars, travellers, or street children. In Europe for centuries, legal and administrative measures controlling 'vagrancy' criminalized poverty, to keep it and the effects of economic dislocation out of sight.

The view in the quote above that 'not every "wanderer" qualifies as a target' aptly demonstrates the discriminatory aim of these laws and how they perpetuate social exclusions against millions of ordinary Nigerians. This view is shared by the African Commission, which notes the disproportionate impact of petty offence laws on poorer persons in the population:²⁰

Such violations extend to both the enactment and enforcement of criminal laws in relation to petty offences, and to the policing of certain spaces, which actively seek to exclude categories of people from areas of public life, namely the poor. In this regard, laws that criminalise petty offences have the effect of punishing, segregating, controlling and undermining the dignity of persons on the basis of their socio-economic status.

Although the African Commission avoided the directness of denouncing elite power or pronouncing on the legitimacy of existing power systems, its understanding of criminalisation through petty offence laws hint at the power dynamics in society. More importantly, the African Commission also hints at the use of these petty offences to perpetuate elite power by repressing the rest of the population:²¹

The enforcement of these laws also perpetuates the stigmatisation of poverty by mandating a criminal justice response to what are essentially socio-economic issues. In this regard, the criminalisation of petty offences reinforces discriminatory attitudes against marginalised persons. The criminalisation of petty offences contributes to discrimination and marginalisation by criminalising poverty, homelessness and unemployment, and impact the poorest and most marginalised persons in our communities.

¹⁹ Gupta (n 7 above) 26.

²⁰ 'Principles on the decriminalisation of petty offences in Africa' (n 4 above) 4.

²¹ As above.

Similar to the views of the African Commission, a foremost human rights lawyer and activist in Nigeria described the unfairness inherent in the selective enforcement of petty offences in Nigeria:²²

[W]henver rich people were found on the street taking a walk it was said that they were exercising their fundamental right to freedom of movement. But whenever the poor exercise such fundamental right to freedom of movement they were usually arrested by the police who accused them of wandering or loitering.

As the experiences of self-identified gay men, bisexual men, and MSM in Nigeria show, this kind of selective enforcement is present in the criminalisation of same-sex relationships, and its impact on sexuality and gender freedoms. The people who often get arrested by the police under the laws criminalising same-sex relationships would ordinarily have been vulnerable to some of the petty offences as well. This situation could also explain why – as discussed in Chapter Three – the commission of an actual sexual offence is often immaterial to the hegemonic criminal arrest process: the person is already criminalised in some way. These point to the fact that sexuality is, for law enforcement, simply another means for the control of the poor and marginalised, with the focus being on the individual's status rather than a direct concern with the individual's sexuality.²³ If activists and advocates on different issues in Nigeria were to recognise this common ground, there would be potential for a more effective focus on the hierarchies of power within the state and a push to eliminate laws and enforcement processes that are meant to keep the poor in check, including victimless petty offence laws.

5.2.2 The enforcement of serious criminal laws

The enactment and enforcement of petty offences in Nigeria, as discussed above, is deliberately targeted at vulnerable people both by intent and implementation. However, the enactment of serious criminal laws – such as assault, corruption, or murder – can be assumed as intended to apply to everyone in society. Yet, there still exists a considerable level of

²² 'Falana asks police to stop arresting citizens for loitering, wandering' (5 April 2017) <https://www.thisdaylive.com/index.php/2017/04/05/falana-asks-police-to-stop-arresting-citizens-for-loitering-wandering/> (accessed 8 May 2020).

²³ S Jolly 'Poverty and sexuality: What are the connections? Overview and literature review' (2010) 19, the report notes: 'Economic status affects how people negotiate sexuality norms. Poverty can constrain sexual expression. Poverty is one of the structures which regulates people's sexual practices, setting constraints on space, social status, sex to be had, confidence and self-esteem, which in turn will affect leeway for negotiating other structures.'

segregation and discrimination in the enforcement of these laws. While this chapter does not intend a full analysis on law enforcement broadly in Nigeria, existing data on criminal law enforcement in Nigeria show a discrepancy between the effect of the criminal justice system on the privileged and its impact on the vulnerable.

For instance, since money plays a crucial role in access to justice, socially or economically privileged people with the capacity to hire full-time lawyers can exploit almost all the substantive 'rights' and procedural technicalities available in the criminal justice process. Similarly, when it comes to discretionary issues such as bail and sentencing, it is more likely that accused persons who are more entrenched in the 'respectability' hegemonic values are more likely to get a more lenient decision.²⁴

As such, Nigeria has a dysfunctional criminal justice system where a privileged person who has been accused of a serious crime can perpetually delay the judicial process until a favourable political climate arises, while an economic or socially marginalised person can be in detention perpetually while awaiting trial.

In this setting, the police are more likely to serve as guards for the political elite than impartial enforcers of law. As such, fair hearing and access to criminal justice is not considered as a right, but as a privilege that has to be paid for through some demonstration of proximity to elite power. For example, William Chambliss, in discussing a construction of the political economy of crime in Nigeria, describes several scenarios from a study conducted in 1967:

An incoming American who illegally photographed an airport was allowed to go (without even destroying his film), upon payment of \$15.00 to the arresting officer. Six dollars was sufficient for the wife of an American professor to avoid arrest for reckless driving. A young son of a wealthy merchant was arrested on numerous occasions for being drunk, driving without a license, stealing and getting into fights. On every occasion the police returned him to the custody of his parents without charges being filed when the father paid the arresting officer (or the policeman on the desk) thirty to forty-five dollars ... It was said, and research bears this out, that one with money could pay to be excused from any type or amount of crime. Who, then, did get arrested? In general, those who lacked either the money or the political influence to 'fix' a criminal charge.²⁵

He then concludes that crime is, ultimately, 'a matter of who can pin the label on whom, and underlying this socio-political process is the structure of social relations determined by the political economy.' Similarly, in a 1985 study on the Nigerian police, Marenin also observes:²⁶

²⁴ See the argument by Stuntz that 'Criminal law is ... not law at all, but a veil that hides a system that allocates criminal punishment discretionarily.' WJ Stuntz 'The pathological politics of criminal law' (2001) 100 *Michigan Law Review* 505 599.

²⁵ WJ Chambliss, 'Toward a political economy of crime' (1975) 2 *Theory and Society* 160.

²⁶ O Marenin 'Policing Nigeria: Control and autonomy in the exercise of coercion' (1985) 28 *African Studies Review* 80.

The police in their routine work tend to protect the powerful. Police are visible *en masse* during ceremonial occasions when they cordon off VIPs from the common folk; they are assigned to guard the homes of the powerful, government buildings, and act as body guards for important officials. One rarely sees a high-level officer without a police officer. Police are concentrated in urban areas and within urban areas concentrate on patrolling ... the home of indigenous and expatriate elites ... Such practices teach the rank and file who needs protection and who does not, who is entitled to services and whose demand can be rejected.

Despite several attempts at police reforms, nothing has changed significantly over the last fifty years since Chambliss and Marenin made the above observations.²⁷ The continuing lack of political will by successive governments to reform the underlying philosophy of surveillance and repression demonstrated by police activities in Nigeria²⁸ suggests that the corruption in the police system serves the role of safeguarding elite power, and ensuring the unequal application of laws and the social exclusion of vulnerable groups. For instance, in a 2010 report, Human Rights Watch observed that, while police corruption affected everyone, the impact of corruption was felt more by the poor:

Those in precarious economic situations, scraping out a living day to day, are more susceptible to police extortion because of the profound effects that unlawful detention, or the mere threat of arbitrary arrest, have on their livelihoods. The sums regularly demanded by the police also represent a larger portion of the poor's income. Moreover, many Nigerians are simply unable to pay the bribes required for basic police services²⁹

Similarly, in a 2014 report by Amnesty International on the use of torture by the Nigerian Police,³⁰ the organisation noted that, in the instances where people were tortured to extract forced confessions and information from them, or to punish them for alleged offences, the

²⁷ EO Alemika & I Chukwuma *Analysis of police and policing in Nigeria* (2003) available at <http://new.cleen.org/policing.%20driver%20of%20change.pdf> (accessed 14 May 2020); I Chukwuma 'Motions without movement: Report of the presidential committees on police reforms in Nigeria' (2008) 127 available at <http://new.cleen.org/Report%20of%20Presidential%20Committee%20on%20Police%20Reform.pdf> (accessed 14 May 2020).

²⁸ Amnesty International "'Welcome to hell fire" Torture and other ill-treatment in Nigeria' (2014) 45 available at <https://www.amnesty.org/download/Documents/4000/afr440112014en.pdf> (accessed 14 May 2020), which notes, 'In the past 10 years, at least five Presidential Committees and working groups have been set up to make recommendations on reforming the criminal justice system. However, most of the recommendations made by these committees and working groups ... are yet to be implemented by the government'; Bertelsmann Stiftung *BTI 2016 — Nigeria Country Report* (2016) 22, makes a similar comment: 'despite abundant federal reserves and several declarations of intent, ... rebuilding the almost destroyed national police force did not make much progress.'

²⁹ Human Rights Watch "'Everyone's in on the game" Corruption and human rights abuses by the Nigeria Police Force' (2010) 3 - 4 available at <https://www.hrw.org/report/2010/08/17/everyones-game/corruption-and-human-rights-abuses-nigeria-police-force> (accessed 14 May 2020).

³⁰ Amnesty International (n 23) 24.

victims were mostly poor and from vulnerable groups. The unfortunate consequence of this policing system is the overall dysfunctionality of the criminal justice process and, accordingly, diminishing public confidence in the rule of law and in the capacity of the judiciary.³¹

If advocates for the protection of sexual and gender minorities understand the use of elite power in criminal justice and factor these into their work, then it will be expedient that they focus as much on the wider systemic issue as much as they focus on specific criminal justice issues for sexual and gender minorities. The dysfunctionality of the criminal justice process in Nigeria means that sexual and gender minorities who are susceptible to criminalising laws are almost always in the same circumstances as other vulnerable groups. Based on this premise, the next section will consider how advocacy for wider social inclusion in Nigeria can advance the protection of sexual and gender minorities.

5.3 Correlations between the protection of sexual and gender minorities and wider social inclusion

Having considered the linkages between wider social exclusions in Nigeria and the criminalisation of same-sex relationships, there is an implicit conclusion that wider social inclusion in the broader society will lead to increased opportunities for the protection of sexual and gender minorities in Nigeria. By focusing on the goal of fairly distributing power in society through the reconstitution of the dominant hegemony, advocates for the protection of sexual and gender minorities can create an environment where it is easier for vulnerable persons – including sexual and gender minorities – to be better protected in society. In the following sub-sections, I consider two correlations between an increase in wider social inclusion for the majority of people, under a democratic system, and better protections for sexual and gender minorities. These are:

- (i) an increase in the general experience of democratic freedoms; and
- (ii) an increase in the general experience of socio-economic empowerment and socio-economic equality.

5.3.1 Democratic freedoms and social inclusion

Democracy continues to remain a problematic concept in theory and there are various approaches that can be taken on its meaning and implications.³² However, it is not contested that a democratic society offers the highest level of freedom to citizens in comparison with other forms of government. Consequently, it is also understood that there is a correlation

³¹ White Paper on the 2007 Presidential Commission on Reform of the Administration of Justice in Nigeria; Nigerian Bar Association 'Practical steps to reforms of the administration of justice in Nigeria' (2016).

³² SM Lipset & JM Lakin *The democratic century* (2004) 19.

between the existence of high levels of freedom in a democratic society and inclusion for minorities. As such, the greater the level of democratic freedom available to dominant majorities, the more opportunities there will be for minorities to be legally included in the enjoyment of those freedoms.³³ This reasoning is supported by a 2018 study by the Williams Institute, which found a strong correlation between social acceptance and legal inclusion of LGBT persons.³⁴ This study concluded that the greater the freedom of the press and the stronger the rule of law, the stronger the relationship between social acceptance of LGB persons and legal inclusive-policies. Overall, the study emphasised the importance of a functional democracy to more legal inclusiveness:

In democracies, acceptance has a strong association with legal inclusiveness. In anocracies, the association is weaker and the level of legal inclusiveness is not likely to be high even as acceptance increases. Within autocracies, social acceptance has no association with LGB inclusion.³⁵

While the Constitution of the Federal Republic of Nigeria (Nigerian Constitution) conceives of Nigeria as a democratic country,³⁶ the reality of governance is that of an anocracy. An anocracy can be described as a system of government that is neither pure democracy nor pure dictatorship,³⁷ or a 'a regime that permits some means of participation through opposition group behaviour but that has incomplete development of the mechanisms to redress grievances.'³⁸ Indeed, since 1999, Nigeria has operated under a Constitution that provides for fundamental rights, periodic elections, and an independent judiciary.³⁹ However, from a Critical Legal Studies perspective, the Nigerian Constitution has to be considered first as a literal military enactment,⁴⁰ as a document for safeguarding the established political system

³³ Considering recent trends in global politics where democracy has led to populism and even the promotion of hate speech, it is understood that no system is fully free of discriminatory influences. However, it is arguable that the free exchange of ideas, along with more investment in public education, will allow minorities (including sexual and gender minorities) more opportunity to advocate their causes.

³⁴ AR Flores & A Park 'Polarized progress: Social acceptance of LGBT people in 141 countries, 1981-2014' (2018) 1 - 2. The report defines acceptance as 'the extent to which LGBT people are seen by individuals in society in ways that are positive and inclusive', including opinions about LGBT people and positions on LGBT policy. Legal inclusion is defined as 'the extent to which a country's legal standards recognize and protect the rights of LGB people'.

³⁵ As above.

³⁶ Constitution of the Federal Republic of Nigeria ('Nigerian Constitution') sec 14(1).

³⁷ JR Vreeland 'The effect of political regime on civil war: Unpacking anocracy' (2008) 52 *Journal of Conflict Resolution* 401.

³⁸ PM Regan & SR Bell 'Changing lanes or stuck in the middle: Why are anocracies more prone to civil wars?' (2010) 63 *Political Research Quarterly* 747, 749.

³⁹ Nigerian Constitution secs 6, 14, 17, and 33 - 43.

⁴⁰ The Nigerian Constitution was enacted by a military decree, Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 of 1999.

that continues to protect elite interests through the expansive nature of executive powers,⁴¹ the non-justiciability of socio-economic rights,⁴² the unilateral control of the army and police by the executive without legislative oversight,⁴³ and the limited extent to which the ordinary voters are able to participate in policymaking.⁴⁴ These constitutional flaws are buttressed by the real day-to-day use of the military to suppress protests,⁴⁵ laws that gag and limit free expression⁴⁶ and, of course, the retention of oppressive colonial criminal laws as discussed above.

According to the 2018 report by the Mo Ibrahim foundation, Nigeria has an overall governance score of 47.9 out of 100, and ranks 33rd out of 54 African countries.⁴⁷ In particular, Nigeria has a score of 46.4/100 in the category 'Safety and Rule of Law' and 53.2/100 in the category 'Participation and Human Rights'.⁴⁸ In a similar conclusion, the *Economist's* 2019 Democracy Index scores Nigeria 4.12 out of 10, with a score of 3.33/10 in political participation and 4.41/10 in civil liberties.⁴⁹ Clearly, there is a broad limit to democratic freedom in Nigeria which makes it a difficult environment for the negotiation of rights claims. While an increase in overall democratic freedoms does not automatically guarantee social acceptance and legal inclusion of sexual and gender minorities, the existence of a restrictive and anocratic political environment makes it difficult for ideas of human rights, the rule of law, and the independence of the judiciary to blossom and enable an environment for the protection of sexual and gender minorities.

5.3.2 Socio-economic empowerment/equality and social inclusion

The correlation between an increase in the wider socio-economic empowerment/equality and better protections for sexual and gender minorities can be considered under the headings of:

⁴¹ For instance, the Nigerian Constitution sec 6(6)(d) limits the judiciary from hearing 'any action or proceedings relating to any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law', which has the effect of preventing litigation to address and ensure accountability for decades of oppressive military laws and policies.

⁴² Nigerian Constitution sec 6(6)(c).

⁴³ Nigerian Constitution sec 215, 216 & 218.

⁴⁴ Nigerian Constitution sec 153 establishes a number of appointive 'executive' bodies that do not have legislative oversight and make or advise the presidency on issues such as the economy, security, salaries of public officials, and the civil service.

⁴⁵ D Searcey & E Akinwotu 'Nigeria says soldiers who killed marchers were provoked. Video shows otherwise' (17 December 2018) <https://www.nytimes.com/2018/12/17/world/africa/nigeria-military-abuses.html> (accessed 15 May 2020).

⁴⁶ A Ewang 'Nigeria's wavering commitment to freedom of expression' (28 June 2019) <https://www.hrw.org/news/2019/06/28/nigerias-wavering-commitment-freedom-expression> (accessed 15 May 2020).

⁴⁷ Mo Ibrahim Foundation '2018 Ibrahim Index of African Governance: Snapshot: Nigeria' (2016) 4.; Mo Ibrahim Foundation Ibrahim Index of Africa governance: detailed methodology (2018) 6.

⁴⁸ As above.

⁴⁹ The Economist Intelligence Unit 'Democracy index 2019: A year of democratic setbacks and popular protest' (2019) 22.

(i) utilising the economics of sexuality; (ii) influencing liberal social attitudes; and (iii) creating an enabling environment for a rights-based advocacy.

5.3.2.1 The economics of sexuality

Under an elite-based system of hegemonic power, legal and other systems are used to create and maintain structures that heighten socio-economic inequalities. There is, therefore, an eventual disparity in the socio-economic ability of individuals in the society which, in turn, reinforces social exclusion and prevents vulnerable persons from self-actualising or even negotiating improved structures. This interaction between socio-economic ability and social inclusion is very evident when applied to aspects of sexuality and gender.⁵⁰ For instance, the economy and the ability to participate in it are often defined in heteronormative ways that exclude sexual and gender minorities who do not have existing economic privileges;⁵¹ people with a higher level of economic ability often have a higher capacity to negotiate sexuality norms;⁵² and people with less economic ability are susceptible to or affected by violations of sexual and gender rights.⁵³ As the report by Jolly explains:⁵⁴

Economic status affects how people negotiate sexuality norms. Poverty can constrain sexual expression. Poverty is one of the structures which regulates people's sexual practices, setting constraints on space, social status, sex to be had, confidence and self-esteem, which in turn will affect leeway for negotiating other structures.

As discussed above, the majority of the Nigerian population either lives in extreme poverty or in some kind of poverty. This economic context, where most of the population do not enjoy socio-economic rights, implies a weak social and legal environment for the use a rights-based approach to negotiate, influence, and shape social attitudes and legal norms on sexuality. However, as the interviews in Chapters Three and Four demonstrate, even within this hostile environment, those who are fortunate enough to earn an above-average income, or those who have some other means of economic ability are more likely to reside in locations with relatively liberal attitudes towards sexuality, and have daily interactions with neighbours and law enforcement officers who respect their privacy and other rights. It is, therefore, important for

⁵⁰ H Armas 'Whose sexuality counts? Poverty, participation and sexual rights' (2007) Institute of Development Studies, Working Paper 294; K Bedford & J Jakobsen 'Towards a vision of sexual and economic justice' (2009) 4 *New Feminist Solutions Series* 1; S Jolly 'Poverty and sexuality: What are the connections? Overview and literature review' (2010); P Oosterhoff, L Waldman, & D Olerenshaw 'Literature Review on Sexuality and Poverty' (2014).

⁵¹ Jolly (n 50 above) 6.

⁵² Jolly (n 50 above) 9.

⁵³ Jolly (n 50 above) 17 - 19.

⁵⁴ Jolly (n 50 above) 19.

advocates for the protection of sexual and gender minorities in Nigeria to understand that an intersectional and widespread advocacy for – and improvement of – socio-economic equality in Nigeria will create opportunities for the protection of sexual and gender minorities. These opportunities can manifest in two principal ways: (i) by fostering liberal social attitudes; and (ii) by creating an appropriate environment for rights-based advocacy.

5.3.2.2 Liberal social attitudes

It is clear that sexual and gender minorities in Nigeria who have a higher level of socio-economic ability are able to negotiate existing systems of power and become insulated from the legal impact of the criminalising laws. As such, as discussed in Chapter Four, advocates have tried to create and implement programmes for boosting the socio-economic ability of their community members. Unfortunately, these projects cannot be scaled up to a national level without access to significant financial and other resources, and without being able to reach out and connect with every person that identifies as a sexual or gender minority in Nigeria, a situation that would also require people who are willing to publicly identify themselves. Therefore, the better and more practical alternative to focusing *only* on the socio-economic empowerment of sexual or gender minorities is to also focus on the constitutional level socio-economic empowerment and equality of *all* citizens, with the knowledge that the success of this campaign will also increase space for liberal social attitudes and create an environment for inclusive legal norms. Indeed, existing research suggests that there is a strong correlation between (democratic) countries that have a high GDP *per capita* and the level of inclusion for sexual and gender minorities. For instance, according to 2018 findings from a study conducted by the Williams Institute:⁵⁵

Inclusion is strongly correlated with GDP per capita ... There is also good reason to expect that countries with higher GDP per capita will be more accepting of LGBT people and more likely to pass laws ensuring rights for LGBT people. Therefore, we emphasize that this finding represents a strong correlation, or statistical association, that will require further research to assess how much reflects a causal relationship between inclusion and higher GDP per capita.

Clearly, there is no direct causality between improved socio-economic empowerment or equality and automatic acceptance of sexual and gender minorities. Nevertheless, there is a strong enough correlation between these two that it suggests the need for engagement with the issue by advocates.

⁵⁵ MVL Badgett, A Park, & A Flores 'Links between economic development and new measures of LGBT inclusion' (2018) 1.

It is important to emphasise that this economic correlation also interacts with the kind of power dynamics existing within the relevant society. It is not sufficient, for example, that a country has a large economy or a high GDP per capita on paper, there must also be a *real* socio-economic equality in the sense that economic power is diffused and not concentrated in an elite, and access to social goods are not determined mainly by proximity to centres of power. For instance, a thriving economy within an autocratic state, such as we have in Saudi Arabia, Russia or China – all of which still maintain a hegemonic system for a political elite – will not directly or indirectly correlate with the protection of marginalised groups.

A society with a diffused distribution of economic participation and ability also provides the ability and space for people to self-actualise their identities, and to negotiate with the systems and structures of the state for increased social inclusion. Just as importantly, there will be a consistent feedback loop between inclusion and socio-economic equality: the more economically empowered a society is, the more inclusion it allows and the more inclusion a society allows, the more economically empowered it becomes. As the report by the Williams Institute notes:⁵⁶

The findings here suggest that passing laws to recognise the rights of LGBT people in participation in the marketplace, families, and important institutions may have positive effects on the economy. Also, efforts to improve public attitudes toward LGBT people may have positive effects on the economy, either alone or in combination with legal rights.

5.3.2.3 Better environment for rights-based advocacy

Another positive effect of increased socio-economic empowerment and socio-economic equality is the creation of an appropriate and effective legal environment that facilitates rights claims and a rights-based advocacy. In a thriving and equal-opportunity economic environment, commercial and social enterprises require the freedom to contract, the independence of a judicial system, and widespread respect for the rule of law. While these structures are often set up to achieve economic goals, they are also crucial elements in a human rights discourse and for the creation of an enabling environment to advocate rights claims for vulnerable groups, including sexual and gender minorities.⁵⁷

⁵⁶ Badgett et al (n 55 above) 11.

⁵⁷ A Jjuuko 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in Common Law Africa' unpublished LLD thesis, University of Pretoria (2018) section 6.2.4. According to Jjuuko, 'Since the economy influences the way the law operates, economic factors need to be taken advantage of if LGB [strategic litigation] is to stimulate the creation of the necessary social change. It is therefore suggested that LGB activists do the following to take advantage of the prevailing economic factors: file more LGB [strategic litigation] cases in countries that are rapidly developing economically, and prioritise economic empowerment of LGB persons'.

Under the international human rights system, this particular point is recognised in the idea that human rights are indivisible, interdependent, and interrelated and the effectiveness of any one right is also dependent on the observance of other rights.⁵⁸ Consequently, in a political and legal system where socio-economic conditions are unequal and the majority of the population are socially and economically marginalised, a rights advocacy for sexual and gender minorities will have little or no success. Conversely, in a political and legal system with more socio-economic equality, rights advocacy for sexual and gender minorities will have a higher chance of success. In other words, focusing on a rights-based advocacy for sexual and gender minorities without having conducted an assessment of and, if necessary, renegotiation of the existing socio-economic conditions amounts to placing the proverbial cart before the horse.

In summary, the effectiveness of any rights-based advocacy requires the indivisibility of human rights⁵⁹ and arbitrary criminalisation is often made effective by limitations on the 'social and economic' rights of those most affected by the criminal laws. There is, as such, an interactive loop between socio-economic conditions and civil and political repression, and this loop should be engaged with by advocates for a more effective and intersectional advocacy that protects sexual and gender minorities.

5.4 Opportunities for advocacy

Considering the foregoing analysis, advocates for the protection of sexual and gender minorities in Nigeria can effectively engage hegemonic power dynamics and focus on the improvement of wider democratic freedoms and socio-economic equality by:

- (i) emphasising the role of power dynamics in human rights conversations and discourse;
- (ii) forming alliances with mainstream organisations to address democratic freedoms and socio-economic empowerment and equality; and
- (iii) designing and implementing nationwide collaborative strategies that focus on the economic development of sexual and gender minorities in Nigeria.

5.4.1 Emphasising the role of power dynamics in human rights conversations

Based on the discussion in Chapter Four, it is evident that the predominant – and default approach – currently adopted by advocates in Nigeria is a focus on the respect and protection of the individual rights of sexual and gender minorities in the country. This approach is used in awareness raising campaigns, strategic litigation, publication of reports, and presentation

⁵⁸ 1993 Vienna Declaration and Programme of Action, para 5.

⁵⁹ H Armas (n 50 above) 3.

of statements to international human rights bodies. While there is significant value to this approach, it has not yielded progress for the movement in Nigeria. Contextually, it is arguable that it has been counterproductive as indicated in the background to this thesis in Chapter One.

However, advocates for sexual and gender minorities in Nigeria can mitigate hostile reactions and win a new audience within the country by emphasising the role of power dynamics during these human rights campaigns. Issues such as the unequal enforcement of criminalising laws, in such a way that it affects only the socio-economically marginalised members of the community, can strike a resonance with, and yield a more sympathetic response from similarly affected communities in Nigeria. This perspective is expressed in the recommendations of a study on sexuality and poverty in Rwanda, in which advocates are advised to 'consider framing LGBT issues in terms of inclusion and non-discrimination rather than individualised human rights and freedoms'.⁶⁰ Advocates can also educate citizens, not just on individual rights, but also on the fact that in a society that is as highly unequal as Nigeria is, and where few people have access to social goods, only those who have resources will be able to take advantage of benefits under the law, whether or not the law gives rights to sexual and gender minorities.

Also, by emphasising power dynamics in human rights reports and petitions, international organisations and other stakeholders can develop a better grasp of the root causes, and of the actual scope of violations. For instance, when drafting reports to the African Commission, a typical NGO statement on the situation of sexual and gender minorities can be phrased in a way that emphasises power dynamics. As such, advocates can avoid wording statements like this:

In 2016, human rights organisations documented and reported several human rights violations by state and non-state actors in Nigeria based on the real or imputed sexual orientation and gender identity of the victims.

The above statement has a 'generic' human rights assessment on the marginalisation of sexual and gender minorities. Instead, advocates can adopt a wording that looks like this:

In 2016, human rights organisations documented and reported several human rights violations by state and non-state actors in Nigeria *against socially and economically vulnerable persons* based on the real or imputed sexual orientation and gender identity of the victims.

⁶⁰ P Haste and TK Gatete 'Sexuality, poverty and politics in Rwanda' (2015) Institute of Development Studies, 131 Evidence Report 5.

While this may seem a small change, it can help to spotlight the actual problem of social and economic inequality. By factoring power dynamics into human rights statements, advocates can use their platforms to call the attention of human rights bodies to the systemic violations of the economic and social rights of their community members and not just inform human rights bodies on violations of individual civil and political rights. Other than gaining a sympathetic audience and being more accurate about the scope of violations, placing emphasis on power dynamics also advances the goal of advocacy from mere legal reform to actual social transformation. For example, by way of analogy, Sherry Wolf observes that the focus on marriage law reform by advocates in the United States falls short of systemic social transformation.⁶¹

First, gay marriage is a reform. Like all reforms under capitalism, it leaves the structure of the system intact while alleviating a grievance--in this case, the denial of both material benefits and the desire to have LGBT relationships acknowledged as equal to those of heterosexuals. Like the demand for unionisation, under which the terms of workers' exploitation are renegotiated--with workers gaining higher wages and benefits, but not eliminating the power of bosses--equal marriage would end some discrimination without eliminating oppression altogether.

By framing the conversation around power dynamics and highlighting the role of elite power and proximity to elite power, advocates can begin to raise consciousness about issues of social justice. Such conversations can help to stimulate and deepen conversations in Nigeria around democracy, rule of law, and equality, thereby paving the way for systemic transformation, and also transiting advocacy for sexual and gender minorities into mainstream conversations on elite power and the use of discriminatory laws for social control.

5.4.2 Forming alliances to address democratic freedoms and socio-economic empowerment

While it is possible for sexual and gender minority advocates to also include issues of power dynamics in their programmes, it is imperative that they broaden their platforms by forming alliances with other advocacy groups, social institutions, and other communities, such as the literary and artistic community. Such alliances can also be extended to 'liberal' interests that have demonstrated an interest in investing in democratic freedoms (such as commercial

⁶¹ S Wolf 'What should the LGBT movement fight for?' (21 April 2009) <https://socialistworker.org/2009/04/21/lgbt-movement> (accessed 15 May 2020). See also Y Nair 'Against equality, against marriage' in R Conrad & Y Nair (eds) *Against equality: Queer critiques of gay marriage* (2010) 15 16 -17 where the author notes that 'what appears to be a wish to bestow dignity upon queers is in fact deeply rooted in a fear and loathing of the unmarried, and a neoliberal belief that the addition of private rights tied to the state's munificence will end all social problems.'

businesses and multinationals) as well as ‘conservative’ institutions that have demonstrated an interest in investing in economic empowerment and equality. As Lennox and Waites note:⁶²

[F]orming alliances with cosmopolitan neoliberal business interests might be the most effective strategy to win decriminalisation ... LGBTI people and organisations have never won decriminalisation without support from others, whether from significant voices in the Church of England and political allies like Roy Jenkins, as in England and Wales, or key politicians in the Bahamas, or Nelson Mandela and ANC leaders in South Africa.

As such, there are opportunities for collaboration with other institutions and communities on issues that deal with the enlargement of democratic freedoms and issues that promote socio-economic empowerment and equality. This kind of alliances can also give effect to the advice of the African Commission on addressing ‘the root causes of poverty and other marginalisations’⁶³ rather than continuous criminalisation of petty offences.

Advocates for the protection of sexual and gender minorities can enter into new alliances by integrating other elements of social exclusion into their advocacy, thus indicating a willingness to collaborate with other groups and institutions already working on these issues. The integration of public healthcare into sexuality, as discussed in Chapter Four, is a good reference example. Just as has been done with healthcare, advocates can also integrate other issues of social exclusion, for example access to housing, food, and employment, into the conversations on sexuality and gender.⁶⁴

The formation of alliances can also provide an opportunity for members of the wider society to become educated on the idea that the problems of social exclusions they face – in employment, food, education, housing, healthcare – are the same factors used by law enforcement authorities to persecute vulnerable sexual and gender minorities in Nigeria. By highlighting the role of elite power in the enactment and enforcement of criminalising laws, ordinary citizens can begin to understand that their social exclusions have less to do with the diversity of groups and identities, and more to do with the existence of a political elite and hegemonic power dynamics.

Presently, advocacies and advocacy groups for diverse aspects of oppression, discrimination, and marginalisation in Nigeria are still very compartmentalised, thus hindering the emergence of an effective movement. However, advocates for sexual and gender minorities – as ‘outsiders’ – have the most to lose by this compartmentalisation. As such, they

⁶² C Lennox & M Waites ‘Comparative analysis of decriminalisation and change across the Commonwealth: Understanding contexts and discerning strategies’ in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth* (2013) 534.

⁶³ ‘Principles on the decriminalisation of petty offences in Africa’ (n 4 above) 17.

⁶⁴ H Armas (n 50 above) 3.

can lead the process of building an alliance by showing that there is a common thread of elite power and oppression that runs through the diverse advocacy for women, immigrants, people with disabilities, and children, particularly in terms of how the Nigerian society is politically and economically structured to exclude the majority of people. These alliances can then help to generate and stimulate the critical mass of unified citizens required to exert democratic political pressure for systemic transformation. This strategy assumes that the core interest of other advocacy groups is the promotion of a more equal and beneficial society overall rather than, for example, the promotion of hegemonic values or self-interested career progress through donor funding. In any case, individual advocates on other issues that are demonstrably focused on the bigger picture of socio-economic equality can be mapped and engaged on coalition building.

5.4.3 Designing strategies on the economic development of sexual and gender minorities

As discussed in Chapter Four, advocates in Nigeria have already started engaging issues of economic development for their community members, such as the provision of scholarships and business loans. This approach of economically empowering the community is an important aspect of engaging power dynamics and charting a path for negotiating rights claims, not just in a dysfunctional legal environment, but also in functional legal systems: As Jjuuko observes:⁶⁵

One of the reasons why the marginalisation of LGB persons continues is their failure to economically support themselves, thus remaining economically disempowered and unable to effectively demand their rights. Without economic empowerment, even if all LGB cases were won, people would not be empowered enough to take advantage of the resulting benefits, and the victories and legal changes would largely be in vain. According to Funeka Soldaat of Free Gender in South Africa, ‘Even if you know how the constitution works, you don’t know how to use it to protect yourself. If you don’t have money, you don’t have access to the justice system.’

However, significant challenges to this approach in Nigeria include scale, collaboration, and strategy. In terms of scale, the efforts by advocates are still very local and the resources available can only benefit a few persons at a time – which is an ineffective way to tackle a systemic problem. Instead, advocates need to create nationwide programmes, for instance establishing educational institutions that provide a significant number of scholarships for sexual and gender minorities, or by mapping and initialising a network of friendly commercial and business interests that will provide employment for otherwise marginalised sexual and gender minorities.

⁶⁵ Jjuuko (n 57 above) section 6.2.4.

The effectiveness of such a scaled-up approach requires strategising by, and collaboration between, the different organisations spread across the country. Regarding strategies, these projects can be cooperatively tested first at state levels – for instance in the commercially inclined southern states – and then at regional and national levels. These activities also require donors to spend just as much on empowerment projects as they spend on human rights research, protection, and awareness projects. Donors should be made to understand that direct investments in the economic and social empowerment of sexual and gender minorities are just as important – if not contextually more important – as human rights policy projects.

In essence, an increase in social and economic empowerment for members of the sexual and gender minority, community will be less susceptible to petty offences; gain a higher social status and reputation and thus influence social attitudes; have an increased ability to take advantage of power dynamics to benefit from established rights; and to negotiate or demand the establishment of a systemic foundation that supports new rights claims.⁶⁶

5.5 Conclusions

Over the years, political rhetoric in Nigeria has continued to use political homophobia and laws criminalising same-sex relationships as a tool to justify the social exclusion of sexual and gender minorities in Nigeria. However, in reality, the people who have been most impacted by these laws are those who are already socially and economically marginalised in other ways. This impact on sexual and gender minorities in Nigeria is similar to ways in which vulnerable people in Nigeria are impacted by wider criminalising laws. As such, poorer sexual and gender minorities in Nigeria have more in common with other socially excluded Nigerians than it appears at first glance. Rather than an exceptional exclusion, sexuality becomes one more means through which the Nigerian political elite justifies already existing wider social exclusions. This situation can be contrasted against that of more socially and economically comfortable Nigerians who have better access to public goods – and the protection of rights – irrespective of their sexuality.

Nevertheless – and despite these areas of common ground – the concept of respectable citizenship and its accompanying moral code has ensured that the majority of Nigerians think of the criminalisation of sexual and gender minorities as appropriate, thus reinforcing division between marginalised groups, and creating an exceptionalism against sexual and gender minorities that has so far shaped advocacy responses.

⁶⁶ As above.

However, within the community of sexual and gender minorities in Nigeria, the everyday reality is just as segregated as that of the wider society. Economic and socially privileged members of the community are less susceptible to the effects of criminalising laws while marginalised members of the community often experience the full effects of the law including arrest and imprisonment. Considering this reality, advocates for the protection of sexual and gender minorities in Nigeria must go beyond the focus on individual rights to instead engage with issues of systemic change. This engagement requires that their advocacy activities incorporate issues of democratic freedoms and social inclusion in the wider society as well as issues of socio-economic empowerment and equality. These issues require an emphasis on power dynamics in human rights conversations, the formation of alliances with mainstream organisations, and the implementation of strategies to ensure the economic development of sexual and gender minorities in Nigeria. In this way, advocates for sexual and gender minorities in Nigeria can connect the struggles of their communities with wider social struggles and help to establish a liberal environment that ensures that access to the legal system can be more equally distributed, thereby allowing the human rights system – and consequent advocacy for the specific protection of individual rights of sexual and gender minorities – to thrive.

CHAPTER SIX: SUMMARY AND CONCLUSION

6.1 Introduction

Over the last one hundred years, since the advent of colonial rule in the early 1900s, the Nigerian government has continued to criminalise sexual and gender minorities, with the most recent federal legislation being the Same Sex (Marriage) Prohibition Act of 2013 that prohibits same-sex marriage or other same-sex romantic and emotional relationships, homosexual identity, as well as advocacy and support for these. Over the last decade, originating around 2004 and solidifying in the 2010s, organised advocacy for the protection of sexual and gender minorities has taken shape in Nigeria in response to these laws. This advocacy has adopted the framework of international human rights law on state obligations towards sexual and gender minorities and has adopted methods of strategic litigation, petitions before international bodies, presentation of violations reports to the national human rights bodies, and public engagement on the rights of sexual and gender minorities.

While this approach to advocacy in the Nigerian context has had its successes, the preceding chapters of this thesis have built an argument to support the need to complement existing advocacy efforts focused on sexual and gender minorities through an engagement – not just with the human rights issues – but also with the hegemonic power dynamics that are embedded in the evolution and enforcement of the laws criminalising same-sex relationships in Nigeria. In the process, this thesis has sought to concretise the relationship between the persecution of vulnerable sexual and gender minorities in Nigeria and wider social exclusions affecting a majority of the population.

6.2 Summary of key findings

This research asked the question: *How are the laws criminalising or discriminating against same-sex relationships and non-heteronormative sexuality and gender identity in Nigeria ('the criminalising laws') derived from and enforced for the benefit of dominant power systems and how can advocacy for sexual and gender minorities be improved by an understanding of the linkages?* In the following paragraphs, the key findings of this research are summarised under the headings of the research sub-questions posed at the start of the thesis.

6.2.1 Power dynamics in the emergence and evolution of criminalising laws

In response to the first research sub-question (*How do theories of political homophobia, social exclusion, and elite theory explain the emergence and evolution, over various time periods, of the legal framework criminalising same-sex relationships in Nigeria?*), this thesis relied on

contemporary theories of power dynamics in society with a focus on elite power, political homophobia, and social exclusion to examine the evolution and enactment of the laws criminalising same-sex relationships in Nigeria at four different time periods. Using a Critical Legal Studies approach, this aspect of the research analysed conceptual literature, legal texts, archival records, and media reports to arrive at a response to the research question.

The research situated and discussed theories of power in the context of the legislative criminalisation of same-sex relationships, particularly in the ways the political elite utilised political homophobia to secure its hegemonic interests in socially excluding a majority of the population. From this analysis of the concepts and their application to Nigeria's criminalisation history, the research was able to show that the growth and nature of the Nigerian legal system, including the laws that criminalise same-sex relationships, were principally a product of colonial elitism and the imposition of hegemonic values on the population, with little input and participation by the population. In the instances where it did seem that ordinary people desired the criminalising laws, the research showed that there was a religious elite – working with the political elite – to manage the process. Key findings from the four phases of criminalisation are summarised in the following paragraphs.

During the colonial phase (1914 – 1960), the research showed that, just as the historical introduction of laws criminalising same-sex relationships in England was deeply connected to a hegemonic 'Protestant Christian' morality that sustained the interests of the English royalty, political homophobia was also used as a conscious political strategy – as Bosia and Weiss posited¹ – to advance the interests of the colonial project across all of the British Empire, including in Nigeria. This colonial project also adopted the notion that cultures and societies that did not fit into the Protestant Christian hegemony were 'savage', 'primitive', and 'barbaric'. With this justification, the colonial project could proceed to: (i) undermine and erase existing local norms and values; (ii) introduce British hegemonic ideals to justify British political control; and (iii) establish British political control to secure British commercial interests.

The early post-colonial phase (1960s – 1990s) consolidated and adopted the colonial criminal laws under the governance of an emergent elite (a new crop of educated people in the South and the British co-opted emirates in the North) that had been educated in the hegemonic values of Victorian England. By promoting both a new national identity and the 'respectable' values in which they had been trained, the new elite were able to establish political legitimacy as the 'voice' of the people, thus giving them access to the economic control of the new state. Although, in the decades following independence, the early political elite merged with a new set of military rulers under continuous regime changes, an ideological

¹ MJ Bosia & ML Weiss 'Political homophobia in comparative perspective' in ML Weiss & MJ Bosia (eds) *Global homophobia: States, movements, and the politics of oppression* (2013) 2.

consistency remained that, for instance, resulted in the introduction of colonial sodomy laws into court-martial offences and providing the Supreme Court case of *Magaji v Nigerian Army*² where the court pronounced homosexuality as a 'bestly, barbaric and bizarre offence'.

The adoption of Shari'a laws by twelve out of the thirty-six states in Nigeria sets out the third phase of criminalisation (early 2000s). Throughout the colonial period, hegemonic Islam in Northern Nigeria – which had begun in the early 1800s – had continued to be prevalent, sometimes with the support of the British who used the emirates as a tool of social control. However, it was in the early 2000s that the Northern political elite fused religion into democratic politics and used it as a populist campaign strategy by promising to enact the Shari'a as a state criminal law – including its provision of capital punishment for same-sex acts between men. Even though several 'morality' laws already existed and the promise of Shari'a served no real purpose in terms of social order, the re-criminalisation mantra in this phase involved political homophobia that: (i) appealed to religious sentiment and guaranteed popular support that could be converted into political capital; (ii) distracted from the issues affecting the relevant societies by reframing social and economic problems as moral problems; and (iii) reinforced the political legitimacy of the existing emirates and aristocracy.

The fourth phase of criminalisation (2000s – 2010s) overlaps the third and was marked by a resurgence of political homophobia through Protestant Christian-backed federal and state laws that recriminalised same-sex relationships in terms that included marriage and expressions of sexuality and relationships such as banning 'gay clubs' and 'processions'. Although (unlike the colonial and early post-colonial phases where laws were simply imposed on the population) the civilian leaders claimed that their enactments were an expression of public opinion, there was no popular agitation for these laws, neither was there any 'social problem' that had emerged that required recriminalisation. In fact, the presidency at the time could comfortably claim that there were no gay people in Nigeria. Instead, the recriminalisation was the outcome of cooperation between Protestant Christian leaders and the political elite, ostensibly as a response to events in other countries, but principally as a method of gaining political capital and legitimising the government in the midst of economic and security challenges.

Overall, the research on question one demonstrated four phases in the evolution and enactment of the criminalising laws in Nigeria and how, at these different periods, active elements of power dynamics, particularly political homophobia, elite control, and social exclusion shaped the emergence of these laws.

² *Major Bello Magaji v The Nigerian Army* (2008) 8 Nigerian Weekly Law Reports (Part 1089) 338. Case report available at <https://www.judiciary.gov.ng/cases/magaji-v-nigerian-army-9de3873c-75b9-4be2-86fd-ad9f8ef99708> (accessed 20 July 2020).

6.2.2 Power dynamics in the enforcement of criminalising laws

The research for the second research sub-question (*Using the persecution and prosecution self-identified gay men, bisexual men, and men who have sex with men (MSM) living in urban Nigeria as a focus, how is dominant power dynamics reflected in the enforcement of the criminalising laws?*) employed the experiences of communities directly affected by the existence of the criminalising laws to ascertain how the theories of power discussed under the first research sub-question are reflected in the everyday enforcement of the criminalising laws. For this purpose, field research was undertaken through semi-structured interviews with 24 self-identified gay men, bisexual men, and men who have sex with men (MSM) in four Nigerian cities: Abuja, Kaduna, Lagos, and Port Harcourt. The participants were aged between 20 and 37 inclusive, had varying levels of education (from secondary school certificates to postgraduate degrees), were in varying stages of employment or unemployment. Using a thematic analysis process, the data from the interviews yielded elements that supported the involvement of power dynamics under two broad themes of: (i) police persecution; and (ii) police protection.

The theme of 'police persecution' described the method inherent in the 'arbitrary' arrests of vulnerable sexual and gender minorities in Nigeria and the ways in which community members try to evade this persecution. The resulting data indicates that, while the purported goal of legislation is to regulate sexual conduct impartially in line with 'cultural' and 'religious' values, the actual enforcement of the laws focuses on targeting identities that challenge or threaten hegemonic values around masculinity and gender – regardless of whether or not the person has engaged in prohibited sexual conduct. While the legal requirements for criminalisation require that a person should have been involved 'carnal knowledge', 'carnal intercourse', 'entering into a same-sex marriage contract' or similar with another person of the same sex, the experience of respondents indicated that, in reality, the police 'arbitrarily' arrest men whose dressing, gestures, and mannerisms are considered as effeminate or feminine. This situation has resulted in a predictable pattern in the enforcement of political homophobia that community members tend to avoid by 'being careful' in public and performing hegemonic 'respectability'. For those who get arrested, there are four potential possibilities: (i) immediate release after an extortion; (ii) unconditional release; (iii) sustained detention or prosecution; and (iv) a release with a warning or promise to investigate the alleged offence. The outcome of any particular instance of arrest will depend on either the personality of the arresting officer or on the cumulative identity of the alleged offender. Overall, the theme of power and the negotiation of power dynamics – rather than law and legality – plays a prominent role in the persecution of vulnerable sexual and gender minorities in Nigeria.

The theme of 'police protection' described the methods through which the police shield privileged or powerful sexual and gender minorities from arrest and prosecution by respecting

one of or a combination of their economic ability, social status, or spatial location. In these instances, the affected persons do not have to conform to notions of respectability or hide their sexuality from the police in order to be protected. The data from the interviews demonstrated that community members have experienced or observed this form of protection where, for instance, the police can be hired to secure parties and events hosted by community members or refrain from arresting people perceived to have a high economic ability – even when the police have knowledge of or evidence of their same-sex acts. The data also showed that the police are also known to respect social status such as having a professional job, being with or being an older person, having a respected family background, or having social influence. In some instances, the police have been known to ignore ‘celebrities’ who violate the hegemonic constructions of gender and sexuality. Similarly, in the four cities visited, police protection also extended to ‘group’ protection of people who live in high-end city locations, including sexual and gender minorities. In these instances, the research showed that there was less policing of the of residents in such locations, and their privacy was more respected than in other locations.

Overall the experiences of respondent community members in four principal cities in Nigeria demonstrated that there is little or no reliance by law enforcement on the actual content of the criminalising laws. Instead, a system of power dynamics determines who gets prosecuted and who gets protected, thus supporting the discussion in Chapter Two that these laws were enacted as a tool of hegemonic social control.

6.2.3 Advocacy responses to power dynamics

The third research sub-question (*What are the responses by advocates to the criminalising laws and in what ways have these addressed the role of power dynamics?*) followed up on the third by inquiring into the extent to which advocates working on the rights of sexual and gender minorities in Nigeria are aware of power dynamics in the evolution and enforcement of the criminalising laws and the extent to which they have addressed power dynamics in their programming. This aspect of the research explored possible gaps in existing methods of advocacy for sexual and gender minorities in Nigeria by examining advocacy responses to the criminalising legal framework and the extent to which these responses indicate an understanding of, and addressed the experiences by community members of hegemonic power in Nigerian society, as well as the existing challenges to and potential issues that will arise from such an approach.

For this purpose, the research relied on media reports, organisational statements and reports, and on original field research undertaken through semi-structured interviews with 17 respondents, working organisationally or individually, in Abuja, Kaduna, Lagos, and Port Harcourt. Following a thematic analysis process, the data from the interviews – along with

other secondary sources – indicated three issues in the engagement of power dynamics by advocates for sexual and gender minorities in Nigeria: (i) awareness of power dynamics; (ii) responses to and programming for power dynamics; and (iii) challenges to programming. A summary of the key findings on these issues are provided in the following paragraphs.

Regarding awareness of power dynamics in the evolution and enforcement of criminalising laws, the respondent advocates confirmed the experiences of the respondent community members including the dimensions of police persecution and police protection of sexual and gender minorities in Nigeria. Respondents also noted that their experiences, as advocates, with the police has also been shaped by hegemonic power dynamics, with the balance of power often on the side of advocates due to their professional and educational privileges – a situation that has resulted in the police avoiding persecuting advocates with verifiable organisational profiles.

On the issue of responses to and programming for the criminalising laws, the research showed two broad approaches by advocates: what this thesis refers to as a ‘default’ response, and a ‘material’ response.

On one hand, the default response focuses on an umbrella advocacy for sexual and general minorities in Nigeria regardless of individual or group differences within the community. This approach assumes the social exclusion of *all* sexual and gender minorities in Nigeria on the basis of the law and, accordingly, focuses on legal change and legal protections under the international human rights framework. Examples of this approach has included strategic litigation cases and public education and awareness on human rights issues as they affect sexual and gender minorities. This approach does not account for hegemonic power dynamics and the different impact that hegemonic power has on different individuals who may share the same sexual orientation or gender identity. However, some advocates also called attention to the healthcare impact of the criminalising laws on sexual and gender minorities in general. To the extent that this focus on healthcare had an impact on general public health, such advocates were able to enter into partnership with the state to deliver healthcare services to sexual and gender minorities and, in this way, were able to utilise the hegemonic interests of political actors in sustaining their own legitimacy domestically and internationally through the appearance of providing public health services.

On the other hand, what this thesis termed as a ‘material’ response by advocates focuses on the individual and communal differences within the community of sexual and gender minorities in Nigeria. Responses of this kind directly engage power dynamics in society by designing and implementing programmes that empower the most vulnerable members of the community, particularly economically and educationally, and provide them with a ‘fighting chance’ to navigate and negotiate, at least, police power in particular and hegemonic power in general. From the data, responses that engage power dynamics can be broadly categorised

into programs that: (i) navigate power through respectability; (ii) navigate power through economic ability; (iii) navigate power through social status and self-esteem; and (iv) navigate power through spatial locations. While advocates have had some successes with these responses, they are also either problematic (for example, encouraging the performance of respectability) or have only been implemented on a small scale due to lack of funding and support.

Regarding the third issue, that is, the challenges to programming for power dynamics, the research indicated three broad areas that have contributed to a difficulty in utilising material responses to the criminalising laws: (i) classism within the community; (ii) engaging mainstream advocacy networks; and (iii) funding and availability of resources. Classism within the community mirrors wider issues of classism in the Nigerian society, essentially making class identity more relevant to individuals in the community than sexual identity. As such, wealthy community members may have no inclination in supporting programmes against a system that benefits them, as they may feel more affinity towards wealthy heteronormative peers than with poorer community members. The challenge of engaging mainstream advocacy networks requires advocates working on mainstream human rights issues and advocates working for sexual and gender minorities to bridge the existing gap between their activities and understand that, on both sides of the divide, it is the poorest that suffer the most severe social exclusions while the richest enjoy the most constant access to social goods. This issue is explored in more detail under the fourth research sub-question in Chapter Five of the thesis. Finally, the challenge of funding and donor-led programming has restricted advocates to 'safer' programmes that focus on human rights issues rather than more politically charged programmes that confront power dynamics in the Nigerian society.

6.2.4 Linkages in, and opportunities for, addressing power dynamics

The fourth research sub-question (*What are the linkages between dominant power in the criminalising laws and wider social exclusions in Nigeria and how can awareness of these linkages improve advocacy for sexual and gender minorities?*) concentrated on the linkages between the criminalisation of same-sex relationships, the overall entrenchment of dominant power systems, and the existence of wider social exclusions in Nigeria as a guide to formulating opportunities for complementing existing advocacy strategies for sexual and gender minorities in Nigeria. The research for this sub-question adopted an analytical approach, utilising the conclusions from the field research and other sources such as media and organisational reports to reach its conclusions. The answer to this sub-question required a discussion of three issues: (i) linkages between the criminalisation of same-sex relationships and wider *social exclusion* in Nigeria; (ii) correlations between the protection of sexual and gender minorities and wider *social inclusion* generally; and (iii) opportunities for advocacy.

The discussion on the first issue considered that the experiences of power dynamics in police persecution, as described by the respondents in Chapter Three, are not unique to sexual and gender minorities. Instead, these interactions are a common occurrence for Nigerians who are vulnerable under other kinds of criminalising laws, regardless of their sexual orientation or gender identity. The discussion thereafter considered these other kinds of criminalising laws under the headings of 'petty offences' laws and serious criminal laws. Regarding petty offence laws, the research finds that laws of these nature that criminalise situations such as wandering, loitering, or being a 'vagabond' are used in the deliberate social control of vulnerable people, that is, people who are already socially excluded in some other ways. These laws confer wide discretionary powers on law enforcement to serve as the gatekeepers of hegemonic values and police conduct and identities that are socially considered disresponsible. The research also showed that petty offences are selectively enforced, targeting poorer or otherwise vulnerable people while being almost wholly unenforced against wealthier members of society. In this way, there is a linkage between the use of petty offences and the use of sexuality offences as methods for the control of the poor and marginalised. Similarly, in the enforcement and prosecution of serious criminal laws, such as theft or murder, the research showed that there is a considerable level of segregation and discrimination in the enforcement of these laws, in a way that disproportionately has an impact on the socially and economically vulnerable. Even in the enforcement of serious crimes, the police often serve more as guards for the political elite rather than as impartial enforcers of the law, pointing to a dysfunctionality in the criminal justice system that benefits the privileged over the vulnerable, and which makes economically or socially vulnerable sexual and gender minorities more at risk than others. Criminal justice in Nigeria show a linkage between wider social exclusions in Nigeria and the criminalisation of same-sex relationships.

The second issue considered the other side of the linkages by examining correlations between wider social inclusion and more protection for sexual and gender minorities. For this purpose, two aspects of wider social inclusion were examined: (i) an increase in the general experience of democratic freedoms; and (ii) an increase in the general experience of socio-economic empowerment and socio-economic equality. The research pointed out that, based on secondary data, there is a general correlation between higher levels of freedoms in a democratic society and inclusiveness for minorities; the greater the level of democratic freedoms that are available to any dominant majorities, the more opportunities there will be for minorities to be included in the enjoyment of those freedoms. Similarly, the research from secondary data shows that, while there is no direct causality between improved socio-economic empowerment or equality and automatic acceptance of sexual and gender minorities, there is a strong correlation between these two. In particular, an increase in socio-economic equality is capable of fostering liberal social attitudes and creating a more

appropriate environment for a successful rights-based advocacy. Finally, based on the preceding discussions, the research considered potential opportunities for complementing existing advocacy strategies in Nigeria. These include: (i) emphasising the role of power dynamics in human rights conversations and discourse; (ii) forming alliances with mainstream organisations to address democratic freedoms and socio-economic empowerment and equality; and (iii) designing and implementing nationwide collaborative strategies focusing on the economic development of sexual and gender minorities in Nigeria.

6.3 Conclusion

Advocacy for the protection of sexual and gender minorities is a continuing project, especially in Sub-Saharan Africa. In countries like Nigeria, sexual and gender minorities are not only criminalised in multiple ways, but they also face social stigma and discrimination that has led to mob attacks, blackmail and extortion, assault and even murder. In almost all cases, the persons most affected by the criminalising laws and discriminatory social attitudes are sexual and gender minorities who are economically and socially vulnerable, as well as other economic and socially vulnerable persons who are perceived to be sexual and gender minorities. Conversely, the constitutional protections and other opportunities for judicial redress against discrimination have only been accessible by persons who have economic, social, and other privileges. This situation points to the underlying power dynamics that is pervasive within the Nigerian society and justice system. The existence of power dynamics indicates that, even if laws are changed to be more tolerant towards sexual and gender minorities, the existing hegemonic construct of society in a way that benefits elitist interests will prevent ordinary people from taking advantage of protective laws and protective laws will only benefit the middle and upper classes of society.

Considering all these, it is important that – in addition to existing methods of legal advocacy – advocates working for the protection of sexual and gender minorities in Nigeria should also adopt complementary advocacy strategies that address power dynamics in the country, and that will ensure that the benefits of any legal change are accessible by everyone and not just the socially or economically privileged. These strategies will include designing advocacy campaigns in ways that emphasise the intersectional nature of discrimination, highlighting the disproportionate impact of criminalising laws and discriminatory social attitudes on economically and socially vulnerable persons, and extending advocacy for sexual and gender minorities to include wider political issues such as constitutional reforms and socio-economic issues such as housing, education, and access to justice.

6.4 Areas for further research

While this thesis has expanded on the existence of power dynamics in the evolution and enforcement of laws criminalising same-sex relationships in Nigeria, the dataset and scope of the research has been quite narrow. Consequently, further research needs to be conducted in areas that will expand the scope of the study. For instance, the scope of the field research can be increased to include a study on power dynamics as it affects and is affected by gender, particularly in the enforcement of laws against trans persons, lesbians and queer and bisexual women or women perceived to be sexual or gender minorities.

Similarly, other studies can be done to fully engage the interaction of power dynamics in the enforcement of criminalising laws with regard to age and religion as drivers of social status. While some aspects of these have been discussed in this thesis, there is still opportunity for a more nuanced study on these two in the Nigerian religious and cultural contexts. Another study of this nature could consider the enforcement of criminalising laws in rural settings in Nigeria and whether or not and to what extent power dynamics are relevant in that setting.

Beyond expanding the scope of the current study, another suggested critical area of further research could be a quantitative measurement of the correlations between an increase or decrease in people's experience of democracy and social empowerment and an increase or decrease in the experience of inclusion by sexual and gender minorities in Nigeria and elsewhere.

BIBLIOGRAPHY AND REFERENCES

BIBLIOGRAPHY

Books and chapters in books

Aderinto, S *When sex threatened the state: Illicit sexuality, nationalism, and politics in colonial Nigeria, 1900 –1958* (2015) Urbana and Chicago: University of Illinois Press

Ake, C 'The Nigerian state: Antinomies of a periphery formation' in Ake, C (ed) (1985) *Political economy of Nigeria* Essex: Longman

Ake, C 'The state in contemporary Africa' in Ake, C (ed) (1985) *Political economy of Nigeria* Essex: Longman

Ake, C (1985) *Political economy of Nigeria* Essex: Longman

Allen, J, Cars, G & Madanipour, A 'Introduction' in Madanipour, A, Cars, G & Allen, J (eds) (1988) *Social exclusion in European cities* London and Philadelphia: Jessica Kingsley Publishers

Auerbach, CF and Silverstein, LB (2003) *Qualitative data: An introduction to coding and analysis* New York: New York University Press

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* Pretoria: PULP

Best, H & Higley, J 'The Palgrave handbook of political elites: Introduction' in Best et al (eds) (2017) *The Palgrave handbook of political elites* London: Macmillan

Bosia, MJ 'Why states act: Homophobia and crisis' in Weiss, ML & Bosia, MJ (eds) (2013) *Global homophobia: States, movements, and the politics of oppression* Urbana: University of Illinois Press

Bosia, MJ & Weiss, ML 'Political homophobia in comparative perspective' in Weiss, ML & Bosia, MJ (eds) (2013) *Global homophobia: States, movements, and the politics of oppression* Urbana: University of Illinois Press

Bourne, R (2015) *Nigeria: A new history of a turbulent century* London: Zed Books

Boyle, J (1992) *Critical legal studies* New York: New York University Press

Brinkmann, S 'Unstructured and semi-structured interviewing' in Leavy, P (ed) (2014) *The Oxford handbook of qualitative research* Oxford: Oxford University Press

Byrne, D (2005) *Social exclusion* Berkshire: Open University Press

Cameron, E 'Unapprehended felons: Gays and lesbians and the law in South Africa' in Gevisser, M & Cameron, E (eds) (2013) *Defiant desire: Gay and lesbian lives in South Africa* New York: Routledge

Claeys, G (2018) *Marx and marxism* London: Penguin Books

Cohen, S (2011) *Folk devils and moral panics: The creation of the mods and rockers* New York: Routledge

Crompton, L (2003) *Homosexuality and civilization* Cambridge: Harvard University Press

Crowder, M (1962) *The story of Nigeria* London: Faber

Davies, M (2017) *Asking the law question* Pymont: Thomas Reuters

Diamond, L (2015) *Class, ethnicity and democracy in Nigeria* New York: Syracuse University Press

Elias, TO (1963) *The Nigerian legal system* London: Routledge & Kegan Paul

Epprecht, M (2013) *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* London: Zed Books

Fineman, MA 'Introduction: Feminist and queer legal theory' in Fineman, MA, Jackson, JE & Romero, AP (eds) (2016) *Feminist and queer legal theory: Intimate encounters, uncomfortable conversations* London: Taylor & Francis

Fineman, MA, Jackson, JE & Romero, AP (eds) (2016) *Feminist and queer legal theory: Intimate encounters, uncomfortable conversations* London: Taylor & Francis

Foucault, M (1998) *The will to knowledge: The history of sexuality: Volume 1* trans Hurley, R London: Penguin Books

Gaudio, RP *Allah made us: Sexual outlaws in an Islamic African city* (2009) Hoboken, New Jersey: Wiley-Blackwell

Gevisser, M & Cameron, E (eds) (2013) *Defiant desire: Gay and lesbian lives in South Africa* New York: Routledge

Gloppen, S & Rakner, L 'LGBT rights in Africa' in C Ashford & A Maine (eds) *Research handbook on gender, sexuality and the law* (2020) Cheltenham: Elgar

Graf, WD (1988) *The Nigerian state: Political economy, state class and political system in the post-colonial era* London: James Currey

Gramsci, A (1971) *Selections from prison notebooks* trans Hoare, Q & Smith, GN New York: International Publishers

Gramsci, A (1992) *Prison notebooks: Vol 1* trans JA Buttigieg New York: Columbia University Press

Gramsci, A (1996) *Prison notebooks: Vol 2* trans JA Buttigieg New York: Columbia University Press

Gramsci, A (2007) *Prison notebooks: Vol 3* trans JA Buttigieg New York: Columbia University Press

Halliday, S & and Schmidt P (eds) (2009) *Conducting law and society research: Reflections on methods and practices* Cambridge: Cambridge University Press

Higley, J 'Elite theory and elites' in Leicht, KT & Jenkins, JC (eds) (2009) *Handbook of politics: State and society in global perspective* New York: Springer

Jjuuko, A 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges' in Namwase, S & Jjuuko, A (eds) (2017) *Protecting the human rights of sexual minorities in contemporary Africa* Pretoria: PULP

Kaoma, K 'The marriage of convenience: The US Christian right, African Christianity, and postcolonial politics of sexual identity' in Weiss, ML & Bosia, MJ (eds) (2013) *Global homophobia: States, movements, and the politics of oppression* Urbana: University of Illinois Press

Karibi-Whyte, AG (1993) *History and sources of Nigerian criminal law* (1993) Ibadan: Spectrum

Leavy, P (ed) (2014) *The Oxford handbook of qualitative research* Oxford: Oxford University Press

Lennox, C & Waites, M 'Comparative analysis of decriminalisation and change across the Commonwealth: Understanding contexts and discerning strategies' in Lennox, C & Waites, M (eds) (2013) *Human rights, sexual orientation and gender identity in the Commonwealth* London: School of Advanced Studies

Lennox, C & Waites, M (eds) (2013) *Human rights, sexual orientation and gender identity in the Commonwealth* London: School of Advanced Studies

Lipset, SM & Lakin, JM (2004) *The democratic century* Norman: University of Oklahoma Press

Lloyd, HDL & Freeman, MDA (2008) *Lloyd's introduction to jurisprudence* London: Sweet & Maxwell

Lugard, FD (1922) *The dual mandate in British tropical Africa* Edinburgh & London: Blackwood & Sons

Lynch, JF 'Aligning sampling strategies with analytic goals' in Mosley, L (ed) (2013) *Interview research in political science* Ithaca: Cornell University Press

Madanipour, A, Cars, G, & Allen, J (eds) (1998) *Social exclusion in European cities* London and Philadelphia: Jessica Kingsley Publishers

Massad, J *Desiring Arabs* (2009) Chicago: University of Chicago Press

Mosley, L (ed) (2013) *Interview research in political science* Ithaca: Cornell University Press

Nair, Y 'Against equality, against marriage' in Conrad, R (ed) (2010) *Against equality: Queer critiques of gay marriage* Edinburgh: AK Press

Namwase, S & Jjuuko, A (eds) (2017) *Protecting the human rights of sexual minorities in contemporary Africa* Pretoria: PULP

Ngwena, C (2018) *What is Africanness? Contesting nativism in race, culture and sexualities* Pretoria: PULP

Nyanzi, S 'Unpacking the [govern] mentality of African sexualities' in Tamale, S (ed) (2011) *African sexualities: A reader* Nairobi: Fahamu/Pambazuka

Nyeck, SN 'Mobilizing against the Invisible' in Nyeck SN & Epprecht, M (eds) *Sexual diversity in Africa: Politics, theory and citizenship* (2013) Montreal: McGill-Queen's University Press

Obilade, AO (1979) *The Nigerian legal system* London: Sweet & Maxwell

Okonkwo, CO (1980) (ed) *Introduction to Nigerian law* London: Sweet & Maxwell

Okonkwo, CO (1990) *Okonkwo and Naish on criminal law in Nigeria* Ibadan: Spectrum

Onuora-Oguno, AC 'Protecting same-sex rights in Nigeria: Case note on *Teriah Joseph Ebah v Federal Government of Nigeria*' in Namwase, S & Jjuuko, A (eds) (2017) *Protecting the human rights of sexual minorities in contemporary Africa* Pretoria: PULP

Park, AEW (1963) *The sources of Nigerian law* London: Sweet & Maxwell

Robertson, J (ed) (2008) *Same-sex cultures and sexualities: an anthropological reader* New Jersey: John Wiley & Sons

Saldana, J (2013) *The coding manual for qualitative researchers* London: SAGE

Sanusi, SL 'Politics and Sharia in northern Nigeria' in Soares, B & Otayek, R (eds) (2007) *Islam and Muslim politics in Africa* New York: Palgrave Macmillan

Schwarzmantel, J (2014) *The Routledge guidebook to Gramsci's prison notebooks* London: Routledge

Serrano-Amaya, JF (2017) *Homophobic violence in armed conflict and political transition* Switzerland: Palgrave Macmillan

Soares, B & Otayek, R (eds) (2007) *Islam and Muslim politics in Africa* New York: Palgrave Macmillan

Summers, RS (2005) *Form and function in a legal system: a general study* New York: Cambridge University Press

Tamale, S (ed) (2011) *African sexualities: A reader* Nairobi: Fahamu/Pambazuka

Walker, A & Walker, C (eds) (1997) *Britain divided: The growth of social exclusion in the 1980s and 1990s* London: CPAG

Walker, R 'Poverty and social exclusion in Europe' in Walker, A & Walker, C (eds) (1997) *Britain divided: The growth of social exclusion in the 1980s and 1990s* London: CPAG

Weiss, ML & Bosia, MJ (eds) (2013) *Global homophobia: States, movements, and the politics of oppression* Urbana: University of Illinois Press

Williams, C (2012) *Researching power, elites and leadership* London: SAGE

Journal articles

Ake, C 'The African context of human rights' (1987) 34 *Africa Today* 5

- Allman, D; Adebajo, S; Myers, T; Odumuye, O & Ogunsola S 'Challenges for the sexual health and social acceptance of men who have sex with men in Nigeria' (2007) 9 *Culture, Health, & Sexuality* 153
- Anderson, T 'The political economy of human rights' (2002) 50 *Journal of Australian Political Economy* 200
- Armas, H 'Whose sexuality counts? Poverty, participation and sexual rights' (2007) Institute of Development Studies, Working Paper 294
- Banjo, A 'The Elite and Political Process in Nigeria' (2011) 38 *Africa Insight* 50
- Bedford, K & Jakobsen, J 'Towards a vision of sexual and economic justice' (2009) 4 *New Feminist Solutions Series* 1
- Berry, S 'Social institutions and access to resources' (1989) 59 *Africa* 41
- Braun, V & Clarke, V 'Using thematic analysis in psychology' (2006) 3 *Qualitative Research in Psychology* 77
- Chambliss, WJ 'Toward a political economy of crime' (1975) 2 *Theory and Society* 149
- Cotterrell, R 'Why must legal ideas be interpreted sociologically?' (1998) 25 *Journal of Law and Society* 171
- Crenshaw, KW 'Race, reform, and retrenchment: Transformation and legitimation in antidiscrimination law' (1988) 101 *Harvard Law Review* 1331
- Currier, A 'Political homophobia in postcolonial Namibia' (2010) 24 *Gender & Society* 110
- Ebobrah, ST '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
- Epprecht, M & Egya, SE 'Teaching about homosexualities to Nigerian university students: A report from the field' (2011) 23 *Gender and Education* 367
- Gabel, P 'Reification in legal reasoning' (1980) 3 *Research in Law and Sociology* 25

Gabel, P & Harris, P 'Building power and breaking images: Critical legal theory and the practice of law' (1982) 11 *NYU Review of Law and Social Change* 369

Garcia, J & Parker, R 'From global discourse to local action: The makings of a sexual rights movement?' (2007) 12 *Horizontes Antropológicos* 13

Gaudio, RP 'Trans-Saharan trade: The routes of "African sexuality"' (2014) 55 *Journal of African History* 317

Goodman, R 'Beyond the enforcement principle: Sodomy laws, social norms, and social panoptics' (2011) 89 *California Law Review* 643

Johshi, Y 'Respectable queerness' (2012) 43 *Columbia Human Rights Law Review* 415

Klugman, B 'Effective social justice advocacy: A theory-of-change framework for assessing progress' (2011) 19 *Reproductive Health Matters* 146

Kollman, K & Waites, M 'The global politics of lesbian, gay, bisexual and transgender human rights: An introduction' (2009) 15 *Contemporary Politics* 7

Lacey, N 'Feminist Legal Theory' (1989) 9 *Oxford Journal of Legal Studies* 383

Ladapo, OA 'Effective investigations, a pivot to efficient criminal justice administration: Challenges in Nigeria' (2011) 5 *African Journal of Criminology and Justice Studies* 79

Lugard, FD 'The white man's task in Africa' (1926) 5 *Foreign Affairs* 57

Marenin, O 'Policing Nigeria: Control and autonomy in the exercise of coercion' (1985) 28 *African Studies Review* 80

McKay, T & Angotti, N 'Ready rhetorics: Political homophobia and activist discourses in Malawi, Nigeria, and Uganda' (2016) 39 *Qualitative Sociology* 397

Morris, HF 'How Nigeria got its criminal code' (1970) 14 *Journal of African Law* 141

Murray, R & Viljoen, F 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86

Nelken, D Blinding insights? The limits of reflexive sociology of law (1998) 25 *Journal of Law and Society* 407

Osita-Njoku, A 'The political economy of development in Nigeria: From the colonial to post-colonial eras' (2016) 21 *IOSR Journal of Humanities and Social Science* 11

Osha, S 'Unravelling the silences of black sexualities' (2004) 18 *Agenda: Empowering Women for Gender Equity* 92

Regan, PM & Bell, SR 'Changing lanes or stuck in the middle: Why are anocracies more prone to civil wars?' (2010) 63 *Political Research Quarterly* 747

Rubenstein, M 'An Anglican crisis of comparison: Intersections of race, gender, and religious authority with particular reference to the Church of Nigeria' (2004) 72 *Journal of the American Academy of Religion* 341

Rudman, A 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1

Schäfer, R & Range, E 'The political use of homophobia: Human rights and the persecution of LGBTI activists in Africa' (2014) *International Policy Analysis* 1

Schiff, DN 'Socio-legal theory: Social structure and law' (1976) 39 *Modern Law Review* 287

Sklar, RL 'The nature of class domination in Africa' (1979) 17 *Journal of Modern African Studies* 531

Sleptcov, N 'Political homophobia as a state strategy in Russia' (2018) 12 *Journal of Global Initiatives: Policy, Pedagogy, Perspective* 140

Sogunro, A 'Citizenship in the shadows: Insights on queer advocacy in Nigeria' (2018) 45 *College Literature* 632

Sogunro, A 'One more nation bound in freedom: Themes from the Nigerian "anti-gay law"' (2014) 114 *Transition: An International Review* 47

Stammers, N 'Social movements and the social construction of human rights' (1999) 21 *Human Rights Quarterly* 980

Stephen, HL 'A model criminal code for the colonies' (1899) 1 *Journal of the Society of Comparative Legislation* 439

Strolovitch, DZ & Crowder, CY 'Respectability, anti-respectability, and intersectionally responsible representation' (2018) 51 *Politics Symposium, Political Science & Politics* 340

Stuntz, WJ 'The pathological politics of criminal law' (2001) 100 *Michigan Law Review* 505

Tamale, S 'Confronting the politics of nonconforming sexualities in Africa' (2013) 56 *African Studies Review* 31

Tamale, S 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150

Tamale, S 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 53

Victor, JS 'Moral panics and the social construction of deviant behavior: A theory and application to the case of ritual child abuse' (1998) 41 *Sociological Perspectives* 541

Vreeland, JR 'The effect of political regime on civil war: Unpacking anocracy' (2008) 52 *Journal of Conflict Resolution* 401

Weinrib, EJ 'Legal formalism: On the immanent rationality of law' (1987) 97 *Yale Law Journal* 949

Reports

'Joint submission by LGBTI organisations in Nigeria to the second Universal Periodic Review of Nigeria' prepared by four Nigerian organisations and presented at the Human Rights Council session in October 2013

African Men for Sexual Health and Rights & Synergia Initiative for Human Rights 'Application of Resolution 275 by the African Commission on Human and People's Rights: A six-year assessment' (2020)

Alemika, EO & Chukwuma, I (2003) *Analysis of police and policing in Nigeria*

Amnesty International "'Welcome to hell": Torture and other ill-treatment in Nigeria' (2014) 26 available at <https://www.amnesty.org/download/Documents/4000/afr440112014en.pdf>

Badgett, MVL Park, A & Flores (2018) A 'Links between economic development and new measures of LGBT inclusion'

Bakare-Yusuf, B & Pereira, C (2016) 'Gender and sexual diversity: Engaging civil society in Nigeria'

Bertelsmann Stiftung *BTI 2016 — Nigeria Country Report* (2016)

Centre for Human Rights, University of Pretoria 'Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations' (2016)

Chukwuma, I (2008) 'Motions without movement: Report of the Presidential Committees on Police Reforms in Nigeria'

Economist Intelligence Unit, The (2019) 'Democracy index 2019: A year of democratic setbacks and popular protest'

Flores, AR & Park (2018) A 'Polarized progress: Social acceptance of LGBT people in 141 countries, 1981-2014'

Gore, C (1994) 'Social exclusion and Africa south of the Sahara: A review of the literature' A report by the International Labour Organisation (Labour Institution and Development Programme DP/62/1994A)

Gupta, A (2008) 'This alien legacy: The origins of "sodomy" laws in British colonialism' Human Rights Watch

Haste, P and Gatete, TK (2015) 'Sexuality, poverty and politics in Rwanda' Institute of Development Studies, 131 Evidence Report

Human Rights Watch (2004) "'Political Shari'a" Human rights and Islamic law in Northern Nigeria'

Human Rights Watch (2006) 'Nigeria: Obasanjo must withdraw bill to criminalize gay rights'

Human Rights Watch (2010) "'Everyone's in on the game": Corruption and human rights abuses by the Nigeria Police Force

Human Rights Watch (2016) "'Tell me where I can be safe" The impact of Nigeria's Same Sex Marriage (Prohibition) Act'

Institute for Human Rights and Business, (2014) 'State of play: Human rights in the political economy of states'

Jolly, S (2010) 'Poverty and sexuality: What are the connections? Overview and literature review'

Mo Ibrahim Foundation '2018 Ibrahim Index of African Governance: Snapshot: Nigeria' (2016) 4

Mo Ibrahim Foundation Ibrahim Index of Africa governance: detailed methodology (2018) 6.

Mendos, LM (ed) *State-sponsored homophobia* (2019)

Nigerian Bar Association (2016) 'Practical steps to reforms of the administration of justice in Nigeria'

Oosterhoff, P, Waldman, L & Olerenshaw, (2014) D 'Literature Review on Sexuality and Poverty'

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

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

The Economist Intelligence Unit 'Democracy index 2019: A year of democratic setbacks and popular protest' (2019)

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

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

United Nations Development Programme (2018) 'National human development report 2018: Achieving human development in North East Nigeria'

United States Department of State (2016) 'Country reports on human rights practices for 2016

White Paper on the 2007 Presidential Commission on Reform of the Administration of Justice in Nigeria

World Bank Group (2020) 'Poverty & Equity Brief – Nigeria'

News and website articles

5 gay men fighting after infecting each other with HIV arrested in Lagos (9 April 2018)
<http://www.informationng.com/2018/04/5-gay-men-fighting-after-infecting-each-other-with-hiv-arrested-in-lagos.html> (accessed 31 July 2020)

[About 9 in 10 Nigerians Support The Proposed Anti-Same-Sex Marriage Bill](http://www.noi-polls.com/root/index.php?pid=287&ptid=1&parentid=66) <http://www.noi-polls.com/root/index.php?pid=287&ptid=1&parentid=66> (accessed 31 July 2020)

Again, police raid Abuja clubs, arrest 70 women (28 April 2019) <https://www.premiumtimesng.com/news/headlines/327355-again-police-raid-abuja-clubs-arrest-70-women.html> (accessed 8 May 2020)

Alake, M 'It is time for Nigerian Police to revise its policies on arresting gay people' (29 August 2018) available at <https://www.pulse.ng/gist/pop-culture/nigerian-police-only-arrest-alleged-gay-men-on-the-mainland-id8786505.html> (accessed 31 July 2020)

Alimi, B 'If you say being gay is not African, you don't know your history' (9 September 2015) <https://www.theguardian.com/commentisfree/2015/sep/09/being-gay-african-history-homosexuality-christianity> (accessed 31 July 2020)

Ameh, J, Adepegba A, & Baiyewu, L 'No going back on same-sex law, Reps vow' (22 April 2018) <https://punchng.com/no-going-back-on-same-sex-law-reps-vow/> (accessed 31 July 2020)

Anti-gay law: Lawyers urge FG not to succumb to foreign pressure Vanguardngr.com (16 January 2014) <https://www.vanguardngr.com/2014/01/anti-gay-law-lawyers-urge-fg-succumb-foreign-pressure/> (accessed 15 July 2020)

April 1990 coup d'état speech <https://dawodu.com/orkar.htm> (accessed 27 July 2020)

At least 41 gay men arrested in Nigeria (31 July 2017) <https://www.news24.com/Africa/News/at-least-41-gay-men-arrested-in-nigeria-20170731> (accessed 31 July 2020)

Augoye, J 'Why we shut down Bobrisky's birthday party venue — Police' (31 August 2019) available at <https://www.premiumtimesng.com/entertainment/naija-fashion/349818-why-we-shut-down-bobriskys-birthday-party-venue-police.html> (accessed 31 July 2020)

Bobrisky brags about making N8 million in two weeks from eyelash business (4 June 2019) available at <https://www.jivenaija.com/people-places/news/bobrisky-brags-about-making-n8-million-in-two-weeks-from-eyelash-business> (accessed 31 July 2020)

Bobrisky, 'Africa's male Barbie' dominates Google trend (2 November 2016) available at <https://www.vanguardngr.com/2016/11/bobrisky-africas-male-barbie-dominates-google-trend/> (accessed 31 July 2020)

Buhari 'pointblank' on gay rights, says "No" to U.S. — Presidency (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 July 2020)

Clash over Nigeria cross-dressing (28 August 2007) <http://news.bbc.co.uk/2/hi/africa/6956848.stm> (accessed 31 July 2020)

Collison, C 'Mass arrests of Nigerian "gay" men' (6 September 2017) <https://mg.co.za/article/2017-09-06-00-mass-arrests-of-nigerian-gay-men> (accessed 31 July 2020)

Cooley, D 'I didn't want my mum to know': The men and boys arrested for being gay in Nigeria (22 October 2017) <http://www.abc.net.au/news/2017-10-22/arrested-for-being-gay-in-nigeria/9069350> (accessed 31 July 2020)

Dozens arrested in Nigeria after anti-gay law passes (14 January 2014) <https://nypost.com/2014/01/14/dozens-arrested-in-nigeria-after-anti-gay-law-passes/> (accessed 31 July 2020)

DSS arrests 59 commercial sex workers in Calabar (4 May 2019) <https://punchng.com/dss-arrest-59-commercial-sex-workers-in-calabar/> (accessed 8 May 2020)

Ewang, A 'Nigeria's wavering commitment to freedom of expression' (28 June 2019) <https://www.hrw.org/news/2019/06/28/nigerias-wavering-commitment-freedom-expression> (accessed 15 May 2020)

Falana asks police to stop arresting citizens for loitering, wandering (5 April 2017) <https://www.thisdaylive.com/index.php/2017/04/05/falana-asks-police-to-stop-arresting-citizens-for-loitering-wandering/> (accessed 8 May 2020)

Ferreira, F and Sánchez-Páramo, C 'A richer array of international poverty lines' (13 October 2017) <https://blogs.worldbank.org/developmenttalk/richer-array-international-poverty-lines> (accessed 8 May 2020)

Instagram post of 17 January 2019 by Dolapo Badmos (@opetodolapo), a Zonal Public Relations Officer for the Nigerian Police, available at <https://www.instagram.com/p/Bsv665mBlxj/?igshid=13wl6itxkc1n5> (accessed 31 July 2020)

Jackman, J 'Six men arrested in Nigeria for being gay' (17 August 2018) <https://www.pinknews.co.uk/2018/08/17/gay-sex-six-men-arrested-nigeria/> (accessed 31 July 2020)

Kano: Nigeria's ancient city-state BBC (20 May 2004) <http://news.bbc.co.uk/2/hi/africa/3708309.stm> (accessed 27 July 2020)

Kenechukwu, SC 'Lagos CP deploys 100 operatives to venues of Bobrisky's birthday' (31 August 2019) available at <https://lifestyle.thecable.ng/lagos-cp-orders-tight-security-ahead-of-bobriskys-birthday/> (accessed 31 July 2020)

Makanjuola, O 'Why Nigerians still support Same Sex Marriage Prohibition Act' (17 May 2017) <https://guardian.ng/features/why-nigerians-still-support-same-sex-marriage-prohibition-act/> (accessed 31 July 2020)

Mass Nigerian arrests for 'homosexual acts' in Lagos State (31 July 2017) <https://www.bbc.com/news/world-africa-40774930> (accessed 31 July 2020)

Mo Ibrahim Foundation '2017 Ibrahim Forum - Session 1' YouTube.com (24 April 2017) <https://youtu.be/ZT3cDm9UCes?t=4670> (accessed 28 July 2020)

Nigeria National Bureau of Statistics <https://nigerianstat.gov.ng/> (accessed 8 May 2020).

Nigeria police arrest 57 after 'gay party' <https://www.myjoyonline.com/world/2018/august-29th/nigeria-police-arrest-57-after-gay-party.php> (accessed 11 September 2018)

Nigeria: Police arrest over 100 alleged gays and lesbians (11 June 2018) <https://76crimes.com/2018/06/11/nigeria-police-arrest-over-50-alleged-gay-and-lesbians/> (accessed 31 July 2020)

Nigeria's emir of Kano dethroned for 'disrespect' (9 March 2020) <https://www.bbc.com/news/world-africa-51804764> (accessed 27 July 2020)

Nigerian court rules against arrest of sex workers <https://pettyoffences.org/nigerian-court-rules-against-arrest-of-sex-workers/> (accessed 8 May 2020)

Nigerian human rights activist brings lawsuit after unlawful detention (3 November 2014) <http://oblogdeeblogda.me/2014/11/03/nigerian-human-rights-activist-brings-lawsuit-after-unlawful-detention/> (accessed 30 April 2020)

Ntsabo, M 'Nigeria | Police arrest dozens of party-goers "accused" of homosexuality' (12 June 2018) <http://www.mambaonline.com/2018/06/12/nigeria-police-arrest-party-goers-accused-of-homosexuality/> (accessed 31 July 2020)

Nwaubani, AT 'LGBT acceptance slowly grows in Nigeria, despite anti-gay laws' (17 May 2017) <https://www.reuters.com/article/us-nigeria-lgbt-survey/lgbt-acceptance-slowly-grows-in-nigeria-despite-anti-gay-laws-idUSKCN18C2T8> (accessed 31 July 2020)

Obasanjo backs bishops over gays (27 October 2004) <http://news.bbc.co.uk/2/hi/africa/3955145.stm> (accessed 15 July 2020)

Ogunayo, A 'If you don't want to be unfortunate, don't call me bro - Bobrisky warns' (8 May 2019) available at <https://www.legit.ng/1237437-dont-call-bro-i-a-baby-girl-bobrisky.html> (accessed 31 July 2020)

Odunsi, W 'Six gay suspects arrested in Abia hotel' (17 August 2018) <http://dailypost.ng/2018/08/17/six-gay-suspects-arrested-abia-hotel/> (accessed 31 July 2020)

Officials raid Abuja night club, arrest 34 strippers (19 April 2019) <https://www.premiumtimesng.com/regional/north-central/326152-officials-raid-abuja-night-club-arrest-34-strippers.html> (accessed 8 May 2020)

Ogundipe, S '#EndSARS: Police mum as Nigerians recount atrocities of Special Anti-Robbery Squad' (3 December 2017) <https://www.premiumtimesng.com/news/headlines/251271-endsars-police-mum-nigerians-recount-atrocities-special-anti-robbery-squad.html> (accessed 31 July 2020)

Oloworekende, W 'Nigerians condemn police shutting down Bobrisky's 28th birthday party in Lagos' (31 August 2019) available at <https://www.qed.ng/nigerians-condemn-police-shutting-down-bobriskys-28th-birthday-party-in-lagos/> (accessed 31 July 2020)

Olufinlua, T 'Nigerians: Gays, as long as they're not our gays, are okay' (7 October 2017) <https://africasacountry.com/2017/07/nigerians-gays-as-long-as-theyre-not-our-gays-are-okay> (accessed 31 July 2020)

Opoola, L 'Bobrisky is not a cultural ambassador, Runsewe warns youths' (14 June 2019) available at <https://www.dailytrust.com.ng/bobrisky-is-not-a-cultural-ambassador-runsewe-warns-youths.html> (accessed 31 July 2020)

Police storm hotel in Lagos, arrest at least 57 suspected of homosexuality (29 August 2018) <https://www.news24.com/news24/Africa/News/police-storm-hotel-in-lagos-arrest-at-least-57-suspected-of-homosexuality-20180829> (accessed 31 July 2020)

Radio broadcast by Major Chukwuma Kaduna Nzeogwu – announcing Nigeria's first military coup on Radio Nigeria, Kaduna on January 15, 1966 *Vanguard* <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 7 July 2020)

Salaudeen, A 'Nigerians want police's SARS force scrapped' (15 December 2017) <https://www.aljazeera.com/news/2017/12/nigerians-demand-police-sars-unit-171215153831230.html> (accessed 31 July 2020)

Sanusi, H 'Meet Bobrisky, the most popular Nigerian on Snapchat' (30 August 2016) available at <https://web.archive.org/web/20161102164921/http://thenet.ng/2016/08/meet-bobrisky-the-most-popular-nigerian-on-snapchat/> (accessed 31 July 2020)

Searcey, D & Akinwotu, E 'Nigeria says soldiers who killed marchers were provoked. Video shows otherwise' (17 December 2018) <https://www.nytimes.com/2018/12/17/world/africa/nigeria-military-abuses.html> (accessed 15 May 2020)

Sheets, CA 'Gay in Nigeria: LGBT life in one of the world's most homophobic nations' (13 September 2013) available at <https://www.ibtimes.com/gay-nigeria-lgbt-life-one-worlds-most-homophobic-nations-1405130> (accessed 31 July 2020)

Statement from the bishops of the Anglican Church of Nigeria (21 November 2003) <http://www.anglicannews.org/news/2003/11/statement-from-the-bishops-of-the-anglican-church-of-nigeria.aspx> (accessed 15 July 2020)

Tayo, A 'An emerging culture in Nigeria's society' (19 September 2016) <https://www.pulse.ng/gist/cross-dressing-an-emerging-culture-in-nigerias-society/87gs0ct> (accessed 31 July 2020)

Badgett, MVL, Flores, A & Park, A 'The connection between strong economies and LGBT rights is no joke' (27 April 2018) <https://www.advocate.com/commentary/2018/4/27/connection-between-strong-economies-and-lgbt-rights-no-joke> (accessed 31 July 2020).

Tshabalala, S 'Nigeria's president was asked about gay marriage in the US. His reply: "sodomy" is "abhorrent"' (22 July 2015) <https://qz.com/460923/nigerias-president-was-asked-about-gay-marriage-in-the-us-his-reply-sodomy-is-abhorrent/> (accessed 31 July 2020)

UN human rights chief denounces new anti-homosexuality law in Nigeria (14 January 2014) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14169&LangID=E> (accessed 4 May 2020)

Where love is a crime <https://www.whereloveisacrime.org/>

Wolf, S 'What should the LGBT movement fight for?' (21 April 2009) <https://socialistworker.org/2009/04/21/lgbt-movement> (accessed 15 May 2020)

Yulius, H 'Behind political homophobia: Global LGBT rights and the rise of anti-LGBT in Indonesia' (16 June 2017) <https://th.boell.org/en/2017/06/16/behind-political-homophobia-global-lgbt-rights-and-rise-anti-lgbt-indonesia> (accessed 31 June 2020).

Unpublished documents

Agada, A 'Assessing the human rights implications of the Nigerian law dealing with sexual orientation' unpublished LLD thesis, University of Pretoria (2018)

Dispatch from WT Thiselton-Dyer, Dec 31, 1897 to Edward Wingfield at the Colonial Office, London

Jjuuko, A 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in Common Law Africa' unpublished LLD thesis, University of Pretoria (2018)

Kruse, LM 'Sex offenders, sexuality, and social control: A case study in the social construction of a social problem' (2007) *Master's Theses and Doctoral Dissertations* 1

Letter dated 10 January 1809 from the District Commissioner to the Colonial Secretary, *Epe letter book*, (1908 - 09) 188

Letter dated 1898 'Re: Sanitation of Lagos' from Osbert Chadwick to the Crown Agents for the Colonies

REFERENCES

International instruments and documents

African Charter on Human and Peoples' Rights

African Commission on Human and Peoples' Rights '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)

African Commission on Human and Peoples' Rights 'Resolution on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity' (2014)

African Union Executive Council's decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights (2015)

Principles on the decriminalisation of petty offences in Africa (2017)

Vienna Declaration and Programme of Action (1993)

Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2007)

National legislation and documents

Administration of Criminal Justice Act of 2015

Administration of Criminal Justice Law of Lagos of 2015

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9
Laws of the Federation of Nigeria 2004

Armed Forces Act Cap A20 Laws of the Federation of Nigeria 2004

Constitution of the Federal Republic of Nigeria 1999

Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004

Criminal Law of Lagos State 2011

Criminal Procedure Act of 1945

Criminal Procedure Code of 1960

Fundamental Rights (Enforcement Procedure) Rules 2009

Minor Offences (Miscellaneous Provisions) Act of 1989

Nigeria Police Act of 2020

Ordinance 3 of 1863

Penal Code (Northern States) Federal Provisions Act Cap P3 Laws of the Federation of Nigeria 2004

Police Act of 1943

Same Sex Marriage (Prohibition) Act of 2013

Shari'a Penal Code

Violence Against Persons (Prohibition) Act of 2015

Case law

Nigeria

Attorney-General of Ondo State v Attorney-General of the Federation (2002) 9 Nigerian Weekly Law Reports (Part 772) 222

Chief Gani Fawehinmi v Inspector General of Police (2002) 7 Nigerian Weekly Law Reports (Part 767) 606

Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board, (2014) unreported Suit No. FHC/ABJ/CS/799/2014

Major Bello Magaji v The Nigerian Army (2008) 8 Nigerian Weekly Law Reports (Part 1089) 338

Olafisoye v Federal Republic of Nigeria (2004) 4 Nigerian Weekly Law Reports (Part 864) 580

Pamela Adie v Corporate Affairs Commission (2018) unreported, Suit No FHC/ABJ/CS/827/2018

Robert Igbinedion v Nigeria (2012) unreported (Suit No unavailable)

Teriah Joseph Ebah v Nigeria (2014) unreported, Suit No FHC/ABJ/CS/197/2014

African Commission

Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)

Human Rights Committee

Toonen v Australia Communication 488/1992, UN Doc CPR/C/50/D/488/1992 (1994)

Young v Australia Communication 941/2000, UN Doc CPR/C/78/D/941/2000 (2003)

APPENDICES

Appendix A: Ethical approval



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law

RESEARCH ETHICS COMMITTEE

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MR AYO SOGUNRO
LLD CANDIDATE
CENTER FOR HUMAN RIGHTS
FACULTY OF LAW
UNIVERSITY OF PRETORIA
PRETORIA
0002

20 December 2018

Dear Mr Ayo Sogunro

ETHICS CLEARANCE CERTIFICATE

The Research Ethics Committee of the Faculty of Law at the University of Pretoria has reviewed your application for ethics clearance entitled "**Advocacy, social control, and the criminalisation of same-sex relationships: the evolution and enforcement of 'anti-gay laws' in Nigeria**" and granted ethics approval for your project.

Please note that you need to keep to the protocol you were granted approval on – should your study procedures be amended in due course, you will need to submit the amended version to us.

We wish you success in your research project.

Yours faithfully

A handwritten signature in black ink, appearing to read 'A G Nienaber', written over a light grey diamond-shaped background.

(PROF) A G NIENABER
CHAIR: RESEARCH ETHICS COMMITTEE (FACULTY OF LAW)

Appendix B: Interview participant information

Community members

Name	City	Age	Educational level	Employment status	Interview date
A1	Abuja	29	Undergraduate	Student	17 January 2019
A2	Abuja	33	Graduate (university)	Unemployed	17 January 2019
A3	Abuja	25	Undergraduate	Student	17 January 2019
A4	Abuja	28	Secondary school	Self employed	17 January 2019
A5	Abuja	22	Graduate (university)	Employed	18 January 2019
K1	Kaduna	28	Graduate (Polytechnic)	Self-employed	19 January 2019
K2	Kaduna	24	Graduate (Polytechnic)	Employed	19 January 2019
K3	Kaduna	28	Graduate (Polytechnic)	Student	19 January 2019
K4	Kaduna	37	Postgraduate	Employed	19 January 2019
K5	Kaduna	27	Graduate (Polytechnic)	Employed	19 January 2019
K6	Kaduna	21	Undergraduate	Student	19 January 2019
K7	Kaduna	29	Secondary school	Self-employed	19 January 2019
L1	Lagos	29	Graduate (university)	Employed	19 February 2019
L2	Lagos	25	Graduate (Polytechnic)	Employed	19 February 2019
L3	Lagos	20	Secondary school	Self-employed	19 February 2019
L4	Lagos	24	Undergraduate	Student	19 February 2019
L5	Lagos	25	Undergraduate	Student	20 February 2019
L6	Lagos	23	Undergraduate	Student	20 February 2019
P1	Port Harcourt	29	Graduate (university)	Self-employed	14 January 2019
P2	Port Harcourt	29	Secondary school	Student	14 January 2019
P3	Port Harcourt	22	Secondary school	Student	14 January 2019
P4	Port Harcourt	22	Secondary school	Unemployed	14 January 2019
P5	Port Harcourt	22	Graduate (Polytechnic)	Unemployed	14 January 2019
P6	Port Harcourt	30	Graduate (university)	Employed	15 January 2019

Advocates

Name	City	Job title	Interview date
AA1	Abuja	Outreach Coordinator	17 January 2019
AA2	Abuja	Program Officer	17 January 2019
AA3	Abuja	Executive Director	17 January 2019
AA4	Abuja	Executive Director	17 January 2019
AA5	Abuja	Public Health Officer	18 January 2019
KA1	Kaduna	Executive Director	19 January 2019
KA2	Kaduna	Executive Director	20 January 2019
KA3	Kaduna	Lawyer/Advocate	19 January 2019
LA1	Lagos	Director - Sexual Health and Wellbeing	19 February 2019
LA2	Lagos	M&E Coordinator	19 February 2019
LA3	Lagos	HR Programming Officer	19 February 2019
LA4	Lagos	Director - Human Rights and Advocacy	20 February 2019
LA5	Lagos	Referral Officer	19 February 2019
PA1	Port Harcourt	Case Manager	15 January 2019
PA2	Port Harcourt	Outreach Coordinator	14 January 2019
PA3	Port Harcourt	Program Officer	14 January 2019
PA4	Port Harcourt	Assistant Program Officer	14 January 2019

Appendix C: Information leaflet & Consent form

PARTICIPANT INFORMATION LEAFLET AND INFORMED CONSENT

Dear Participant,

Title of project: Advocacy, social control, and the criminalisation of same-sex relationships: the evolution and enforcement of 'anti-gay laws' in Nigeria

Introduction

You are invited to volunteer for a research study. This information leaflet is to help you decide if you would like to participate. Before you agree to take part in this study you should fully understand what is involved. If you have any questions, which are not fully explained in this leaflet, do not hesitate to ask the researcher. You should not agree to take part unless you are completely happy about all the procedures involved.

What is the purpose of the study?

The growth and enforcement of laws criminalising same-sex relationships in Nigeria suggest that the regulation of sexuality in Nigeria is part of wider social control aimed at perpetuating hegemonic power. Consciousness of these underlying motivations can lead advocates and scholars to more nuanced, more contextual, and more intersectional advocacy on the rights of sexual minorities in Nigeria.

This purpose of this study is to interrogate the role of dominant power dynamics in the enforcement of the regulation of sexuality in Nigeria from the perspective of LGBT community members and advocates with a view to highlighting opportunities for legal advocacy for the rights of sexual minorities.

How will the study be conducted?

This research intends to conduct semi-structured interviews of self-identified gay men and advocates in Lagos, Kaduna, Port Harcourt, and Abuja. If you are a self-identified gay man, this interview will be conducted through a face-to-face session of approximately 30 minutes to 1 hour. During the session, I will ask questions on your experiences of the criminalising laws and on your perception of how your aggregate social identity influences interactions with law enforcement.

If you are an advocate working for the rights of sexual minorities in Nigeria, this interview may be conducted either through face-to-face or telephone sessions. I will ask questions on your perception of power relations in the enforcement of criminalising laws and your advocacy responses to any perception of power relations in enforcement of the laws.

In either case, and with your permission, I will audiotape and take notes during the interview. The recording is to allow accurate transcription of the information you provide. If you choose not to be audiotaped, I will take notes instead. If you agree to be audiotaped, the recording will not be shared with any other person. Your comfort and the confidentiality of information is a priority and I will follow whichever option suits you best. All recordings will be stored and securely encrypted on an external storage device that will be handled only by the researcher.

Has the study received ethical approval?

This research protocol was submitted to the Faculty of Law Research Ethics Committee, University of Pretoria, and written approval has been granted by the Committee. The study has been structured in accordance with ethical considerations such as the protection of the identity of all participants.

What are my rights as a research participant in this study?

Your participation in this research is entirely voluntary and you can refuse to participate or stop at any time without stating any reason. The investigator retains the right to withdraw you from the study if considered to be in your best interest.

May any of the research procedures result in any discomfort?

No aspects of the research will result in any discomfort to you as a participant.

What are the benefits involved in the study?

By highlighting the role of hegemonic power and social control in the regulation of sexuality and same sex relationships in Nigeria, this research aims to contribute to the literature on and improve advocacy efforts for the rights of sexual minorities in Nigeria. This will potentially be of benefit to the lives of the sexual minorities in Nigeria.

Are there any restrictions concerning my participation in this study?

There are no restrictions concerning your participation in this study.

Source of additional information

The study will be conducted by way of interviews by Ayodele O Sogunro. Should you have any questions, please do not hesitate to contact him. The telephone number is +2348062124450, through which you can reach him or another authorised person. You can also contact the researcher through ayosogunro@gmail.com.

Confidentiality

All information obtained during the course of this research is confidential. Data that may be reported in law or scientific journals will not include any information which identifies you as a participant in this study, unless expressly authorised by you (particularly through the authorisation clause in the informed consent clause). Sensitive data / information will be published anonymously.

INFORMED CONSENT CLAUSE

I hereby confirm that I have been informed by the researcher _____ (state particulars) about the nature, conduct, benefits and risks of the proposed research. I have also received, read and understood the above written information (informed consent) regarding the study.

I am aware that the results of the study, including personal details regarding sex, age, marital status etc (state) of myself will be anonymously processed into the research report. (See in particular the definition of “personal information” in the Promotion of Access to Information Act 2 of 2000.)

I may, at any stage, without prejudice, withdraw my consent and participation in the study. I have had sufficient opportunity to ask questions and (of my own free will) declare myself prepared to participate in the study.

Participant's name: _____

Participant's signature: _____

To authorise name and/or quote referencing, please sign here: Yes _____ No _____

I, _____ herewith confirm that the above participant has been informed fully about the nature and scope of the above study.

Investigator's name: _____

Investigator's signature: _____

Witness's name: _____

Witness's signature: _____

Date: _____

Appendix D: Interview questionnaires

QUESTIONS FOR COMMUNITY MEMBERS

A. Demographics

1. How old are you?
2. What is your educational background?
3. What is your occupation and employment status?
4. What social class do you consider yourself?
5. What sexual orientation do you identify as?

B. Knowledge of the legal system

6. Are you aware of the laws criminalising same sex relationships ('the laws') in the country?
7. What led to your awareness and understanding of the laws?
8. What acts do the laws prohibit?

C. Experiences of the legal system

9. Have you had any encounters with the police under the laws?
 - a. If yes: what led to the encounter and how was it dealt with?
 - b. If no: why do you think this is the case?
10. Do the existence of the laws affect you social and economic life?
11. Do you think law enforcement will consider other factors in engaging you on your sexuality?
 - a. If yes: can you give examples of such factors?
 - b. If no: why do you think this is the case?
12. Do you think the laws are applied equally in society?
 - a. If yes: can you give examples of this?
 - b. If no: why do you think this is the case?
13. Do you think advocates in Nigeria are responding to law enforcement appropriately?
Where would you want to see improvements?

D. Reflections

14. Do you have any new realisations after this interview?
15. How do you feel about this?

QUESTIONS FOR ADVOCATES

A. Demographics

1. How old are you?
2. What is your educational background?
3. What is your occupation and employment status?

B. Advocacy

4. What is the nature of your advocacy work?

C. Experiences of the legal system

5. Has your work been inhibited by the laws criminalising same sex relationships ('the laws') so far?
6. Have you had any encounters with the police under the laws?
 - a. If yes: what led to the encounter and how was it dealt with?
 - b. If no: why do you think this is the case?
7. Has anyone threatened or attempted to blackmail you for your work based on the laws?
8. Have other advocates that you know of had encounters with the police under the laws?
 - a. If yes: what led to the encounter and how was it dealt with?
 - b. If no: why do you think this is the case?
9. Do law enforcement officers apply the laws equally in your experience?
 - a. If yes: what examples of this can you give?
 - b. If no: why do you think this is the case?
10. If no to question 10, how does this affect your work and what has been your response to this?
11. Do you think advocacy in Nigeria is reflecting the state of law enforcement? Where would you want to see improvement?

D. Reflections

12. Do you have any new realisations after this interview?
13. How do you feel about this?