

## 4 “Judging” lesbians

### Prospects for advancing lesbian rights protection through the courts in Nigeria

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#### Introduction

The year 2020 marks two and a half decades since the United Nations Fourth World Conference on Women, popularly called the Beijing Conference. The ensuing Beijing Declaration and the Platform for Action marked a significant milestone in the global gender equality discourse and still significantly influence the international and various national agendas for women’s empowerment and gender equality. In addition to legal reforms, courts represent an important forum for promoting gender equality issues. In Nigeria, the courts play an important role of denying enforcement to discriminatory customary practices and statutes entrenching gender inequality (Ekhaton, 2015; Enabulele & Bazuaye, 2019). Nonetheless, issues of women’s sexual and reproductive health and rights are still impacted by legal, cultural, and religious factors, among others, including the legal restrictions on same-sex relations (Anozie, 2020). In addition to the extant criminalization of sexual offenses against the “order of nature” under the Criminal Code Act (1916) and more recent Penal Code provisions, Nigeria has in recent decades witnessed more restrictive legal changes on non-heterosexual relations, which have in turn spurred the LGBT (lesbian, gay, bisexual, and transgender) movement (Sogunro, 2017). This is not unconnected with the trends of increasing focus on lesbian, gay, bisexual, transgender, and queer (LGBTQ) issues in the global political discourse and in social justice movements (Amaya & González, 2019; Ashford, 2010; United Nations, 2013).

The attributes and experiences of non-heterosexual sexualities and non-binary genders in Nigeria are often homogenized under the description of “gay” or LGBT, whereas the term LGBT itself “encompasses a complex and contradictory set of identities, political agendas and collective actors” (Amaya & González, 2019: 372; Namwase et al., 2017). At the same time, the LGBT movement in Nigeria has been expanding in recent years to include emerging gender identities and sexualities (Sogunro, 2018). There is also growing reference to the term “queer” in the LGBT movement in Nigeria, and across the African continent, in relation to deconstructing sexuality (Massaquoi, 2013; Matabeni, 2014; Moreau & Tallie, 2019). Lesbians<sup>1</sup> specifically face intersecting forms of discrimination that impact their access to justice (CEDAW, 2017). However, lesbians have

been historically under-represented in the scholarly literature on sexual minorities (Currier & Migraine-George, 2017), and feminist literature exploring themes around sexual minorities has been disapproved of in mainstream scholarship (Malumfashi, 2019; Whitsitt, 2003). Lesbians are also under-represented in the LGBTQ movement in Nigeria. To date, there has only been one decided case by a Nigerian court that specifically involves lesbian rights (freedom of association), the case of *Pamela Adie v Corporate Affairs Commission* (2018), which will be discussed in more detail further on in the chapter. In contrast, there are currently 15 cases before the Federal High Court in Lagos, all on issues involving the rights of gay men.<sup>2</sup> This also makes it even more likely that the recognition of sexual minority rights in Nigeria may come through a case on gay rights.

Adopting a feminist intersectional perspective, this chapter uses qualitative research methods to address the question: *how can courts protect lesbians in Nigeria against discrimination on the grounds of their gender identity?* The research combines analysis of legislation and case law, interview data, and participant observations to understand the links between the legal framework and experiences of lesbians in the society (Venturi, 2017; Ashford, 2010). Attempts were made to secure interviews with members of the lesbian community (including self-identifying lesbians and LGBTQ advocates), being mindful of the heterogeneity of the community and how intersecting identities might affect an individual's experiences of discrimination. Initial attempts to contact LGBTQ organizations in Nigeria through emails were unsuccessful. The experience revealed the challenges of conducting qualitative research on LGBTQ issues due to the sensitive nature of the subject and the vulnerability of members of the community (Suen, 2015). Another round of attempts was made using the snowballing technique. This involved contacting LGBT scholars and advocates outside Nigeria, who assisted with identifying willing respondents in Nigeria. Through this, it became possible to gain access to key actors in the LGBTQ community in Nigeria and have meaningful engagements for this research. In the end, five key informant interviews were conducted with two self-identified Nigerian lesbians who have themselves experienced various forms of discrimination in Nigeria and are leading activists, one Nigerian lawyer who has been directly involved in LGBTQ advocacy and seeking justice for lesbians through both formal and informal justice mechanisms in Nigeria, and two queer scholars.

The chapter is divided into four sections. The first section presents the grounding of the research in intersectionality theory. The second section highlights two levels of discrimination experienced by lesbians through expounding on social discrimination and forms of violence, and discrimination and erasure in legislations. The third section focuses on access to justice in the courts and draws from the jurisprudence of the African Charter on Human and Peoples' Rights system and domestic courts in African countries such as Botswana and South Africa for the analysis of constitutional rights protections. The fourth section builds on the research findings to make pragmatic recommendations for a multi-stakeholder approach and judicial activism for the protection of lesbians against discrimination in Nigeria.

## **Framing intersectionality as context and reality**

Situating this study in intersectionality theory is necessary to support analyzing and framing of how lesbians experience intersecting forms of vulnerability to violence and discrimination and inequality, which also creates barriers to accessing justice. The relationships between inequality and social identities, such as gender and sexual orientation, are interactive rather than additive (Bowleg, 2008). As such, a generalized human rights analysis for female sexual minorities is only a first step toward understanding the diverse experiences occasioned by respective multiple identities and would not capture the cumulative effects of the interactions between inequality and social identity. Generally, negative attitudes toward minority sexual orientations often converge with other social identities, including age and economic status, to occasion human rights violations (Biddulph, 2006; Afe et al., 2019). Even within similar settings, the experiences of sexual minorities are known to differ based on multiple identities such as ethnicity, religion, social class, income, geographical location, health status, age, educational qualifications, race, and more (Meyer, 2012; McGuffey, 2018).

In the African context, some of the nuances are mostly reflected in tensions between the regulation of female sexuality in formal institutions, particularly “Westernized” settings, versus more traditional societies. For instance, while female nakedness has been used as a sign of protest (Tamale, 1996) and connotes a spiritual dimension in some traditional settings, it is common to have women’s dress codes regulated in churches, schools, and other formal settings as a means of upholding “morality.” Moreover, the history of lesbianism in African societies has been characterized by fluidity and complex meanings beyond the simplistic and rigid binary understanding of same-sex relations in Western literature. In addition to women engaging in same-sex relations, the concept of minority female identities is further complicated by men who adopt feminine roles or attributes or are sexually attracted to other men—such as the “Yan Daudu” in northern Nigeria (Ayeni, 2017; Gaudio, 2009) and the “Gor-Digen” in Senegal (M’Baye, 2013). “Yan Daudu” describes cross-dressing males who also display sexual ambiguity and are associated with feminine attributes. “Gor-Digen” means “man-woman,” who are also cross-dressing or gender non-conforming. The complexity of meaning around gender and sexuality is well covered in the African queer literature (Amadiume, 1987; Gay, 1985; Kendall, 1999; Oyèrónké, 2005).

Intersectionality theory expands our understanding of the location of multiple identities and how they intersect while opening up possibilities for exploring the links between the identities and individual or group experiences (Crenshaw, 1991). Intersectionality itself is rooted in the experiences of women of color and the limitations of homogeneous feminist approaches, which did not account for the different yet convergent social identities of women (Crenshaw, 1991; Schiller, 2000). McCall (2005) identifies three approaches adopted by intersectionality theory scholars to manage the complex intersecting social relations in social life: anticategorical complexity; intracategorical complexity; and intercategorical complexity. Anticategorical complexity challenges set categories because “social

life is considered too irreducibly complex ... to make fixed categories anything but simplifying social fictions that produce inequalities in the process of producing differences” (McCall, 2005, p.1773). Intracategorical complexity acknowledges established social categories and mainly manages complexity by focusing on particular social groups at neglected points of intersection, represented by individuals. Intercategorical complexity similarly acknowledges established social categories and analyzes relationships of inequality along multiple and conflicting dimensions rather than focusing on complexities within a single group.

The application of intersectionality in this chapter is “group-centered” (Choo & Ferree, 2010) and falls under McCall’s (2005) intercategorical approach. This group-centered intersectionality analysis has been applied by scholars to understand the experiences of individuals who belong to a single group, such as black lesbians, but have experiences differentiated by the other categories with which they also identify—such as race, class, or ethnicity (Moore, 2012; Collins, 2004). The racial dimension is not a major concern for the LGBTQ movement in Nigeria. However, other categories such as gender, sex, ethnicity, class, age, education, and location (in urban or rural areas) are some of the prominent categories experienced. This research considers how intersecting categories (such as gender, sexual orientation, class, and location) experienced by lesbians in Nigeria affect discrimination and access to justice.

## **Lesbians’ experiences of discrimination**

### *Social experiences*

Overall, lesbians experience diverse forms of vulnerability to violence and discrimination in different spheres of life (Azuah, 2016; The Initiative for Equal Rights, 2018). There are two main angles to the consideration of lesbian vulnerability and discrimination in society; one is in connection with the wider Nigerian LGBTQ community, and the second is in relation to heterosexual women. Within the LGBTQ community, lesbian issues generally receive less attention, as the focus is mainly on gay and bisexual men. This is attributed first to the patriarchal foundations of the Nigerian society and the fact that women’s issues are generally not prioritized in the public domain. In the words of Interviewee 1:

The idea that gay men are a direct breach to patriarchal notions means that even people who are ordinarily anti-LGBT don’t often see women as a threat to this social understanding of what sexuality means, it’s this whole patriarchal system. If anything, even lesbian sexuality is considered entertainment for men.

Another possible explanation is that the origin of the LGBTQ movement in Nigeria is connected to the prevention of the spread of HIV/AIDS among gay and bisexual men, while lesbian issues have emerged more recently in the public domain (Interviewee 5).

The second angle questions whether lesbians, and indeed other queer women, face forms of vulnerability and discrimination that are either distinct from and/or additional to those experienced by heterosexual women. Two perspectives emerge in connection with this. First, lesbians face similar forms of vulnerability and discrimination as most women, irrespective of their sexuality. This perspective was not popular among the key informants connected to the LGBTQ community compared with other lawyers working in specialized areas (including land law, customary succession, and adoption rights issues) who were contacted for this study (cf. Ayebazibwe, 2019). Conversely, the more prevalent view among the key informants is that lesbians face additional forms of discrimination compared with heterosexual females simply because of their sexual orientation. For Interviewee 5:

The discriminations that lesbians face in Nigeria which I have recognized is literally all the kind of discrimination that women face. (What) queerness does to that is only to deepen such discrimination. The only thing you may add to that in respect of women who are gender non-conforming is they experience a piled on layer of violence which is both systemic and social, ... and basically amplifies the effect of the baseline discriminations that women already face.

Within the home, lesbians, particularly young lesbians who are closeted or whose families do not approve of their sexual orientation, are exposed to various forms of abuse, including financial, physical, and social stigmatization. In some cases, it is family members who perpetrate social stigmatization, rejection, and various forms of violence against lesbians. Interviewee 4:

And so we see a lot of things like “corrective rape” happening within our community, where your family member can arrange somebody for you, someone that is going to rape you in an attempt to “correct” your sexual orientation and to make you straight. And we see people suffer from that. We see people go to the churches for so-called “deliverance” and sometimes the church that is supposed to protect you (is) the one that violates you. So, we hear cases of rape again..., cases of sexual assault.

Additionally, there is workplace discrimination, with lesbians experiencing unwanted social advances from men in the workplace and being denied opportunities for career advancement on grounds of their sexual orientation; indiscriminate arrest on grounds of perceived sexual orientation; blackmail and extortion from persons threatening to expose their sexual orientation to their families or the public; pathologization of lesbianism as a condition that needs to be treated; and trivialization as something that is “not to be taken seriously” or “a form of entertainment for men” (The Initiative for Equal Rights, 2019a; Human Rights Watch, 2016). Lesbians in Nigeria appear to be additionally vulnerable to poverty and physical assault and other forms of discrimination and human rights

abuses, especially when they are forced out of home and have to live with strangers or miss out on educational and livelihood opportunities as a result. Also, on the political level, even though there is no rule against participation in electoral processes, there is no record of a lesbian running for political office, and they remain under-represented in the political space, where laws affecting them are made mainly by men (The Initiative for Equal Rights, 2019a).

### *Erasure in statutes*

Within domestic laws in Nigeria, there are instances of tacit forms of erasure of women and non-gender-conforming persons. This commonly occurs where legal provisions relating to sexual minorities directly address men only, even though the spirit of the law is understood to cover sexual minorities generally. Instances are found in the Criminal Code Act (1916), the Armed Forces Act (1993), and the Same Sex Marriage (Prohibition) Act (2013). The Criminal Code Act (1916) provisions sanctioning offences “against the order of nature” do not expressly mention women as “perpetrators” except when the female involved “permits a male person to have carnal knowledge of ... her against the order of nature” (Criminal Code Act (1916) s. 214). The Criminal Code Act (1916) s. 217 expressly states: “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.”

Remarkably, similar prohibitions of unnatural offenses have in recent times been declared unconstitutional in countries such as India (Misra, 2009; Ruduša, 2019) and Botswana (Montz, 2019), particularly in cases involving consensual sexual relations between adults that are held in private. In contrast, Shari’a laws of some states in northern Nigeria criminalize lesbianism. For instance, the Shari’a Penal Code Law 2000 (Zamfara State) prohibits both sodomy (*Liwat*), defined as having “carnal intercourse against the order of nature with any man or woman” (Shari’a Penal Code Law (2000) s. 130), and lesbianism, defined narrowly as sexual acts between two women (Shari’a Penal Code Law (2000) s. 134). Paradoxically, the punishment for sodomy is more severe (100 lashes and one year’s imprisonment for the unmarried, and stoning to death for the married) than that for lesbianism (50 lashes and a term of imprisonment of up to six months).

Having “carnal knowledge against the order of nature” is also prohibited under the Armed Forces Act (1993) s. 81 with respect to persons subject to the service law under the Act. This offense renders the perpetrator liable, upon conviction by a court martial, to imprisonment for a term of seven years or any lesser punishment under the Armed Forces Act. Interpreting the provision of the Armed Forces Act (1993) s. 81, the Supreme Court of Nigeria in *Magaji v. The Nigerian Army* (2008) defined the order of nature as “carnal knowledge with the female

sex.” It is possible that there was no reference to sex between females in the case because the appellant before the court was a male. Nonetheless, the court in this case missed an opportunity to proffer an inclusive definition of “carnal knowledge against the order of nature” in the context of diverse sexual identities of both males and females.

The Same Sex Marriage (Prohibition) Act (2013) s. 4 generally criminalizes the contracting of same-sex marriage or civil union, social activities, or public display of amorous relations by same-sex couples, or any form of support for these activities. The Same Sex Marriage (Prohibition) Law (2007) for Lagos State contains similar provisions as the national Same Sex Marriage (Prohibition) Act (2013) (Sogunro, 2017). The Same Sex Marriage (Prohibition) Act (2013) s. 5(3) directly sanctions 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, processions, or meetings, liable on conviction to ten years in prison. Although there is no mention of lesbians or bisexual or queer women throughout the law, it was applied by the court in the *Pamela Adie* case to uphold the Corporate Affairs Commission’s refusal of registration to a non-governmental organization for lesbian rights. The Same Sex Marriage (Prohibition) Act (2013) is seen as critical to addressing issues of discrimination and violence against lesbians and other sexual minorities in Nigeria (Ayeni, 2017; Human Rights Watch, 2016). Interviewee 2:

It is with the Same Sex Marriage (Prohibition) Act that even just holding hands in public can be seen as a criminal activity. Previous legal provisions on homosexuality and carnal knowledge against the order of nature focus on the sexual act itself and not on identifying as a gay or lesbian. When people know that same sex cannot display affection in public, people take advantage of it. Just on the basis of perceived sexual orientation, people mob a suspect, a gay man or a lesbian. People are emboldened to carry out these atrocities, because they feel society supports them, they feel religion supports them, they feel the law supports them. The law, the Same Sex Marriage (Prohibition) Act and others, has emboldened perpetrators of violence.

Moreover, in the Nigerian setting, where there is a lot of pressure on young women to get married (Ntoimo & Isiugo-Abanihe, 2014), the Same Sex Marriage (Prohibition) Act (2013) restriction on same-sex marriage exposes lesbians to additional layers of stigmatization, vulnerability, and rights violations. Interviewee 3:

Sometimes, due to the pressures, they are forced to get married and end up in a dysfunctional relationship. This confuses their children. They are hardly home and they expose themselves to health infections because they cannot be in stable relationships. It is multilayered because even to be in a relationship is a problem. For instance, one of my friends had to pretend and say that her lover is her sister. Her landlady went as far as making enquiries and



decided that she cannot continue renting out her house to two women who are together. You cannot be open about the relationship. At some point, you have to prove that the person is your sister. You have to be cautious; you have to live correctly, if you are with your girlfriend, there are certain things you cannot do in public.

Despite the challenges noted by interviewees, a recent survey of social perception on LGBT rights indicates changing attitudes and a slight (7%) decrease in the level of support for the Same Sex Marriage Prohibition Act: 75% support in 2019 compared with 90% support in 2015 (The Initiative for Equal Rights, 2019b). Former President Goodluck Jonathan, who signed the Same Sex Marriage Prohibition Act into law in 2014, declared two years later, in 2016, that “in the light of deepening debates for all Nigerians and other citizens of the world to be treated equally and without discrimination, and with the clear knowledge that the issue of sexual orientation is still evolving, the nation may, at the appropriate time, revisit the law” (Feder, 2016). Nonetheless, the Same Sex Marriage Prohibition Act remains in force throughout Nigeria, being a federal-level law, subject to judicial or legislative review.

### **Access to justice in the courts**

It is difficult to conclusively assess the judicial attitude to lesbian rights in Nigeria for several reasons. First, most cases do not make it to court either because the victims are closeted and do not wish to press charges or because the justice delivery system, particularly the police, has failed to diligently investigate and prosecute the matter, thereby effectively “revictimizing” the victim. Illustrating an instance of workplace discrimination that went unreported, Interviewee 2:

This happened because she (the victim) would have to narrate what has happened and the fact would include revealing her own sexual orientation. Was she ready? She was not ready. Would the table turn? Possibly, yes, the table could turn! They (the police) leave the investigation and start discussing her sexual orientation.

Second, the chance of obtaining justice also varies according to the rights violations alleged. For Interviewee 1:

If you are using your sexuality as the focal point, the Nigerian court system has so far proven to be inhospitable to recognizing that same sex relationships exist and that there are people who go beyond the binaries of male/female identity or the straight sexual orientation.

The perception is, therefore, that cases of police brutality or unlawful arrest would likely be “easier” to establish in court and obtain justice. A ready example is the case of *Ifeanyi Orazulike v. Inspector General of Police & Abuja Environmental*



*Protection Board* (2014). Ifeanyi Orazulike (the applicant), a renowned LGBT advocate, filed a motion on notice in the Federal High Court in Abuja for the enforcement of his fundamental rights. The applicant claimed that he was arrested by the police during his birthday celebration in his office in Abuja and subjected to humiliating and dehumanizing treatment during the raid of his office and his detention. The raid occurred after the enactment of the Same Sex Marriage (Prohibition) Act (2013). The police did not bring any charges against the applicant that warranted the raid. The court ruled in favor of the applicant, stating that his rights to personal liberty, dignity, and freedom of movement had been violated.

There are also laws protecting against discrimination and violence that extend to everyone in the society and can form the basis for instituting related actions in court. An example is the HIV/AIDS (Anti-Discrimination) Act (2014) for the prevention of discrimination based on real or perceived HIV status and the provision of access to healthcare and other services to everyone. Another is the Violence against Persons (Prohibition) Act (2015), which "prohibits all forms of violence against persons in private and public life and provides maximum protection and effective remedies for victims and punishment of offenders" (Explanatory Memorandum, n.p.). The Violence against Persons (Prohibition) Act (2015) is only applicable in the Federal Capital Territory Abuja and needs to be enacted by the house of assembly of each of the remaining 36 states to become effective in other parts of the country.

A third factor affecting access to justice is linked to how personal attributes, such as wealth, income, level of education, and overall status in the society, offer intersecting layers of protections to the LGBTQ community in general and influence the decision to even engage the justice systems. Interviewee 3: "*the more visible you are, the easier it gets.*" This is seen as a critical deciding factor in instances of successful enforcement of fundamental rights protection by the LGBTQ community, as in the *Ifeanyi Orazulike* case. Most lesbians in Nigeria live in vulnerable situations, including those in rural or remote areas with limited availability of justice, and most who cannot afford the high cost of legal representation are unable to access justice systems without external support from non-governmental organizations. Heterosexual women in Nigeria face comparable barriers to accessing justice (CEDAW, 2017). This informs the expectation that progress with gender equality issues, including sexual and reproductive autonomy for women in Nigeria, might culminate in a recognition of lesbian sexuality. Interviewee 1:

This [advancement of lesbian right issues in close connection with sexual and reproductive rights from women] is different from the way gay issues are evolving. Because women have long faced this whole idea of your body is not yours. It's either your father's or your husbands or just society's decision to decide (that) you can't show this, you can't show, you can't wear that, you can't be seen here, you can't open your hair here. Women's bodies have been policed for such a long time that if there is any breakthrough in that

it is much more likely that that is where you will have that breakthrough in women's sexuality.

The only case so far decided on lesbian issues in Nigeria is *Pamela Adie v. Corporate Affairs Commission*. In the *Pamela Adie* case, the respondent (the government agency in charge of company registration and related matters in Nigeria) had rejected the registration/reservation of the applicant's proposed name of an organization that was to be called "Lesbian Equality and Empowerment Initiatives." The applicant requested the court to declare that the respondent's refusal was a violation of her rights to freedom of expression and association under the Constitution of the Federal Republic of Nigeria (1999) and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (1983). The applicant sought a court order enforcing her right to assemble and associate under the stated name and to have the name registered. Additionally, the applicant requested an order of *mandamus* directing the respondent to issue a notice of approval of the proposed name for registration. The court held that "so far as the Same Sex Marriage (Prohibition) Act is still operative in Nigeria and has not been repealed, the case of the Applicant must fail." This justifies the following observation by Interviewee 2:

If the Same Sex Marriage (Prohibition) Act can be systematically addressed, then the problem is half solved. The next issue would be the Criminal Code, and this is deeply engrained in the religious nature of the Nigerian society.

Other decided cases on gay rights also allow a preliminary assessment of indications of justiciability of sexual minority issues in Nigerian courts.<sup>3</sup> In an earlier case, *Teriah Joseph Ebah v Federal Government of Nigeria (FGN)* (2014), the applicant instituted the action on behalf of the "Gay Community in Nigeria" and asked the court to consider the constitutionality of the Same Sex Marriage Prohibition Act. The case was dismissed for lack of *locus standi* because the court noted that there was no such community in Nigeria. The applicant had instituted the originating summons before the Federal High Court of Abuja under the Fundamental Rights (Enforcement Procedure) Rules (2009). The Fundamental Rights (Enforcement Procedure) Rules (2009) requires the court, among others, to encourage and welcome public interest litigation on human rights and provides that no human rights case may be dismissed or struck out for lack of *locus standi* (Onuora-Oguno, 2017). In fact, the court in the *Pamela Adie* case noted that one of the fundamental changes brought about by the Fundamental Rights (Enforcement Procedure) Rules (2009) was a move away from procedural technicalities and that the court, being a court of justice, "will not allow technicalities to stand in the way of substantial justice," contrary to the *Teriah Joseph Ebah* decision. The *Pamela Adie* case is therefore still considered by some of the key informants in this study as an instance of access to justice in the court. The perception of the interviewees is in line with the idea that justice is not tantamount

to victory in court: existing layers of discrimination against lesbians would need to be progressively dismantled one at a time, and every “victory” is an important milestone to accessing justice.

### ***Constitutional rights protection***

Cases on LGBTQ issues in Nigeria have been mainly argued on the grounds of constitutional rights. Although the courts are yet to declare on the constitutionality of legislative restrictions on same-sex relations, human rights protections and the enforcement procedures feature prominently in the court decisions on LGBTQ-related issues in Nigeria. Much of the scholarly focus on LGBTQ issues in Nigeria has also been on the implications of laws sanctioning homosexuality on constitutionally guaranteed human rights (Akogwu, 2018; Anozie, 2020), the right of the Nigerian government under international law to legitimately exercise national sovereignty to impose the restrictions in the Same Sex Marriage Prohibition Act (Nnamuchi, 2019), and the cultural and moral dimensions of the restrictions (Arimoro, 2018).

The Constitution of the Federal Republic of Nigeria (1999) s. 42 prohibits any form of discrimination against any citizen of Nigeria “of a particular community” or “sex” on the basis of being a member of the particular community, sex, or other listed group. The Nigerian Constitution does not expressly prohibit discrimination on the ground of sexual orientation, unlike the Constitution of South Africa 1996 s. 9(3), which prohibits the state from unfairly discriminating against anyone on one or more grounds, including sexual orientation. Nonetheless, the African Charter on Human and Peoples’ Rights (1981) (“Banjul Charter”) Art. 2, which has been enacted into law in Nigeria since 1983, requires that “every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as ..., sex, ... or other status.” The Banjul Charter Art. 2 does not expressly mention “discrimination,” but the Banjul Charter Art. 6 refers to distinction and equality before the law. Any law prohibiting marriage on a “suspect ground” offends against equality and considering sexual orientation as a “suspect ground” also suggests discriminatory treatment (Rudman, 2015).

The Nigerian Constitution s. 37 also expressly guarantees and protects the right to private and family life of all citizens. In line with this, it is the right of citizens to enjoy their privacy, including the right to carry out sexual activities within their private spaces. In South Africa, in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998), the Constitutional Court held that the offense of sodomy was inconsistent with the fundamental rights to equality, dignity, and privacy guaranteed in the country’s constitution. The court distinguished between the right to hold religious beliefs and the state’s ability to impose these beliefs on the entire population, “even in moderate and gentle forms.” It further stated that there was no valid purpose suggested for the limitation and “the enforcement of the private moral views of a section of the

community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose” (Jernow, 2011, p.18). Similarly, in the Botswana case of *Letsweletse Motshidiemang v Attorney General; LEGABIBO (Amicus Curiae)* (2019), the High Court held that the provisions of the Botswana Penal Code that criminalized (attempts to commit as well as commission of) unnatural offenses violated constitutional protections of the rights to liberty, dignity, privacy, and freedom from discrimination. The High Court of Botswana further held in that case that the Botswana Penal Code s. 167, which had hitherto criminalized “indecent” practices between persons, whether in public or in private, should be amended to exclude practices carried out in private in order to ensure compliance with the Constitution of Botswana.

The Nigerian Constitution s. 39 guarantees every person the freedom of expression, including the freedom to hold, receive, and impart ideas and opinions without interference. The Nigerian Constitution s. 40 also guarantees every person their freedom of association, including the freedom to “form or belong to any political party, trade union or any other association for the protection of” the individual’s interests. The right to freedom from discrimination and rights to private and family life, freedom of expression, and freedom of association are, however, violated by laws criminalizing LGBTQ activities, with nuances for lesbians. In the Kenya case of *Eric Gitari v. NGO Board & 4 others* (2015), the Kenya High Court held on the basis of the proportionality principle that it was wrong for the national non-governmental organization (NGO) board to refuse to register an LGBT association on the basis of moral beliefs, as this was an infringement of the freedom of association of LGBT minorities. Notwithstanding, same-sex relations are still criminalized in Kenya. The High Court in the Kenya case of *EG & Ors. v. The Attorney General & Ors.* (2019) ruled against decriminalizing same-sex relations, stating that the extant restrictions do not violate the right to privacy and dignity enshrined in the Constitution of Kenya 2010 Arts. 28 and 31, and that a decision to the contrary would promote same-sex unions, which was against the values of the Constitution of Kenya.

The Nigerian Constitution s. 45(1) also provides that neither the right to privacy nor freedoms of thought, conscience and religion, expression, and peaceful assembly and association “shall invalidate any law that is reasonably justifiable in a democratic society: (a) in the interest of defense, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons.” These grounds for limitation of human rights are far reaching and yet to be adjudicated by the courts in Nigeria, even though the links between law and morality in connection with sexuality remain topical (Agyeman-Budu, 2018; Meerkotter, 2019).

Nonetheless, based on the rule of law, arbitrary interference with human rights is not justifiable. Rather, any limitation of rights can only be justified if it is proportional, considering the extent of the limitation and the outcome. The principle of proportionality has been applied by national courts in other jurisdictions to assess restrictions on constitutional rights. In striking down the sodomy laws in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998), the

Constitutional Court of South Africa considered the lack of valid purpose suggested for the limitation while also observing that “the private moral views of a section of the community..., cannot qualify as ... a legitimate purpose” (Jernow, 2011, p.17). Similar reasoning has also been applied by the African Commission of Human and Peoples’ Rights in interpreting the impact of “claw-back clauses,” which have a similar effect of limiting the applicable rights guaranteed in the Banjul Charter. A claw-back clause is a limitation clause that permits, under normal circumstances, the breach of a human rights obligation based on specific public reasons (Higgins, 1976; Udombana, 2000). This makes a claw-back clause distinct from a derogation clause permitting the breach or suspension of a human rights obligation only during war or public emergency, as special circumstances.

In line with the principle of proportionality, the African Commission on Human and Peoples’ Rights in the case of *Constitutional Rights Project v. Nigeria* (1999–2000) declared: “[T]he justification of limitations (*under Article 27(2) of the Charter*) must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.” The Banjul Charter Art. 27 (2) reads: “[T]he rights, and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.” Similarly, the African Court on Human and Peoples’ Rights in the case of *Mtikila v The United Republic of Tanzania* (2013) held that

the jurisprudence regarding the restriction on the exercise of rights has developed the principle that, the restrictions must be necessary in a democratic society; they must be reasonably proportionate to the legitimate aim pursued. Once the complainant has established that there is *prima facie* violation of a right, the respondent state may argue that the right has been legitimately restricted by “law,” by providing evidence that the restriction serves one of the purposes set out in Article 27(2) of the Charter.

Furthermore, as the African Commission on Human and Peoples’ Rights reiterated in *Article 19 v. Eritrea* (2007), “the Commission’s jurisprudence has interpreted the so-called claw-back clauses as constituting a reference to international law, meaning that only restrictions on rights which are consistent with the Charter and with states parties’ international obligations should be enacted by the relevant national authorities” (para. 92). Moreover, arbitrary deprivation of rights cannot be justified through “claw-back” clauses. It is therefore not enough for the state to rely on restrictions in existing domestic law, as the court mentioned in the Nigerian case of *Pamela Adie*. Rather, human rights restrictions must be shown to be necessary and proportional.

## Recommendations and conclusion

Progress with women’s rights issues in Nigeria, particularly around sexual and reproductive autonomy, benefits all women and can be expected to become a

watershed for lesbian rights. This should therefore be a rallying point for both gender and sexuality rights advocates to promote strengthening of the legal framework for the protection of women's gender and sexuality rights. Given the unique positionality of lesbians, it is further necessary to unpack the social and legal drivers of vulnerability and discrimination, which lesbians experience differently, depending on their respective social identities. Although the institution of law, and justice systems, has in most cases primarily presented barriers to accessing justice for lesbians (and other sexual minorities), it also presents principles that can be drawn on for their emancipation.

Achieving social change for lesbians through the courts would require a proactive approach to the interpretation of fundamental rights guarantees in the Nigerian Constitution. Such a proactive approach could entail relying on the existing fundamental rights guarantees to protect lesbians from discrimination, various forms of violence, and outright human rights violations, which they experience because of their gender and sexual orientation, among other reasons. For this purpose, the interpretation of similar fundamental rights guarantees and the proportionality principle as applied in other jurisdictions to cases involving sexual minority rights offers elements for assessing the legality of any interference with rights on the grounds of gender or sexual identity. There is room for cross-jurisdictional learning drawing on the jurisprudence from the African Commission and domestic courts in other African jurisdictions on issues of proportionality in relation to the rights of sexual minorities.

Some skepticism exists over the value of law in addressing marginalization and violence against sexual minorities, and it is suggested that law reforms need to occur as a part of wider strategies for transformation (Spade, 2015; Devji, 2016). The law and the courts hold key places in addressing discrimination against sexual minorities in Nigeria. As currently constituted, the notorious Same Sex Marriage (Prohibition) Act (2013) and other similar criminal sanctions are largely blamed for recent incidents of violence and discrimination against sexual minorities in Nigeria. These discriminatory practices are reflected in the court cases, particularly the decision of the court in the *Pamela Adie* case. In line with these developments, the judiciary has a primary duty to enforce the rule of law—particularly the Nigerian Constitution—and nullify, rather than enforce, any legislative provision that is relied upon to justify arbitrary limitations or violations of fundamental rights.

From the few cases so far available on sexual minority rights in Nigeria, the law has been used to sometimes maintain the *status quo*, sometimes to remove technicalities that affect access to justice, and at other times to create a paradox whereby sexual minorities are granted audience in the courts but do not achieve their desired “justice” outcomes. In the words of Iñaki Regueiro De Giacomi, “[L]aw functions at the same time as a tool to maintain the status quo of a community—which is what it is often used for—but there are also some exceptional and wonderful cases where law proves to be the opposite, a tool for social change” (Lalor et al., 2016, p.37). In the Nigerian context, the current trend in advocacy for sexual minority rights has entailed legal challenge of a specific provision(s) of the Same Sex

Marriage (Prohibition) Act (2013) on grounds of incompatibility with fundamental rights guarantees and/or challenge against fundamental rights violations without any direct reference to the sexuality of the victims (usually of assault, unlawful arrest, or other forms of inhuman and degrading treatment). It is expected that the jurisprudence arising from such cases would eventually form the legal basis for a challenge to the constitutionality of the Same Sex Marriage (Prohibition) Act (2013) and other discriminatory laws highlighted in this chapter.

Overall, the domestic courts remain a "last hope," yet to be fully explored for access to justice for lesbians and many others in vulnerable situations in Nigeria because of both salient and underlying barriers to access to justice. Other quasi-judicial institutions and agencies that form part of the justice system, particularly the police, also play an intervening role and are more commonly involved in cases affecting lesbian rights. The police have been identified as playing an essential role in the investigation and prosecution of cases (especially criminal cases). As such, any reforms aimed at enhancing the role of the courts in protecting lesbians against discrimination in Nigeria will necessarily have to address other social and legal barriers that affect the capacity of women and lesbians to seek redress in courts and engage with the justice system.

## Notes

- 1 The chapter adopts the definition of a lesbian as "[A] woman who is emotionally, romantically, sexually or relationally attracted to other women" (The Initiative for Equal Rights, 2019a).
- 2 Interviewee 2.
- 3 A case in which the issues of same-sex marriage was mentioned, specifically in connection with women, is *Mr. Afam Okeke v Madam Helen Okeke* (2017). In Okeke's case, one of the issues for determination in the appeal was the validity of a customary practice that allows a woman to have posthumous children for her deceased husband. In delivering the lead judgement, Yakubu JCA stated that while advances in technology and globalization influence societal culture, this should not compromise the value system and ethos through encouraging practices such as same-sex marriage. Although the condemnation of same-sex marriage in the *Okeke* case was by way of *obiter dictum*, as this was not an issue for determination in the present case, it reflects the judicial attitude toward same-sex marriage as an "alien" and "immoral" culture that is not to be encouraged in Nigeria.

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