

The influence of Roman laws regarding same-sex acts on homophobia in Africa

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Summary

In recent years there has been a surge of homophobia across Africa. Among the arguments of this discourse against homosexuality is that homosexuality is a pattern of behaviour, not an orientation, that such behaviour is an import from the West and, as such, unAfrican. Paradoxically, this discourse also argues that homosexuality is against religion, where the religion referred to is Christianity, another Western import. However, one of the most dangerous manifestations of homophobia has been attempts not just to socially condemn, but to legally prosecute homosexual acts. Such legal persecution, especially in some of the former British colonies of sub-Saharan Africa, has been possible due to the presence within their penal codes of laws against 'unnatural' sexual acts. Many commentators have noted that these laws are themselves a remnant of colonial occupation and as such do not communicate African values. Nevertheless, they are being used to help justify homophobia in Africa. However, these commentators have not fully realised the implications of the origin of the laws on unnatural sexual acts. These laws can be traced back not just to Britain, but to the first codified laws regulating same-sex acts in the West, namely, the laws of the ancient Romans. This study examines Roman laws on same-sex acts and the consequent establishment of a legal concept of sexuality. It then illustrates

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how, due to the influence of these laws on the formulation of Victorian laws on unnatural acts, the Roman legal concept of sexuality underlies the laws which exist in many former British colonies. It also briefly outlines the effect of these laws on present-day sub-Saharan Africa. Perhaps understanding the ancient, alien socio-historical context of the legal concept of sexuality behind the Roman laws may assist in subverting the law argument of the African homophobic discourse.

Key words: *homophobia; homosexuality; sub-Saharan Africa; Roman laws; ancient Roman sexuality*

1 Introduction

In 2010, two Malawians, Steven Monjeza and Tiwonge Chimbalanga, classified as men by the Malawian legal system, were sentenced to 14 years in prison with hard labour for conducting a traditional engagement ceremony.¹ This example of homophobia² is just one from a growing trend in recent years, where the prospect of the law being used to persecute homosexuals in parts of sub-Saharan Africa is becoming an increasing threat.³ The West's reaction to the judgment

1 M Epprecht 'The politics of gay-bashing' 28 June 2010 <http://www.dandc.eu/articles/175882/index.en.shtml> (accessed 16 February 2012). They were later pardoned by the President, Bingu wa Mutharika, but in doing so he also said that '[t]hese boys committed a crime against our culture, our religion and our laws'. M Gevisser 'Homosexuality and the battle for Africa's soul' 4 June 2010 <http://www.mg.co.za/article/2010-06-04-homosexuality-and-the-battle-for-africas-soul> (accessed 8 August 2013).

2 While Chimbalanga self-identifies as female and therefore this couple cannot technically be called homosexual, Chimbalanga was identified as male by Malawian society and the courts and so this can still be counted as a display of homophobia. Gevisser (n 1 above).

3 In 2009, a Ugandan MP, David Bahati, proposed a Bill that would allow for harsher punishments to be imposed on those successfully prosecuted for homosexual acts under the existing laws on 'unnatural acts'. These punishments included the death penalty for 'repeat offenders'. J Mmali 'Uganda fear over gay death penalty plans' 22 December 2009 <http://news.bbc.co.uk/2/hi/africa/8412962.stm> (accessed 22 March 2012). A watered-down version of this Bill was signed into law in 2014, but it still allowed for life imprisonment for 'aggravated homosexuality' and 'promotion' of homosexuality. A Cowell 'Uganda's President signs antigay Bill' 24 February 2014 http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-antigay-law.html?_r=0 (accessed 17 June 2014). The law has since been invalidated by the Ugandan Constitutional Court. However, this was on technical grounds and the law may yet be reintroduced in parliament. D Smith 'Uganda anti-gay law declared "null and void" by constitutional court' 1 August 2014 <http://www.theguardian.com/world/2014/aug/01/uganda-anti-gay-law-null-and-void> (accessed 21 September 2014). In 2009, the Rwandan government was forced to put out a statement saying that they would not be interfering in the private lives of citizens, after fears arose that they too were planning anti-gay legislation. Gevisser (n 1 above). However, other former British colonies in Africa, Nigeria and The Gambia, have followed Uganda's lead and imposed similar, harsher laws against homosexuality. A Nossiter 'Nigeria

and similar legal manoeuvres in Africa has been outrage.⁴ The legal persecution of homosexuals conjures images of racism and gender discrimination.⁵ European countries and the United States (US) have threatened to withhold aid to African countries not supporting gay rights.⁶ However, this stance could be considered to be hypocritical.⁷ Homosexuality and most of the main justifications for homophobia in sub-Saharan Africa, namely, Christian morality⁸ and the laws, are actually imports brought in centuries before by the colonial Western powers.⁹ The most systematic, pervasive and firmly-established colonial laws against same-sex acts were imposed by the British and can be found as remnants in the penal codes of many of their former

tries to "sanitize" itself of gays' 8 February 2014 <http://www.nytimes.com/2014/02/09/world/africa/nigeria-uses-law-and-whip-to-sanitize-gays.html> (accessed 17 June 2014); E Margolin 'Another African nation to enact anti-gay law' 10 September 2014 <http://www.msnbc.com/msnbc/gambia-anti-gay-law> (accessed 19 September 2014).

- 4 In response to Uganda's proposed Bill against homosexual acts, Sweden threatened to withhold aid in 2009; Mmali (n 3 above). Barack Obama criticised the Bill in 2010. P Fihlani 'Religion, politics and Africa's homophobia' 23 February 2010 <http://news.bbc.co.uk/2/hi/8528409.stm> (accessed 16 February 2012). In 2011, David Cameron also threatened to withhold aid to Uganda similarly to the US policy announced by Hilary Clinton that they would 'tie US foreign aid to a country's record on gay rights'. N Abraham 'Religious leaders battle African homophobia' 22 December 2011 http://www.salon.com/2011/12/22/religious_leaders_battle_african_homophobia/ (accessed 16 February 2012). UN Secretary-General Ban Ki-Moon also spoke against legalised homophobia in Africa in 2012. N Broverman 'UN Secretary-General calls out African homophobia' 29 January 2012 <http://www.advocate.com/news/daily-news/2012/01/29/un-secretary-general-calls-out-african-homophobia> (accessed 2 August 2013). When the Ugandan anti-gay Bill was signed into law, several European countries threatened to review, withhold or divert aid. The US suggested that the Bill would complicate their relationship with Uganda and decided to review their aid policy, and the UK questioned the Bill's compatibility with Uganda's own Constitution. E Biryabarema 'Ugandan President signs anti-gay Bill, defying the West' 24 February 2014 <http://www.reuters.com/article/2014/02/24/us-uganda-gaybill-idUSBREA1N05S20140224> (accessed 17 June 2014). In 2014, after the signing of the Nigerian anti-gay Bill into law, the then UN High Commissioner for Human Rights, Navi Pillay, said in a statement that the new laws directly violated 'basic, universal human rights'. Nossiter (n 3 above).
- 5 See M Epprecht *Hungochani. The history of a dissident sexuality in Southern Africa* (2004) 6.
- 6 See n 4 above. See also Epprecht (n 1 above).
- 7 It is also causing concern with LGBTI and other human rights groups in Africa who, while condemning the strengthening of laws against homosexuality, feel that the reaction of the West is aggravating the anti-colonial stance of African leaders. See Abraham (n 4 above). See also T Msibi 'The lies we have been told. On (homo) sexuality in Africa' (2011) 58 *Africa Today* 72.
- 8 Islam, the other prominent religion in Africa (also an import), especially in North and parts of West and East Africa, also condemns homosexuality. See Nossiter (n 3 above) on the effect of the interaction between Nigeria's harsher new laws against homosexuality and Islamic law on homosexuality.
- 9 Epprecht (n 5 above) 152-183 suggests that the third common justification for homophobia in Africa, namely that homosexuality is unAfrican, also seems to come from the West. He argues that the concept is the result of the internalisation of Western, colonial ideas about Africans, gender identity and sexual practices.

colonies.¹⁰ Even though commentators have noted the colonial nature of these laws,¹¹ many Africans now call these conservative, Victorian forms of morality their own, and resent what they perceive as Western interference.¹² But this is not the end of the story. The origin of the laws used against same-sex acts is actually far older than British colonialism. They can be traced all the way to ancient Rome. Thus, the ancient, non-religious concept of sexuality, which lay beneath the Roman laws, is being used to justify homophobia and persecute homosexuals in a modern, African, Christian context. Perhaps creating an awareness of the older, alien underpinnings to the colonial laws will undermine the legal justification for homophobia in Africa, where other arguments have not, without being an imposition from the West.

10 Human Rights Watch *This alien legacy. The origins of 'sodomy' laws in British colonialism* (2008) 10. Dutch settlers brought Roman-Dutch law to the Cape settlement in South Africa, which also included provisions against same-sex acts. Human Rights Watch and the International Gay and Lesbian Human Rights Commission *More than a name. State-sponsored homophobia and its consequences in Southern Africa* (2003) 257-262-265. The British South Africa Company, operating out of South Africa, came to settle and occupy several colonies, such as Zimbabwe, Zambia and Botswana, and brought the Roman-Dutch law with them. (Namibia came under the purview of Roman-Dutch law when the colony was passed from German to South African control in 1920.) However, all of these colonies, including South Africa, eventually came under British rule. In some cases, the colonial British penal code was introduced, and in others Roman-Dutch laws were interpreted according to the concepts underlying the colonial British penal code. Human Rights Watch and the International Gay and Lesbian Human Rights Commission (above) 265-274. See Human Rights Watch (above) for a full discussion of the history of sodomy laws in British colonies. For a history of the Roman-Dutch sodomy laws and their interaction with the colonial British penal code, see Human Rights Watch and the International Gay and Lesbian Human Rights Commission (above) 258-274. (The influence of French, German and Portuguese laws against same-sex acts on their former colonies is minimal, with the possible exception of Francophone states Cameroon and Senegal. Human Rights Watch (above) 6-7; F Viljoen 'Equal rights in a time of homophobia. An argument for equal legal protection of "sexual minorities" in Africa' 12 June 2013 11th University of Pretoria Expert Lecture <http://www1.chr.up.ac.za/images/files/research/researchers/Frans%20expert%20lecture-HomosexualityWeb%20version.pdf> (accessed 26 September 2014) 22-23.

11 Eg Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 7-256; Epprecht (n 5 above) 7; Human Rights Watch (n 10 above) 10; AS Leonard 'A spurious defence of sodomy laws in the former British colonies' 15 March 2009 <http://newyorklawschool.typepad.com/leonard/link/2009/03/a-spurious-defense-of-sodomy-laws-in-the-former-british-colonies.html> (accessed 8 March 2012); F Cowell 'Colonial sodomy. Homophobic threat within common law' 14 July 2010 http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=472:colonial-sodomy-homophobic-threat-within-common-law&catid=91:rights-in-focus&Itemid=296 (accessed 16 February 2012); Msibi (n 7 above) 69.

12 See Epprecht (n 5 above) 180-181 184-185; Human Rights Watch (n 10 above) 10.

2 Perception of 'homosexuality' in Africa

In order to understand how and why the law is being deployed by the homophobic discourse in parts of sub-Saharan Africa, it is necessary to know the nature, and to be aware of the context, of this discourse. First, it is important to realise that homosexuality does not have a uniform or concrete meaning. Homosexuality is a fairly modern term. It was coined in the nineteenth century as part of the growing European field of medical and psychological studies to identify people, mostly men, whose erotic attraction to others of the same sex¹³ was believed to constitute an innate perversion, or pathology.¹⁴ This was a radical change from the previous conceptualisation of sex between men as sodomy, which was seen as a 'temporary aberration',¹⁵ not a life-long orientation. As Foucault points out, once provided with an identity and a terminology, 'homosexuality began to speak in its own behalf'.¹⁶ Certain men, and later women, used the discourse of homosexuality to justify a valid identity and existence for themselves. The term 'gay', and the language surrounding it, began to be used in the US as part of the counterculture movements of the 1960s and rights struggles of the 1970s, such as those against racism and sexism, as a means of claiming the identity of homosexuality and recasting it in an affirming light.¹⁷ Consequently, for many in the Western world homosexuality, or the more popular adjective 'gay', has come to refer to an intrinsic sexual orientation in a person towards one of their own sex.¹⁸

The idea of homosexuality as an inborn, life-long orientation is very much a product of the West,¹⁹ and it has been transported to Africa mainly through the Western media and aid organisations.²⁰ While several African communities do have identities for men who do not conform to the Western hetero-normative model, no African culture has ever had a concept of sexual orientation.²¹ The response to such a concept has been multifaceted. Some have accepted it and, where

13 E Cameron 'Sexual orientation and the Constitution. A test case for human rights' (1993) 110 *South African Law Journal* 452.

14 M Foucault *The history of sexuality, vol 1. The will to knowledge* trans R Hurley (1978) 43.

15 As above.

16 Foucault (n 14 above) 101.

17 CF Stychin 'Being gay' (2005) 40 *Government and Opposition* 92-93.

18 The terms 'homosexuality' and 'gay' are usually used to refer to males.

19 Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 7-8.

20 Gevisser (n 1 above). See N Hoad *African intimacies. Race, homosexuality, and globalisation* (2007) 69, who notes that the threat of homosexuality in the eyes of the African homophobic discourse is embedded in Western non-governmental organisations.

21 Msibi (n 7 above) 64-65 points out that traditional sexual identities in Africa were predominately based on reproduction and gender roles, with men who played the passive part in same-sex acts sometimes identified as women. He highlights studies that show the gender and sexual identities of some traditional cultures

appropriate, taken on homosexuality as an identity.²² However, many Africans cannot, or choose not to, comprehend the concept of a biological sexual orientation.²³ Some have seen same-sex acts and those who commit them as simply being re-identified with new, foreign-language terms. A homosexual is therefore a person who commits same-sex acts, not a person with an orientation.²⁴ Others understand the concept of an orientation but refuse to believe it, just as the conservative sexual discourse still does in Western countries. David Bahati, the anti-gay Ugandan Member of Parliament (MP), said that '[i]t's not an inborn orientation, it's a behaviour learnt - and it can be unlearnt'.²⁵ This refusal to accept a homosexual identity and instead to place emphasis on the behaviour of people means that many Africans believe that same-sex acts are a matter of conscious choice:²⁶ Human beings are considered able to choose what behaviour to enact, therefore either those who commit same-sex acts are misguided and can be stopped through counselling,²⁷ or they are wilfully committing the acts and must be stopped through punishment.²⁸

21 from Nigeria, Uganda, Malawi, Senegal and the Zande people of South-Western Sudan, the Central African Republic, and the North-Eastern Congo which included, or accepted, same-sex desire; Msibi (n 7 above) 65-68. Epprecht (n 5 above) 35 69-71 257 n 39 notes acceptance of same-sex practices among the Shona, Shangaan, Zulu and Ndebele of Southern Africa.

22 Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 8. However, Human Rights Watch and the International Gay and Lesbian Human Rights Commission also point out that Africans who take on the identity of homosexual do so in an African context and imbue the term with their own cultural understandings of difference, often based on gender.

23 Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 7. See also K Cheney 'Locating neocolonialism, "tradition", and human rights in Uganda's "gay death penalty"' (2012) 55 *African Studies Review* 81.

24 In fact, the men and women who practise same-sex acts themselves often do not self-identify as homosexual. Scholars, rights groups and journalists have appropriated the identity-free terms MSM ('men who have sex with men') and WSW ('women who have sex with women') from HIV literature to try and identify, research, aid and discuss those who do not identify as homosexual. RM Young & IH Meyer 'The trouble with "MSM" and "WSW". Erasure of the sexual-minority person in public health discourse' (2005) 95 *American Journal of Public Health* 1144. See Young & Meyer (above) for the complexities of the issue.

25 Mmali (n 3 above).

26 Sec 1 of the Anti-Homosexuality Act, 2014 from Uganda specifically defines homosexual as 'a person who engages or attempts to engage in same-gender sexual activity'.

27 David Bahati has encouraged churches and mosques to undertake such counselling. Mmali (n 3 above).

28 Although a Ministry of Health report Scientific Evidence on Homosexuality of 23 February 2014 11, commissioned by Ugandan President Yoweri Museveni on whether or not homosexuality is inborn, came to equivocal conclusions, such as '[n]ature (genes) and nurture (environment) interact to yield homosexuality. However, nurture appears to play a greater role ...'; '[h]omosexuality is not an anomaly or abnormality' and '[n]o single gene for homosexuality is known to date'. The President took the statement '[n]o single gene for homosexuality is known' to be unequivocal evidence that homosexuality is a learnt behaviour and

3 Factors contributing to homophobia in Africa

Considering that there is no evidence to suggest that, before colonialism, African cultures systematically condemned and prosecuted same-sex acts or those with an alternative gender identity,²⁹ the recent surge of homophobia across sub-Saharan Africa³⁰ could be seen as surprising. Homophobia, a term coined from the word 'homosexual', refers generally to prejudice against same-sex acts and the people who practise them. This prejudice manifests itself in Africa as 'exclusions, taunting, name-calling and discrimination' as well as 'murder',³¹ perpetrated not just by individuals but, in some countries, by the media, the state, religious leaders, and group demonstrations and violence.³² Scholars have suggested several factors that they believe are the main driving forces behind this phenomenon. Both Human Rights Watch with the International Gay and Lesbian Human Rights Commission and Epprecht attribute growing homophobia in Southern Africa to polarising rhetoric by some African leaders who are attempting to provide a bulwark to their regimes in the face of the seemingly insurmountable HIV epidemic, economic decline and socio-political inequalities brought about by incomplete democratisation in former European colonies. Condemnation and vilification of homosexuality provides these African leaders with a scapegoat for all society's problems.³³ This rhetoric resonates with people experiencing poverty, and a

used this as his argument for deciding to sign the anti-gay Bill into law. Department of Press and Public Relations, Republic of Uganda, Press Release 'President to sign anti-gay Bill after experts prove there is no connection between biology and being gay' 15 February 2014.

29 See n 21 above.

30 Almost every region of Africa has been affected by homophobia. The start of a recent wave was signalled by an incident at the International Book Fair in Zimbabwe in 1995 and has been followed over the years by homophobic rhetoric by African political and religious leaders, vitriolic anti-gay media reports, arrests, harassment or anti-gay protests in, amongst others, countries in Southern Africa (Zambia, Namibia, Swaziland, South Africa, Malawi), East Africa (Uganda, Kenya), West Africa (Nigeria, Senegal) and North Africa (Egypt). V Reddy 'Homophobia, human rights and gay and lesbian equality in Africa' (2001) 50 *Agenda* 83-85; Gevisser (n 1 above); Fihlani (n 4 above); Abraham (n 4 above); C Mdletshe 'Gays are rotten, says Zulu king' 23 January 2012 <http://www.timeslive.co.za/local/2012/01/23/gays-are-rotten-says-zulu-king> (accessed 23 September 2014); Nossiter (n 3 above).

31 K Naidoo & M Karels 'Hate crimes against black lesbian South Africans. Where race, sexual orientation and gender collide, part 1' (2012) 33 *Obiter* 254. They are specifically referring to South Africa and therefore include 'corrective rape' in this list. Corrective rape is a peculiarly South African phenomenon where lesbians are raped and sometimes murdered in order to change their sexual behaviour, or to frighten other lesbians into changing theirs.

32 See n 30 above.

33 Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 3-9; Epprecht (n 5 above) 177-178. See also V Reddy 'Institutionalising sexuality. Theorising queer in post-apartheid South Africa' in D Constantine-Simms (ed) *The greatest taboo. Homosexuality in black communities*

breakdown in health and education systems.³⁴ Nigerian leaders have also used this rhetoric to unite Christians and Muslims in a common hatred, especially prior to elections.³⁵ Concomitantly, Tamale notes that, in Uganda, by tightly controlling same-sex acts and silencing the individuals and groups who practise them, the state sustains its power by preventing these individuals and groups from organising and fighting for their rights.³⁶

Msibi suggests that homophobia is the result of attempts by Africans to try and redefine their identities in a modern world fuelled by Western culture.³⁷ African cultures, which are predominantly patriarchal, create an identity for men which expects them to be dominant in society and fulfil certain gender roles.³⁸ However, men, especially in urban centres, are finding themselves exposed to a contradictory world view based on gender equality. In addition, to prevent the spread of HIV, new modes of sexual and social interaction between people, mainly men and women, are being prioritised, both by African activists and Western aid agencies.³⁹ Women are being encouraged to take control of their sexual well-being and men are expected to respect a woman's physical integrity. The traditional means for males to self-identify are thus being threatened. Many men are responding by privileging 'traditional' gender roles. However, as Epprecht points out, 'traditional' gender roles are actually an internalisation of Western gender roles.⁴⁰ Nevertheless, these men are reacting with violence to any perceived deviations from the supposed norm. Gay men undermine the traditional dominant male role by choosing another means of self-identification, and lesbians seem to avoid male influence in their lives altogether.⁴¹ This privileging of traditional, cultural gender roles means that many Africans, especially African leaders, are suggesting that same-sex desire is unAfrican,⁴² and did not exist here until it was imported from the West.⁴³ This allows these African leaders to blame the West for their societies' ills,

(2000) 170 on Southern and East Africa. For a more detailed discussion, see Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 12-116; Epprecht (n 5 above) 152-183.

34 Epprecht (n 5 above) 183.

35 Viljoen (n 10 above) 15; personal commentary of B Wainaina 'We must free our imaginations, part 6. China will own us' 21 January 2014 <http://www.youtube.com/watch?v=8FkDm6H6fS0> (accessed 26 September 2014).

36 S Tamale 'Out of the closet. Unveiling sexuality discourses in Uganda' (2003) 2 *Feminist Africa* http://agi.ac.za/sites/agi.ac.za/files/fa_2_standpoint_3.pdf (accessed 16 September 2014).

37 Msibi (n 7 above) 70. See also Gevisser (n 1 above); Epprecht (n 1 above).

38 Msibi (n 7 above) 64.

39 Hoard (n 20 above) 69; Epprecht (n 1 above).

40 Epprecht (n 5 above) 158-159. See also Tamale (n 36 above).

41 Reddy (n 33 above) 170; Msibi (n 7 above) 70. See Epprecht (n 5 above) 153-169 on causes of gender-based violence.

42 Paradoxically, Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 7 suggest that African leaders who are vilifying homosexuals are, by using the term, creating meaning for it as an African identity.

43 Epprecht (n 5 above) 180-181; Msibi (n 7 above) 62-63.

and makes their people hostile to Western calls for their leaders to support gay rights, as they believe the West is trying to encourage homosexuality, and thereby perverting and endangering African children.⁴⁴

Paradoxically, Epprecht and Msibi point out that, while vilifying the West for introducing and encouraging same-sex desire on the continent, many Africans are also claiming that same-sex desire is against their religion.⁴⁵ Despite being a colonial import, the most popular religion in sub-Saharan Africa is Christianity. It is currently one of the main groups supporting homophobia. Evangelical church leaders from the US are visiting parts of Africa, such as Rwanda, Uganda and Kenya, and working together with local evangelists and, in some cases, African leaders themselves, are preaching an anti-gay message and conservative sexual values.⁴⁶ These US church leaders are followed by related church groups which are entering African countries as aid organisations and are using their platform of trying to prevent the spread of HIV through changing patterns of behaviour, to further advocate conservative Christian beliefs in respect of sex and relationships.⁴⁷ Evangelical Christians tend to hold the belief that there are no such people as homosexuals, only heterosexual people with a homosexual problem. In a radically-changing world, people tend to gravitate to fundamentalist religious movements that claim to have all the answers.⁴⁸ These movements also promise salvation to a select few and therefore create an 'us and them' mentality. Certain African leaders have incorporated this mind-set into their rhetoric about the protection of African culture and children from Western interference. 'Us' therefore often becomes independent, righteous, heterosexual Africans against an interfering, perverted, neo-colonialist, Western 'them',⁴⁹ even when 'them' is referring to fellow Africans and countrymen.⁵⁰ These sentiments all promote intolerance and as such they help to justify and intensify homophobic reactions in Africa.

Politics, adverse social circumstances, culture and religion are probably all contributing factors to homophobia in Africa to different

44 Hoad (n 20 above) 69-71 on Southern Africa; Mmali (n 3 above) on Uganda. For further discussions of this issue, see both Epprecht (n 5 above) 180-181 184-185 and Hoad (n 20 above) 68-75 on Southern Africa; Cheney (n 23 above) 86-89 on Uganda.

45 Epprecht (n 1 above); Msibi (n 7 above) 68-69. See also Hoad (n 20 above) 76. Eg see Fihlani (n 4 above); Gevisser (n 1 above).

46 K Kaoma *Globalising the culture wars. US conservatives, African churches, and homophobia* (2009) 3-4 13 15; J Anderson 'Conservative Christianity, the global South and the battle over sexual orientation' (2011) 32 *Third World Quarterly* 1593-1597 1601-1602; Cheney (n 23 above) 82 84-85.

47 Kaoma (n 46 above) 9; Epprecht (n 1 above); Cheney (n 23 above) 82 85.

48 See Epprecht (n 1 above); personal commentary of B Wainaina 'We must free our imaginations, part 2. This ecstasy of madness' 21 January 2014 <http://www.youtube.com/watch?v=SQrlN8pogNw> (accessed 26 September 2014).

49 See Kaoma (n 46 above) 8; Anderson (n 46 above); Cheney (n 23 above) 82.

50 See Tamale (n 36 above) on her own experience; Kaoma (n 46 above) 14.

degrees, depending on the circumstances of individual countries,⁵¹ but the main reason the judgment in Malawi occurred was because there were laws which made the prosecution of same-sex acts possible.⁵² Britain imposed legislation on its African colonies to regulate what was considered to be immoral sexual behaviour. Although it changed its own laws concerning same-sex acts, most colonies had already achieved independence by this time and, as such, their systems of law either petrified or moved in a different direction without any influence from later reforms in Britain.⁵³ The laws Britain left behind are contributing to homophobia due to the concept of sexuality which underlies them. However, while the laws may be a remnant of colonial occupation, their origin and the concept of sexuality which underpins them can be traced back to ancient Rome.

4 Roman origins of the laws on same-sex acts

The first Roman law regulating sexuality that in any way impacted on same-sex relations seems to be the *Lex Scantinia*,⁵⁴ which was probably passed in the second or first century BC.⁵⁵ No text of this law survives, so evidence of its existence has come from other non-legal, literary sources.⁵⁶ Needless to say, the purpose of the authors who mentioned the law was not to define or explain its provisions. With such scanty evidence, the interpretations of modern scholars as to the exact provisions of the law have been widely divergent.⁵⁷ Earlier scholars have suggested in passing that the law banned all

51 In fact, Viljoen (n 10 above) 2 suggests that in light of the differing interactions between the many individual and societal factors which influence homophobia, it may be more appropriate to refer to 'homophobias'.

52 Until this incident, Malawi had never made use of its provisions against same-sex acts. Gevisser (n 1 above).

53 Human Rights Watch (n 10 above) 5-7. See also Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 258-261.

54 CA Williams *Roman homosexuality 2nd ed* (2010) 140.

55 E Cantarella *Bisexuality in the ancient world 2nd ed* trans C ÓCuilleáin (2002) 110-111.

56 Politician and lawyer Cicero *Letters to friends* 8.12 14 seems to have been first to mention the law in a letter dating from 50 BC. Others include historian Suetonius *Life of Domitian* 8.3, satirist Juvenal 2.36-44, both writing in the late 1st to early 2nd century AD, the late 2nd to early 3rd century Christian writer, Tertullian *On monogamy* 12, and from the 4th century, poet Ausonius *Epigrams* 91 and Christian writer Prudentius *Crowns of martyrdom* 10.201-5. Other contemporary references to legislation in relation to male same-sex relations do not specifically mention the law. See J Boswell *Christianity, social tolerance, and homosexuality. Gay people in Western Europe from the beginning of the Christian era to the fourteenth century* (1980) 65-66; Cantarella (n 55 above) 107; Williams (n 54 above) 132-133.

57 For discussions of what contemporary sources may have been referring to the *Lex Scantinia* and how they may be interpreted, see Boswell (n 56 above) 65-69; S Lilja *Homosexuality in Republican and Augustan Rome* (1983) 112-121; D Dalla *Ubi Venus mutatur. Omosexualità e diritto nel mondo romano* (1987) 71-99; E Fantham 'Stuprum. Public attitudes and penalties for sexual offences in Republican Rome' (1991) 35 *Echos du Monde Classique/Classical Views* 285-287; A Richlin 'Not

male same-sex activity.⁵⁸ However, according to the extensive evidence on male same-sex desire and relations, both romantic and physical, this interpretation is simply not feasible.⁵⁹ In ancient Roman society gender, the socially-constructed notion of behaviours, expectations, roles, representations and values that are applied to people by any given society based on whether they are male or female,⁶⁰ was dependent, not on biological sex, but mainly on social status.⁶¹ The normative gender for males was that of the *vir*, the high-class male whose social position allowed him to penetrate others,⁶² namely, women, children and slaves, both male and female. There was no prejudice about what the object of penetration and pleasure should be. However, as those who were acceptable objects were considered to be in a subordinate position to the *vir*, a high-class male who chose, or was seduced into allowing, penetration was automatically perceived as belonging to the subordinate class, and there was strong social prejudice against the actions of such a man.⁶³

More recent scholars, therefore, argue that the law punished men taking the passive role, and/or that it was put in place to protect high-born youths from pederasty,⁶⁴ and the loss of social status associated with being perceived as a potentially passive adult man. Williams gives the latest and most comprehensive interpretation which incorporates these other interpretations. He bases this on the legal definition of *stuprum* and on the provisions of the *Lex Julia* on adultery, passed in 18 BC. Williams postulates that the *Lex Scantinia* did not make a

before homosexuality. The materiality of the *cinaedus* and the Roman law against love between men' (1993) 3 *Journal of the History of Sexuality* 569-571; FX Ryan 'The *Lex Scantinia* and the prosecution of censors and aediles' (1994) 89 *Classical Philology*; E Meyer-Zwiffelhofer *Im Zeichen des Phallus. Die Ordnung des Geschlechtslebens im antiken Rom* (1995) 109-133; Cantarella (n 55 above) 106-119; Williams (n 54 above) 131-136.

58 WT MacCary 'The Bacchae in Plautus' *Casina*' (1975) 103 *Hermes* 463 n 11; LP Wilkinson *Classical attitudes to modern issues* (1978) 136.

59 See J Walters 'Invading the Roman body. Manliness and impenetrability in Roman thought' in JP Hallett & MB Skinner (eds) *Roman sexualities* (1997) 29-43; Williams (n 54 above) 137-245 on the complexities of the construction of male sexualities and related gender identities in Rome. See HN Parker 'The teratogenic grid' in Hallett & Skinner (above) 47-65; MB Skinner *Sexuality in Greek and Roman culture* (2005) 195-197 on the socio-sexual hierarchy in Rome.

60 D Glover & C Kaplan *Genders* (2000) xxiii xxvi.

61 Walters (n 59 above) 32; Parker (n 59 above) 47. Parker mentions that other factors that might have influenced the construction of gender included age, ritual category or power relations.

62 Walters (n 59 above) 32; Parker (n 59 above) 48-49.

63 Those who were perceived as voluntarily taking the passive role were the subject of scorn, crude humour and rhetorical invective. A Corbeil 'Dining deviants in Roman political invective' in Hallett & Skinner (n 59 above) 99-128. Allowing himself to be sexually penetrated was one of several ways in which a man might be perceived as effeminate. Parker (n 59 above) 48-49 51-54.

64 Dalla (n 57 above) 71-99; Richlin (n 57 above) 569-571; Cantarella (n 55 above) 106-119.

distinction between crimes committed against men or women.⁶⁵ Instead, it was a formalisation of the 'traditional Roman [social] sanctions'⁶⁶ against *stuprum*, a crime in which a man committed sexual acts with any free-born woman outside marriage or free-born child, male or female.⁶⁷ In addition, from examining the *Lex Julia* on adultery, a law which attempted to regulate this one specific form of *stuprum*, he believes that, just as the *Lex Julia* punished both partners in adultery,⁶⁸ the *Lex Scantinia* could also have punished both the perpetrator of the act and the man who acted inappropriately by allowing himself to be penetrated.⁶⁹

All these interpretations suggest that the *Lex Scantinia* and, indeed, all laws on *stuprum*, established a legal concept of sexuality based on the belief that some sexual acts were appropriate or inappropriate depending on the person who performed them. Appropriate or inappropriate was usually determined by status and gender roles. Free, male citizens should not take on sexual roles that placed them in the position of a woman or subordinate. Women of high status should not move outside their gender roles of chaste, child-producer, by taking a lover. The concern of the laws, therefore, was the interplay between status, roles in the sex act, gender roles and the sex act itself. However, at this time, there was no crime consisting specifically and exclusively of male same-sex acts, nor was there a legal identity based on sexual orientation.

The *Lex Julia* on adultery itself later came to have an effect on the regulating of male same-sex acts. The original wording seems to have provided not only for the crime of adultery in particular, but also *stuprum* in general. Although adultery was considered to apply to married women, while *stuprum* could also be committed with a

65 Williams (n 54 above) 131-132. Richlin (n 57 above) 561-569, too, uses an argument based on the concept of *stuprum* to argue that passive men were the intended target of the law, but she believes the law applied exclusively to men.

66 Williams (n 54 above) 132. Before the advent of the *Lex Julia*, the regulation of sexual behaviour was under the control and discretion of the head of the family.

67 Williams (n 54 above) 132. 'Whoever shall persuade a boy wearing the *toga praetexta* (ie a prepubescent boy) to commit *stuprum* or any other offence, after abducting or bribing his attendant; or shall solicit a woman or girl or do anything for the purpose of corrupting her *pudicitia* ('chastity'); or shall proffer a gift or give money in order to persuade her to do it: If the offence is actually perpetrated he is punished capitally; if not, he is deported to an island. Attendants who have been bribed are subjected to the ultimate punishment.' *Digest* 47.11.1.2, translation by Williams (n 54 above) 131-132 (brackets added). This version of the edict on *stuprum* was only recorded in the *Digest* in the 4th century AD and the wording may have changed slightly over time. Williams (n 54 above) 131.

68 'It has been held that women convicted of adultery shall be punished with the loss of half of their dowry and a third of their goods, and by relegation to an island. The adulterer, however, shall be deprived of half his property, and shall also be punished by relegation to an island; provided the parties are exiled to different islands.' Paul *Opinions* 2.26.14, translation by MR Lefkowitz & MB Fant *Women's life in Greece and Rome. A source book in translation* (1992) 104.

69 Williams (n 54 above) 133. See also K Ormand *Controlling desires. Sexuality in ancient Greece and Rome* (2009) 176-178 who agrees with Williams's interpretation.

widow, unmarried girl or a male youth, the sources suggest that the general thrust of this law was towards protecting females as commodities. However, in the third century AD the conversion of the Emperor Constantine to Christianity led to a transformation of the Roman Empire towards a Christian ideology. An interrelationship developed between the leadership of church and state. Religious beliefs and state policy became one, guided to a great extent by the emperors themselves,⁷⁰ under the influence of the Bible, early church fathers and canons passed at church councils.⁷¹ This led towards a more conservative stance to sexual acts, especially those outside marriage and which were not for the purposes of procreation,⁷² such as sexual intercourse between two males. The existence of the word *stuprum* in the *Lex Julia* allowed much later jurists to broaden its interpretation to include acts against free-born males.⁷³ Nevertheless, the concept of sexuality behind the laws on *stuprum* did not change.⁷⁴ The added interpretation specified a crime which consisted of a male of high status being forced or coerced into an act in which he played the passive sexual role, and consequently moved outside of his gender roles.

Despite this growing conservatism, only a handful of edicts and laws were passed in the next three centuries in the Roman and later Byzantine Empires that in any way regulated male same-sex acts. The Theodosian Code 9.7.3 records a constitution published by Constantius and Constans in 342 AD which seems to be legislating on matters of same-sex marriage, as it refers to a crime 'when a man is married in the manner of a woman'.⁷⁵ However, both Bailey and

70 H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Fundamina* 223.

71 The condemnation of same-sex acts in the account of the destruction of Sodom and Gomorrah in Genesis 13-19 is one of the main Biblical texts used to justify the church's position, as well as Leviticus 18.22, Romans 1.24-6 and 1 Corinthians 9-11. M Goodich 'Sodomy in ecclesiastical law and theory' (1976) 1 *Journal of Homosexuality* 432. The council of Elvira in 305 or 306 AD passed canon 71 forbidding the 'committees of illicit sexual acts with boys' to take Communion (own translation). Further canons were passed at the Council of Ancyra in 314 AD: canon 16 'Concerning those who have committed fornication with animals'; canon 17 'Concerning those who either have been defiled or commit defilement with animals or with males'. Translation by DS Bailey *Homosexuality and the Western Christian tradition* (1955) 86-87. Late 2nd to early 3rd century AD Christian writer Tertullian *On modesty* 4.5 writes of passions which are 'beyond the laws of nature' and 'unnatural acts' (*monstra*), and which must be repelled from the church (own translation). See Bailey (above) 82-83 86-89.

72 De Ru (n 70 above) 223.

73 Williams (n 54 above) 134-135. 'Anyone who has sexual relations with a free male without his consent shall be punished with death.' Paul *Opinions* 2.26.12. Translation by Lefkowitz & Fant (n 68 above) 104.

74 As Christian writings also centred on the societal understanding of sexuality as acts, rather than identity, the understanding of sexuality underpinning imperial legislation was not affected. See n 71 above.

75 'When a man marries in the manner of a woman, a woman about to renounce men, what does he wish, when sex has lost all its significance; when the crime is one which it is not profitable to know; when Venus is changed to another form;

Cantarella argue that the word *nubere* ('to marry') is not intended to refer to one man actually marrying another, but instead to a male who takes the passive role in sex.⁷⁶ *Nubere* was most often used of women as it referred to the custom of women veiling themselves to indicate marriage. The word was also sometimes used to describe non-marital sexual relations with implausible marriage objects, such as prostitutes or passive males.⁷⁷ A similar law to this was published in 438 and is recorded in the Theodosian Code 9.7.6.⁷⁸ This law refers to the 'disgraceful' custom some men have of acting in a passive role, like a woman, during sexual intercourse. In both cases a man taking the passive role, that of the woman, in sexual intercourse is the object of this law, rather than all men engaging in same-sex acts. Although these men are referred to as seeming to be no different from women; they are not identified as women, but are noted as taking on the role of women. Lastly, these laws seem to be directed at men who take the passive role on a regular basis. While this would suggest the recognition of a legal identity of some men according to their sexual orientation, this is not in fact the case. Code 9.7.3 states that men who 'marry' in such a way are *infames* ('shameful' or 'disreputable'). Although being *infamis* identified a person, this identification was based on any act which rendered them shameful, including committing crimes or taking part in shameful activities such as acting or prostitution.⁷⁹ Code 9.7.6 recognises a sexual preference, but this is not necessarily for sexual intercourse with other males, but simply for playing the passive part. In both these laws, then, men who play the passive role are given a specific identification but in each case it is based on the act in which they take on sexual roles that lead to them flouting gender roles.

The last of the Roman laws on male same-sex acts can be found in the works sponsored by Justinian. In 533 Justinian claimed that the *Lex Julia* punished 'even those who dared to exercise their shameful lust with men'.⁸⁰ *Novel 77* from 538 includes same-sex acts as one of many blasphemous acts. Justinian enjoins men to refrain from such

when love is sought and not found? We order the statutes to arise, the laws to be armed with an avenging sword, that those infamous persons who are now, or who hereafter may be, guilty may be subjected to exquisite punishment.' Theodosian Code 9.7.3. Translation by C Pharr *et al* *The Theodosian Code and Novels and the Sirmondian Constitutions. A translation with commentary, glossary and bibliography* (1952) 231-232.

76 Bailey (n 71 above) 71; Cantarella (n 55 above) 175-176.

77 See also PGW Glare (ed) *Oxford Latin dictionary* (1982) *sv nubere*.

78 'All of those who are accustomed to the disgrace of condemning a masculine body, arranged in female manner, by means of the passivity of the other sex, and who are seen to have nothing different than women, will pay for this sort of crime through the vengeance of flames, with the people watching.' Theodosian Code 9.7.6. Translation by Ormand (n 69 above) 266.

79 Richlin (n 57 above) 558-559; Ormand (n 69 above) 178-181.

80 'Likewise the Julian law on adultery, which not only punished with the sword those who violated other men's wives, but even those who dared to exercise their shameful lust with men.' *Institutions* 4.18.4. Translation by Ormand (n 69 above) 266.

acts as they have brought down natural disasters.⁸¹ *Novel* 141 from 544, in a similar vein, also speaks of acts and includes the belief that such acts are a matter of choice and men can stop them if they so choose.⁸² There seems to be a move away from an underlying concept of sexuality in the law based on status, sex and gender roles, although there is still an understanding of sexuality as a series of acts, not an identity. However, in *Novel* 77 Justinian introduces into law a term from the New Testament, Romans 1.26, possibly influenced by its reiteration in the early church fathers. He writes of men acting *contra naturam* ('contrary to nature').⁸³ What are we supposed to understand by 'nature' in this context? Considering that these edicts do not institute a new crime, but instead encourage the enforcement of the existing laws on same-sex acts, I believe the use of the word 'nature' is imbuing sex roles and gender roles, as understood by Justinian, with an essentialist force.

Throughout the legislation from ancient Rome and the Byzantine Empire, a definite legal concept of sexuality emerges. Sexuality is conceived of mainly as roles and acts, and the law legislates against those roles and acts which are believed to be wrong, even if the exact definition of these changes over time. Importantly, there is no concept in Roman law of anyone having an identity based on sexual orientation. The closest the laws seem to come is acknowledging habitual offenders.

5 Roman laws in Africa

Once the laws on same-sex acts as laid down by the Roman/Byzantine Empires were established, very few changes appear to have occurred. These laws entered England through church, or canon, law. Canon law was an amalgam of 'the Bible, the writings of the church fathers,

81 '... since certain men, seized by diabolical incitement practise among themselves the most disgraceful lusts, and act contrary to nature: We enjoin them to take to heart the fear of God and the judgment to come, and to abstain from suchlike diabolical and unlawful lusts, so that they may not be visited by the just wrath of God on account of these impious acts, with the result that cities perish with all their inhabitants. For we are taught by the Holy Scriptures that because of like impious conduct cities have indeed perished, together with all the men in them.' *Novel* 77. Translation by Bailey (n 71 above) 73.

82 'Preamble ... Wherefore it is not right that we should all despise God's abundant goodness, forbearance, and long-suffering kindness and, hardening our hearts and turning away from penitence, should heap upon ourselves wrath in the day of wrath. Rather, we ought to abstain from all base concerns and acts-and especially does this apply to such as have gone to decay through that abominable and impious conduct deservedly hated by God. We speak of the defilement of males which some men sacrilegiously and impiously dare to attempt, perpetrating vile acts with other men.' *Novel* 141. Translation by Bailey (n 71 above) 74.

83 In Romans 1.26-27, Paul writes of women and men acting against nature by lusting after those of the same sex. Late 4th to early 5th century AD Christian writer John Chrysostom highlights this phrase in his *Homilies on Paul's epistle to the Romans* 4. See also Bailey (n 71 above) 83 n 2.

Justinian's codification, the *Corpus Iuris Civilis*, the canons of church councils and the papal decretals,⁸⁴ and was, according to De Ru, 'basically Roman law as modified to meet the needs of the medieval church'.⁸⁵ It held sway in England over moral and religious matters such as marriage, sex, heresy and sorcery.⁸⁶ However, there was some separation of church and state. In the case of same-sex acts, ecclesiastical courts could judge people, but if the court wanted them to be punished with the applicable penalty, death, they had to hand them over to the state. The state could hold its own tribunal to assess the guilt of the party and could act independently of the church in bringing such men to trial, judging and sentencing them.⁸⁷ The degree to which the laws were implemented by church and state in the medieval period fluctuated and over the centuries Christian writers and law makers felt it necessary to reiterate and refine them.⁸⁸ However, the attitude of the church did not change substantially.⁸⁹ In the sixteenth century, the English king, Henry VIII, split from the Roman Catholic Church which led to many laws, including those against same-sex acts, being recodified as secular laws.⁹⁰ The penalties and the implementation of these laws also fluctuated over time.⁹¹ Nonetheless, the basic laws, and the concept behind them, survived until the nineteenth century.

In the mid-nineteenth century Britain updated and, where necessary, changed their laws for implementation in the colonies. The resulting penal code was later implemented across Asia and Africa.⁹² The sections on same-sex acts can still be found in the Penal Codes of Malawi, Uganda, The Gambia, Nigeria, Kenya and many other former British colonies in Africa.⁹³ The laws used to prosecute Monjeza and Chimbalanga in Malawi provide an excellent example:

84 De Ru (n 70 above) 223.

85 De Ru 222.

86 CP Sherman 'A brief history of medieval Roman canon law in England' (1920) 68 *University of Pennsylvania Law Review and American Law Register* 234-235; Bailey (n 71 above) 146. In fact, M Goodich 'Sodomy in medieval secular law' (1976) 1 *Journal of Homosexuality* 297 points out that '[i]n English law, it would appear that sexual morality fell early under church authority, and crimes against nature were identified with heresy'.

87 Bailey (n 71 above) 146.

88 Bailey 110-120; M Goodich *The unmentionable vice. Homosexuality in the later medieval period* (1979) 71.

89 Bailey (n 71 above) 98; Goodich (n 71 above).

90 Human Rights Watch (n 10 above) 14. See also Bailey (n 71 above) 147.

91 Bailey (n 71 above) 148-152.

92 See Human Rights Watch (n 10 above) 15-25 for a full discussion of the process.

93 See Human Rights Watch (n 10 above) 5-6 for countries affected by the colonial laws of Britain. See Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 262-274 for countries affected by the interaction between Roman-Dutch and colonial British laws. The Constitutional Court of South Africa, in reaction to the South African Constitution Act 108 of 1996 secs 9(3)-(4), which prohibits discrimination on the grounds of sexual orientation, struck down their law against same-sex acts in 1998. Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 265.

Penal Code Cap 7:01 Laws of Malawi 24

Section 153 - Unnatural offences

Anyone who –

- (a) has carnal knowledge of any person against the order of nature; or
- (b) has carnal knowledge of any animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature

shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.

Section 156 - Indecent practices between males

Any male 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, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.

The concept of sexuality underlying section 153 and, indeed, some of the wording, are the direct result of the Roman laws on same-sex acts. Firstly, similar to the Roman laws on *stuprum*, the law is interested in any and all sexual acts considered to be against the moral interest of the law makers, regardless of gender, but it also places a special emphasis on acts between males. Section 156 specifically legislates against, not just acts involving carnal knowledge, but any 'act of gross indecency'⁹⁴ between two men. Notably, neither Roman nor British colonial law overtly acknowledges female same-sex acts. Secondly, these laws are also legislating against the acts people commit, not the people themselves.⁹⁵ 'Permits' in section 153(c) suggests that once again these acts are considered to be a matter of choice, not an intrinsic part of a certain type of man. Lastly, the wording 'against the order of nature' is Justinian's *contra naturam* ('contrary to nature').⁹⁶

'Against the order of nature' and 'act of gross indecency' are not defined by the law. This means that the judge was left to interpret

94 The Roman-Dutch law on 'sodomy' also legislated against acts, not people. See Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 260.

95 The new laws promulgated in Nigeria specifically use the term gay. Eg Same Sex Marriage (Prohibition) Act sec 4(1) against the 'registration of gay clubs, societies and organisations, their sustenance, processions and meetings'. This has led commentators like Viljoen (n 10 above) 11 to suggest that the law 'for the first time criminalises homosexual identity, that is, being gay, as opposed to punishing acts or conduct'. However, I feel it is more accurate to say that the laws recognise that people who engage in same-sex acts have an attendant life-style which consists of acts that are related to same-sex acts, such as congregating with those who also engage in same-sex acts. I do not believe the law is recognising an intrinsic, biological identity. This is in line with the belief that 'homosexual' for many Africans describes a person who practises same-sex acts. See earlier comment under section 2 'The perception of "homosexuality" in Africa'.

96 *Novel* 77. This concept can also be found in the Roman-Dutch laws. See Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 259-260; De Ru (n 70 above) 223.

whatever act he disapproved of as 'against the order of nature' or amounting to 'gross indecency'.⁹⁷ Consequently, it can be seen that both concepts are based on the acts of the people to be punished and the assumption that those acts contravene the judge's understanding of sexual and gender roles. The essentialist word 'nature' is once again being used to refer to socially-defined gender and sex roles. Although status is not an issue, the legal concept of sexuality in former British colonies in Africa is still based on the Roman belief in the importance of the interaction between sexual acts, sexual roles and gender roles. This perfectly coincides with current homophobic mentalities in Africa.

6 Consequences of the Roman sexuality in Africa

The result of this set of circumstances is that these African states have a tool which allows them not only to prosecute homosexuals, namely, those who engage in same-sex acts, but to legally justify denying rights and services to them. On the grounds that it would encourage criminal activity, states with a homophobic agenda are not sponsoring counselling for homosexuals on how to prevent the spread of HIV.⁹⁸ The men themselves are often uneducated as to the means of HIV transmission with many believing that anal sex is safe. The stigma against homosexuality means that many men are also in sexual relationships with women and are therefore spreading the disease through having multiple partners. Homosexuals also find it difficult to access condoms and condom-safe, water-based lubricants. Some clinics have even turned away homosexuals who wished to receive treatment.⁹⁹ Needless to say, homosexuals are also denied protection under the law from religious and societal persecution. Violence against homosexuals, openly fuelled by the media and prominent political and religious figures, is rife.¹⁰⁰ Many homosexuals are being driven into hiding, further alienating them from education and

97 See Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 256-257.

98 Epprecht (n 1 above).

99 'Africa. Homophobia fuelling the spread of HIV' 23 July 2008 <http://www.irinnews.org/report.aspx?reportid=79397> (accessed 16 February 2012); AD Smith *et al* 'Men who have sex with men and HIV/AIDS in sub-Saharan Africa' (2009) 374 *Lancet* 419.

100 See n 30 above. This is in marked contrast to South Africa. Although homosexuals still suffer societal persecution, especially in the form of corrective rape, they do, technically at least, have recourse to the law. The South Africa Constitution Act 108 of 1996 secs 9(3)-(4) prohibit discrimination on the grounds of sexual orientation and thereby ensure that the perpetrators of such rapes, when they are caught, can be prosecuted. See Reddy (n 33 above) 174-175.

treatment.¹⁰¹ The Roman concept of sexuality which underpins their laws is therefore perpetuating, and being used to justify, a state-sponsored homophobic agenda in parts of sub-Saharan Africa.

7 Conclusion

The concept of sexuality which governs the laws of most former British colonies in sub-Saharan Africa is derived from a culture that was the basis for much Western thought, a culture that did not consider male same-sex acts, as such, to be worth regulating and which was only interested in protecting the bodily integrity of males of a certain status. The concept also had no basis in religion, and is therefore no more Christian than a concept of sexuality based on identity and sexual orientation. Yet, this is the state tool being used to persecute homosexuality and perpetuate homophobia in sub-Saharan Africa. Understanding this may bring success in undermining the laws where other arguments, based solely on the Western origin of the laws, have failed. The British may have been invaders, but their morals coincide with the current moral conservatism of their former colonies in Africa. Africans may resent colonialism, but they have always taken what they believed to be useful from Western culture and found ways to integrate it with African concepts. Perhaps if the basis for these laws as non-Christian, alien and accepting of same-sex acts is elucidated, the entrenched colonial legal framework may be destabilised, and the African homophobic discourse may not be so accepting of the absolute natural rightness of these laws and be a little more reluctant to make use of them. But even if this is unlikely, knowing the issues behind the origin of these laws adds an important dimension to understanding the origins of homophobia in parts of sub-Saharan Africa.

101 Men cite fear of rejection by their families, public humiliation, ridicule by healthcare workers, pressure to have children and blackmail as factors that contribute to their decision to conceal their behaviour or orientation. K Lauer 'Men who have sex with men and the global HIV/AIDS epidemic' December 2009 <http://www.thebody.com/content/art56243.html> (accessed 7 August 2013). See also Smith *et al* (n 99 above) 419.