

To cite: A Sogunro 'An analysis of political homophobia, elitism and social exclusion in the colonial origins of anti-gay laws in Nigeria' (2022) 22  
*African Human Rights Law Journal* 493-519  
<http://dx.doi.org/10.17159/1996-2096/2022/v22n2a8>

## An analysis of political homophobia, elitism and social exclusion in the colonial origins of anti-gay laws in Nigeria

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**Summary:** *Critical Legal Studies suggests that any serious legal advocacy must critically engage with the social and political subtext of the law in order to yield positive outcomes. This suggestion is equally applicable to advocacy for sexual and gender minorities in contexts such as Nigeria. Based on this premise, this article employs theories of political homophobia, elite power and social exclusion to analyse the social and political context surrounding the evolution of criminalising laws during the colonial phase of Nigeria's history. The article proceeds to show that political homophobia, through laws that criminalised same-sex relationships, was a strategic tool utilised under the colonial administration to protect colonial interests and maintain the legitimacy of colonisation. This strategy was a colonial imperative regardless of whether or not the local population may have agreed to or participated in the process. The outcome of, and incentive for, this process of political homophobia included the social exclusion of a large majority of the population for the benefit of an elite class. It is argued that an understanding of the rationale behind the colonial evolution of*

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*anti-gay laws can provide an insight into the entrenchment of political homophobia in Nigeria and similar legal systems in Africa and challenge the rhetoric that these laws reflect African values.*

**Key words:** *colonial laws; LGBT advocacy; political homophobia; sexual orientation and gender identity; social exclusion*

## 1 Introduction

Advocacy for the protection of sexual and gender minorities in Nigeria must understand and critically engage with the social and political context of laws criminalising or discriminating against same-sex relationships and non-heteronormative sexuality and gender identity (the criminalising laws) if it is to yield positive outcomes of non-discrimination and equal protection under law for sexual and gender minorities. Such an engagement requires an awareness of the dominant power dynamics and relations underlying the evolution and enforcement of the criminalising laws in Nigeria, with the understanding that these power dynamics are part of wider social control aimed at perpetuating hegemonic power for the benefit of a political elite.

This article adopts a Critical Legal Studies (CLS) perspective that situates legal discourse as discourses of power. Accordingly, *power* in the article refers to the ability of an individual or individuals to authoritatively utilise legal discourse or to pay others to do so on their behalf. Likewise, *hegemonic power*, to borrow a Gramscian approach, is the directing of dominant legal discourse through social consent or coercion.

On this premise, the article employs contemporary theories of power dynamics in society and, based on an understanding of these theories, examines the evolution and enactment of the laws criminalising same-sex relationships in Nigeria during the colonial period. Accordingly, this article serves two broad purposes. First, within a unifying theme of hegemonic power, it reviews the relevant theories of political homophobia, elite power and social exclusion in the context of the colonial criminalisation of same-sex relationships. Second, the article analyses the hegemonic contexts surrounding the colonial enactment of the laws criminalising same-sex relationships in Nigeria, highlighting the overt and subtle deployment of the colonial legal system for the benefit of a structurally-evolving but ideologically-consistent political elite.

Apart from this introductory part, the article is divided into four other parts. In part 2, using doctrinal research methods, I review theories of political homophobia, elite power and social exclusion as hegemonic values in the evolution of criminalising laws in Nigeria. However, this part does not attempt an exhaustive analysis of these theories but instead identifies their relevance to the article, particularly as a precursor to the historical analysis that will be discussed in part 4. In part 3 I provide a broad overview of the growth and nature of the Nigerian legal system, tracing its history from the application of colonial laws in the original colonies and protectorates to the development of a modern legal system. In part 4 I provide some historical/archival document analysis from a research visit I conducted in February 2019 at the National Archives of Nigeria located at the University of Ibadan campus, Ibadan where I was able to access colonial documents and records, including dispatches and letters from the years 1890s onwards. Part 4 provides a substantive analysis of the evolution of the laws criminalising same-sex relationships in Nigeria during the colonial period, roughly from 1914 to 1960, covering the political formation of the Nigerian identity as a colonial state, and the introduction of homophobic colonial laws and values to enhance the political interests of the British Empire. It also discusses the contexts of political homophobia, elite control and social exclusion that shaped the enactment of these laws.

## 2 General foundations and review of theories

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

### 2.1 Understanding political homophobia

The concept of political homophobia has only begun to receive serious attention as a distinct theory and subject of study, and the scope and dimension of this theory is best exemplified in the works of Weiss and Bosia, and Serrano-Amaya.<sup>1</sup> For the purpose of this article I borrow from their work to define political homophobia as the conscious use

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

of homophobia as 'a political strategy, often unrelated to substantial local demands for political rights'.<sup>2</sup> It can also be viewed as 'the use of homosexuality to produce fear for political purposes'.<sup>3</sup> Political homophobia is the theoretical engagement of how

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

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

### **2.1.1 Homophobia as a political tool**

A key argument in this article is that the enactment and enforcement of laws criminalising same-sex relationships or regulating sexuality broadly in Nigeria are not merely random instances of discrimination

2 Bosia & Weiss (n 1) 2.

3 Serrano-Amaya (n 1) 1.

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

5 Bosia & Weiss (n 1) 3.

6 MJ Bosia 'Why states act: Homophobia and crisis' in Weiss & Bosia (n 1) 31 32.

7 A Currier 'Political homophobia in post-colonial Namibia' (2010) 24 *Gender and Society* 110 115.

8 Currier (n 7) 116.

but are part of systemic social control with the purpose of consolidating state power for the benefit of elite interests. For Bosia and Weiss, the traditional understanding of homophobia as ‘some deep-rooted, perhaps religiously inflected sentiment’ was not a sufficient method of analysing the incidents of homophobia in public discourse.<sup>9</sup> Instead, homophobia has to be understood as a ‘conscious political strategy often unrelated to substantial local demands for political rights’<sup>10</sup> and as ‘a state strategy, social movement, and transnational phenomenon, powerful enough to structure the experiences of sexual minorities and expressions of sexuality’.<sup>11</sup> Bosia further conceives of political homophobia as ‘the totality of strategies and tools, both in policy and in mobilisations, through which holders of and contenders over state authority invoke sexual minorities as objects of opprobrium and targets of persecution’.<sup>12</sup>

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

9 Bosia & Weiss (n 1) 2.

10 As above.

11 As above.

12 Bosia (n 6) 31.

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

14 Sleptcov (n 1) 142.

### 2.1.2 *Homophobia as a strategic tool*

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

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

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

However, this article is concerned principally with the political use of laws to repress sexual and gender minorities and serve the interests of hegemonic power in Nigeria. As Sleptcov argues, the examination of legislation is an important aspect of engaging political homophobia as legislation 'denotes both the will of the legislator and demonstrates the perpetuation of political homophobia in the law'.<sup>18</sup> In the case of Russia, for instance, Sleptcov explains how laws that criminalise same-sex acts produce 'a notion of the correct sexual behaviour that transcends into the political realm, reinforcing the heteronationalistic nature of the nation-building'.<sup>19</sup> This allows Russian legislators to set up homosexuality as an ideology ('homosexuality') and exclude

<sup>15</sup> Bosia & Weiss (n 1) 14.

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

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

<sup>18</sup> Sleptcov (n 1) 145.

<sup>19</sup> Sleptcov 146.

from political representation those whose ideology do not fit into the portrayal of Russia as 'purely heterosexual':<sup>20</sup>

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

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

### 2.1.3 *Homophobia is modular*

The issue of modularity engages political homophobia as a similarly recurring phenomenon that is 'imposed in a consistent way' across different political contexts.<sup>22</sup> Although local context is important in the analysis of criminalising laws, the geographical spread of these laws at nearly the same moments in history,<sup>23</sup> and the existence of similar language in legislation and political rhetoric in different social and political contexts<sup>24</sup> contribute to the idea that political homophobia exhibits 'similar characteristic across cases where present'.<sup>25</sup> This aspect of political homophobia is crucial for understanding that, while the Nigerian historical and contemporary context matters, there also is an overarching theme of social control for elite interests in the deployment of political homophobia that transcends historical time and geographical space.

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20 As above.

21 Bosia & Weiss (n 1) 1-24.

22 Bosia & Weiss (n 1) 6.

23 A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 263-265.

24 As above.

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

## 2.2 Elite power and hegemony

The term 'elite' is used to describe 'persons who ... are able to affect political outcomes regularly and substantially'.<sup>26</sup> Another definition considers it to mean 'individuals and small, relatively cohesive, and stable groups with disproportionate power to affect national and supranational political outcomes on a continuing basis'.<sup>27</sup> In particular, the 'political elite' wield or control 'hierarchically structured institutions' including government, top industries and the media, with the capacity to significantly affect political decisions.<sup>28</sup> However, the structures and characteristics of a group that can be recognised as the political elite will vary from country to country and, as such, this diversity means that there is no generally-accepted theory on what constitutes the typology of the elite and their relationship to political effects.<sup>29</sup> This argument is particularly true in the case of Nigeria where, at different periods of its colonial, military and civilian history of governments, different groups of individuals have constituted the nucleus of the political elite.

Nevertheless, an understanding of elite theory is traceable from the work of European thinkers such as Vilfredo Pareto and Gaetano Mosca all the way to writers such as C Wright Mills in more recent times.<sup>30</sup> Their ideas concretised the understanding of the existence of an elite versus the non-elite and the importance of the elite in shaping political outcomes and influencing, directing, or manipulating social values. The diversity of elite structures implies that a political elite can emerge in different ways in different contexts. In the Nigerian context, for instance, a type of elite political emerged, as Higley theorises, 'through colonial home rule and independence struggles where local elites had already received or obtained in the course of their struggles experience in political bargaining and restrained competitions'.<sup>31</sup> According to Sklar, the elites that emerged in post-colonial times are characterised by high-status occupation, high income, superior education and the ownership or control of business enterprises.<sup>32</sup> The idea of a political elite did not solidify in Nigeria until its 'first republic' in the 1960s.<sup>33</sup> Prior to this period, the

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

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

28 As above.

29 As above.

30 As above.

31 Higley (n 26) 167.

32 RL Sklar 'The nature of class domination in Africa' (1979) 17 *Journal of Modern African Studies* 531 533.

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

colonial system had weakened the traditional systems of communal governance and substituted this with a hierarchical social and economic system that utilised and institutionalised political power as a factor of social interaction.<sup>34</sup> It was under these circumstances that a new elite inherited power from the British and became the foundation of a new political class. As noted by Sklar:<sup>35</sup>

Political parties in Nigeria ... were conspicuous agents of class formation. They created elaborate systems of administrative and commercial patronage, involving the 'liberal use of public funds to promote indigenous private enterprise, while many of their leading members entered upon a comparatively grand manner of life in parliamentary office'... In cases of conflict between newly dominant class-interest groups and communal-interest groups, the former would nominally prevail.

This new elite kept the lifestyle and social habits of the colonial administrators and also 'the social distance they had maintained'.<sup>36</sup> Ultimately, the approach to governance by the post-colonial elite resulted in the limited political participation of the majority of the population and the consequent social exclusion.

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

34 Diamond (n 33) 30. The new elite also included families of freed slaves returning from Brazil and Sierra Leone and who also strengthened Victorian values and gender norms in the indigenous societies.

35 Sklar (n 32) 534.

36 Diamond (n 33) 32.

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

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

39 Gramsci *Selections from prison notebooks* (n 38) 198-199; Schwarzmantel (n 37) 74.

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

The colonial hegemonic process in Africa was not merely an accident of history. Instead, it was driven by economic and political interests in securing control over the resources required for the growth of the European nations. This project was executed, among other things, through the introduction of a European-style education and legal system that made a claim to having an intrinsic validity outside the socio-cultural contexts.<sup>42</sup> Those members of the colonised society who conformed to these colonial values were rewarded through the ability to participate in the colonial project as educators, missionaries, administrators and industry professionals.<sup>43</sup> In this way, the dominant colonial values became transferred from the colonisers to a new set of local elite.

The need to preserve the hegemonic values necessitates the elite creating what Higley describes as political institutions based on ‘a highly restricted suffrage’.<sup>44</sup> Such institutions have limited receptiveness to reform and generally are incompatible with the ideals of liberal democracy. Threats to the stability of these institutions provoke a reaction by the elite to ‘distort, partially suppress, or simply confuse the issues’,<sup>45</sup> usually through the spread of moral panics and, in the case of sexual and gender minorities, reliance on political homophobia. In similar vein, Tamale points to the use of these moral panics as critical to the perpetuation of elitism in post-colonial African countries.<sup>46</sup> By institutionalising hegemonic values and focusing the attention of the public on threats to those values,

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

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

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

43 Epprecht (n 42) 124.

44 Higley (n 26) 169.

45 As above.

46 S Tamale ‘Confronting the politics of non-conforming sexualities in Africa’ (2013) 56 *African Studies Review* 31.

the political elite can 'distract attention from the more significant socio-economic and political crises afflicting society'.<sup>47</sup>

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

### 2.3 Social exclusion

Walker defines social exclusion as involving a process of 'being shut out, fully or partially, from any of the social, economic, political, or cultural systems, which determine the social integration of a person in society'.<sup>51</sup> Similarly, social exclusion is considered an integrated and multi-dimensional process, including exclusion from decision making and the political process.<sup>52</sup> The consideration of social exclusion in this article focuses on two levels, namely, (i) a primary level where it specifically affects vulnerable sexual and gender minorities who are excluded from socio-cultural participation through political homophobia; and (ii) the secondary level where it generally affects the majority of society who are excluded from political participation and access to social goods through the manipulation of dominant values.

Byrne's understanding of social exclusion as an outcome of power dynamics between competing interests in society<sup>53</sup> is relevant to both these levels. On the one hand, the exclusion of sexual and gender minorities in Nigeria through criminalisation helps to perpetuate the idea that the dominant hegemony is working to

47 Tamale (n 46) 33.

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

49 Nyanzi (n 48) 481.

50 As above.

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

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

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

preserve the cultural and religious values of the majority, in the fabricated struggle between the interests of sexual and gender minorities and the interests of the rest of society. On the other hand, the exclusion of the majority of society through the manipulation of perceptions of social values helps to secure hegemonic power favouring elite interests against that of the majority. By focusing on sexual and gender minorities (and other vulnerable groups) through the legal system, the political elite are able to keep the majority of the population out of meaningful discourse relating to the control of the political system. This manipulation of social values and interests through legislation focusing on issues of sexual conformity subsumes, diminishes and distracts from other values that are able to lead to anti-hegemonic debates on social justice and equality. In essence, the focus on excluding sexual and gender minorities from socio-cultural participation is linked to the exclusion of the majority of the population from political participation.

However, this is merely one aspect of the issue. Beyond examining the deployment of political homophobia in the enactment of laws targeting sexual and gender minorities as a means of social control, it is also important to consider the actual enforcement of those laws and how enforcement sustains hegemonic power. It is in this consideration of the enforcement practice that Gore's analysis of social exclusion as an 'interrelationship between poverty and social identity'<sup>54</sup> becomes relevant. This means that the enforcement of exclusionary laws is not uniform across one identity. Instead, enforcement is determined by an aggregate of identities 'based on multiple and overlapping criteria'.<sup>55</sup> This is what Berry describes as 'multiple channels of access' which, in turn, create 'multiple and relatively fluid lines of social conflict'.<sup>56</sup> As such, social exclusion is not uniform across one strand of identity and, in the case of sexuality, other factors of identity such as age, educational level, employment status, economic and social status are likely to play a significant role in the extent to which criminalising laws have a negative impact on an individual.

In this interplay of identities, an issue that often comes up in literature is the issue of respectability and how individuals often use this as a means of achieving social inclusion and protecting themselves

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54 C Gore 'Social exclusion and Africa south of the Sahara: A review of the literature' (1994) A report by the International Labour Organisation (Labour Institution and Development Programme DP/62/1994A) para 1.2, <http://agris.fao.org/agris-search/search.do?recordID=GB2013200767> (accessed 8 May 2020).

55 Gore (n 54) para 1.4.

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

from threats of social exclusion.<sup>57</sup> Respectability has been defined as ‘acceptance of the norm’ by following ‘a normative standard of behaviour in public, while being aware of continual evaluations against that standard’.<sup>58</sup> This requires the individual to engage in what Johshi describes as ‘repetitive performance of social norms based on the behaviours society deems respectable’.<sup>59</sup> However, because there is an inherent conflict between the individual’s sense of self and the performance they have to undergo, there is continuous social and self-evaluation of this process.<sup>60</sup>

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

### 3 Setting the stage: The growth and nature of the Nigerian legal system

The application of theories of political homophobia, elite power and social exclusion to the evolution of laws criminalising same-sex relationships in Nigeria is more effectively accomplished through an awareness of the historical growth of Nigerian law.<sup>61</sup> The sovereign entity now known as the Federal Republic of Nigeria originated as an administrative amalgamation of several communities first by the trading entity known as the Royal Niger Company, and later by the British government, which then administered the territories as separate colonies and protectorates and, ultimately, as one country.<sup>62</sup> Accordingly, what is now the Nigerian legal system and its criminal laws originally developed along different trajectories in the different British-controlled territories until these separate systems were integrated as one national legal system under the guidance of British colonial administrators. Today, the original variations are embodied in provincial (state) laws across the country. Nevertheless, there is a general uniformity in the socio-political context of their

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

58 Johshi (n 57) 418.

59 Johshi (n 57) 419.

60 As above.

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

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

evolution over time. Thus, they can be studied as one broad Nigerian legal system.<sup>63</sup>

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

Meanwhile, in interior parts of the south 'customary laws' in their various forms continued to be prevalent, while north of the river Niger – towards the trans-Sahara – Islamic law (which had been introduced from 1804 to 1808, nearly 60 years previously) was practised.<sup>67</sup> These other interior communities were not under British control although they traded with British adventurers who continued their attempts to gain control of the coastal kingdoms in the south. These attempts were granted European international legitimacy when, in 1885, the Berlin Conference recognised the claim of the British and their trading companies to all the territorial areas and seaports that would later be known as Nigeria. In 1900 the British Crown formally purchased these territories from the Royal Niger Company as 'the Southern Nigeria Protectorate' and 'the Northern Nigeria Protectorate'. Under the command of Frederick Lugard, the British then began a series of both diplomatic and violent tactical campaigns against the original

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

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

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

66 As above.

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

ruling houses in both the coastal and interior territories.<sup>68</sup> In 1904, having secured British control north of the Niger, Lugard proclaimed a Criminal Code to aid British administration over all of what would later become Nigeria. This Code was modelled on an 1899 version that was then in use in the Queensland colony, Australia. Curiously, this Queensland code was itself based on a draft code that had been rejected in 1878 in Britain, creating a situation where 'the Codes that the English denied themselves, they gave it with largesse to their colonies and dependencies'.<sup>69</sup>

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

After Nigeria's independence from the British in 1960, the two Codes – the Penal Code in the north and the Criminal Code in the south – continued to govern criminal justice administration across the country. When the two regions were fragmented into three and then four regions, and ultimately into 36 states, the succeeding

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

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

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

71 Okonkwo (n 64) 9.

72 Okonkwo (n 64) 9-10.

jurisdictions in each region inherited the respective codes with local amendments and alterations over time. Despite these variations across the country, it is important to emphasise that 'both the Criminal Code and the Penal Code have a common origin, employ the same concepts, and are governed by the same philosophical considerations'.<sup>73</sup> This understanding also applies to the broader legal system and, as such, despite the current federal nature of Nigeria's legal system, the evolution of the 36 states from two regions means that there is a uniformity in the context of these laws.<sup>74</sup>

#### **4 Political homophobia, social exclusion and elite power in the criminalisation of same-sex relationships in Nigeria during the colonial period (1914-1960)**

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

##### **4.1 Criminalising laws**

The legal framework criminalising<sup>75</sup> same-sex relationships in Nigeria were first introduced across Nigeria in 1914, following the amalgamation of Nigeria as one administrative territory. Today, those colonial provisions criminalising same-sex relationships are (generally) set out in sections 214 to 217 of the Criminal Code and sections 284 and 405 of the Penal Code. The Criminal Code states:<sup>76</sup>

214 Unnatural offences  
 Any person who:  
 (1) has carnal knowledge of any person against the order of nature;  
 or  
 ...

<sup>73</sup> Karibi-Whyte (n 69) ix.

<sup>74</sup> As above.

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

<sup>76</sup> Secs 214-217 Criminal Code (n 75).

- (3) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.

215 Attempt to commit unnatural offences

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

...

217 Indecent practices between males

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

Similarly, the Penal Code states:<sup>77</sup>

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

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

- (e) any male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession;
- (f) any female person who dresses or is attired in the fashion of a man in a public place.<sup>78</sup>

## 4.2 Context of political homophobia in the colonial phase

The deliberate and unilateral inclusion of provisions criminalising same-sex acts in the colonial criminal laws by the British colonial government is a demonstration of Bosia and Weiss's conceptualisation of political homophobia as a 'conscious political strategy' often unrelated to substantial local demands for political rights.<sup>79</sup> Still, it is important to critically examine the ways in which these laws constituted a philosophy of political homophobia and how this philosophy strategically favoured the political and economic interests of the colonial project across all of the British Empire. In view of this goal, I will examine the context of political homophobia in the colonial

<sup>77</sup> Sec 284 Penal Code (n 75).

<sup>78</sup> Not all the Penal Code states have retained this sub-section (f).

<sup>79</sup> Bosia & Weiss (n 1) 2.

laws from two perspectives, namely, (i) the origins of homophobic laws in England and their codification in the Queensland Code and its offshoots; and (ii) the process and *raison d'être* for introducing these codes in Nigeria.

Regarding the first perspective, it is useful for understanding the analysis in this section to trace the origins of homophobia from the hegemonic politics of England to the colonial Queensland Code. The first occurrence of a law criminalising same-sex relationships in England was in 1533, under the reign of King Henry VIII, when the offence of 'buggery' – punishable by hanging – was legislated by Parliament.<sup>80</sup> The year that this legislation was passed was not happenstance. In 1533 King Henry VIII married Anne Boleyn against the directives of the Pope and in 1534 he declared himself the head of the Church of England. Thus, the direct criminalisation of homosexuality by the English Parliament coincided with the political struggles between the English monarch and the papacy, with the English Parliament limiting the jurisdiction of the ecclesiastical church,<sup>81</sup> in this way demonstrating the political motivation behind the use of homophobia. Strategically, the English monarch was also able to make accusations of homosexuality against the monks in the papal monasteries as a pretext for seizing their lands and assets.<sup>82</sup> 'Within a few years the monasteries were dissolved and their wealth transferred to Henry and those nobles and lawyers who had supported his policies.'<sup>83</sup> These actions were carried out without criminal trial and, in fact, the only documented criminal trial on the issue of homosexuality was 'brought to bolster a case that was primarily political'.<sup>84</sup>

Thus, the introduction of laws criminalising same-sex relationships in England was deeply connected to a morality intended to sustain the political and economic interests of the English monarchy. The theological question of whether or not priests should be able marry – a key issue between the Protestants and the Catholics – was framed around homosexuality through political propaganda, with Catholic monks constantly accused of being 'sodomites'.<sup>85</sup> When the Catholics were temporarily restored to political favour in 1553 under the reign of Queen Mary, the buggery law was repealed, but was

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

81 Crompton (n 80) 363.

82 As above.

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

84 As above.

85 Crompton (n 80) 365.

reinstated in 1564 after Queen Elizabeth I – a Protestant – came to power. This reinstated statute, with an amendment of the sentence from death to life imprisonment, would go on stay in the English statute books until eventually repealed in 1967. More importantly, this 1564 statute influenced the codification of homophobia into the criminal laws of British colonies starting with the Queensland Code in Australia and, ultimately, the Criminal and Penal Codes of colonised societies such as Nigeria.<sup>86</sup>

The use of legislation to enforce political homophobia in England reinforced the ‘protestant’ Christian values that secured the political interests of the monarchy, creating a hegemonic ideal that guided the notion of a dutiful citizen of the English Crown.<sup>87</sup> Thus, under this ideal, there was a ‘natural’ order of things and acts that did not fit into this so-called natural order were to be frowned upon. The language of the codified homophobic legislation emphasised that same-sex relationships were ‘against the order of nature’ or ‘unnatural offences’. As Gupta notes:<sup>88</sup>

Edward Coke, in his seventeenth-century compilation of English law, wrote that ‘Buggery is a detestable, and abominable sin, amongst Christians not to be named’. He stressed the foreign derivation of the term – ‘an Italian word’ – as well as the act itself: ‘It was complained of in Parliament, that the Lumbards had brought into the realm the shameful sin of sodomy, that is not to be named.’

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

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

86 A Gupta *This alien legacy: The origins of ‘sodomy’ laws in British colonialism* (2008) 4-8.

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

88 Gupta (n 86) 14-15.

establishment of British political control to secure British commercial interests.

After the British administration took control of Lagos in 1862, the English common law and native law were initially implemented simultaneously. However, the colonial authorities gradually imported the body of English law, including the common law and doctrines of equity, for use in the colony. Park,<sup>89</sup> commenting on the process, justifies this decision on the grounds that (i) large numbers of Europeans had arrived in the colony following the acquisition of political power by Britain; (ii) local laws were unsuitable for large-scale commercial activities; and (iii) Europeans were unwilling to be bound by unwritten and seemingly unascertainable 'tribal' laws. These reasons, while convenient for the colonial administrators, did not consider the values and ideals of the indigenes nor did they accommodate the disapproval of the indigenes. Instead, the colonial government actively undermined the population, particularly in its attempt to codify the criminal law, a decision that met with strong resistance from the inhabitants of Lagos. In 1899 members of the colony petitioned the Colonial Office on the issue of codification and, among other points, insisted that

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

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

That the natives, ie the uneducated element, have been imposed upon is clear to me from the questions they ask with regard to the measure, but unfortunately the idea has got into their heads that the Bill creates new offences, that the punishments under it are far more severe than under the existing law and that some of the officers entrusted with the

<sup>89</sup> Park (n 61) 16.

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

<sup>91</sup> As above.

administration of justice would be only too glad to take advantage of the increased powers of punishment which they allege it gives.

Denton's language here is patronising and paternalistic. For him, the public opinions of the people of Lagos who are to be governed by the proposed Criminal Code are merely a case of obstinacy. He refuses to engage with the issues, secure in the confidence that the values embedded in the Criminal Code were inherently superior to any objections that could be raised by the colonised population. Yet, neither Denton nor the other administrators consider that the English people had previously rejected similar attempts at a code for England. The arguments that were considered legitimate by the English were now considered unreasonable by the Lagosians. As Gupta notes, '[t]he colonial environment was the perfect field for experiments in rationalising and systematising law. The colonies were passive laboratories.'<sup>92</sup> The attempt to introduce the Queensland Code failed in Lagos in 1899, but in 1916 Frederick Lugard – without the hindrance of public debate – introduced the Code across all of Nigeria.

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

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

Thus, the first object of the colonial project was to extract resources of the colonies for the benefit of Europe, while the second object was to 'guide' the people in the colonies in paternalistic fashion. To the extent that modern African societies and governments have almost

92 Gupta (n 86) 15.

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

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

95 Lugard (1926) (n 94) 58.

wholly accepted and adopted this 'guidance', this objective of the colonial project has been successful. As Gupta notes:<sup>96</sup>

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

### 4.3 Context of elite power in the colonial phase

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

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

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

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

<sup>96</sup> Gupta (n 86) 23.

<sup>97</sup> Bourne (n 62) 15.

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

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

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

However, elite privilege was not limited to the colonial administrators, but also encompassed all other Europeans in the territory, particularly missionaries, educators and entrepreneurs. Because of this expanded racially-based elitist context, the inclusion of homophobic laws in the Criminal Codes became even more urgent for the colonial administrators. This colonial anxiety is described by Gupta as 'fears of moral infection from the "native" environment'.<sup>100</sup> The introduction of vagrancy laws into the colonial criminal laws effectively criminalised poverty in the local population, thus perpetuating the distinction between the (mostly white) political elite and the rest of the people.

#### 4.4 Context of social exclusion in the colonial phase

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

Nigeria as a colonial entity enjoyed boom in the agricultural production and the mining of mineral resources such as iron ore, tin and coal. Foreign exchange was earned from the above resources. Each region

99 Lugard (1922) (n 94) 128.

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

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

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

had a comparative advantage through which it made its contributions to the centre. The North, for instance, was known for groundnut production, the West for her cocoa while the East produced palm oil ... the British political economy in Nigeria was along the line of economic exploitation of the colonised by foisting it into the orbit of the European capitalist economic system. The operations and activities of the colonial authorities had no potential for stimulating economic development ... the overall subordination of colonised nations by dominating foreign power is to 'keep the colonised people in complete political subjection, and to maximise local human and natural resources'.<sup>103</sup>

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

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

In a bit of self-awareness, the official acknowledges that '[t]his procedure [of eliminating all the poor population] would be somewhat drastic', but he then justifies it on the basis of public health.<sup>105</sup> As Ake explains, the colonial investment in Nigeria was only to the extent needed to yield profits:<sup>106</sup>

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

If we understand this colonial project as an exploitative one, it necessarily follows that the legal system that was built around it was principally meant to cater to this goal, and not targeted social inclusivity or political participation. This is evidenced not only in the introduction of homophobic laws to exclude a subset of the

<sup>103</sup> Osita-Njoku (n 102) 9-15.

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

<sup>105</sup> As above.

<sup>106</sup> C Ake *A political economy of Africa* (1981) 43.

community and alienate more tolerant perspectives on sexuality, but also demonstrated by the wider exclusion of poorer members of the colonised population through the use of vagrancy and other laws that criminalised the person rather than any harmful act. Gupta notes:<sup>107</sup>

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

Although the term 'catamite' is not used in the Penal Code, the substance of the definitions of vagabond are retained by the law.<sup>108</sup> Similarly, the Criminal Code criminalises 'idle and disorderly persons'<sup>109</sup> with the same intent of criminalising a type of identity that does not fit into the hegemonic values of the colonising powers.<sup>110</sup> To be clear, the colonial administrators did not think that only a subset of the population fell into these categories. Instead, the colonial perception of the majority of the population – including the traditional chiefs – suggests that anyone could be criminalised on the basis of their identity alone. For example, an administrator described an encounter with two uncooperative traditional chiefs as follows:<sup>111</sup>

On my recent visit to the Mahin community, the Amapetu or 'king of Mahin' complained of the conduct of two of his chiefs (both stipendiary) the Bales [chiefs] of Ipetu and Atijere. The first named was at the time in the town of Mahin so I sent for him: the man behaved very insolently in my presence and I ordered him to be taken to Epe

107 Gupta (n 86) 28.

108 Sec 405(e) Penal Code.

109 Sec 249 Criminal Code.

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

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

there to be dealt with: on the following day he was sorry for himself and apologised ... Of the Bale of Atijere I have little to write. He is a very useless individual and should never have been appointed as Bale.

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

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

This process of demonising African sexuality, while simultaneously hegemonising European values in Africa, is what Ngwena<sup>113</sup> notes as the power relationships inherent in the normative process of regulating sexuality, where a hegemonic culture is imposed by the dominant political elite – in this case the colonial government – and then political power is used to exclude groups ‘whose sexualities are outside the domain of majoritarian and hegemonic culture’.<sup>114</sup>

## 5 Conclusion

This article is premised on the CLS perspective that any serious legal advocacy for sexual and gender minorities in Nigeria must critically engage with the social subtext of the law in order to yield positive outcomes. By employing relevant theories of political homophobia,

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

113 Ngwena (n 40) 242.

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

elite power and social exclusion, the article has set out the social and political context surrounding the evolution of criminalising laws during the colonial phase of Nigeria's history.

Elite theory suggests that a stable, cohesive group of individuals who are able to affect political outcomes or control hierarchical institutions in government and society will try to make use of hegemonic values to maintain their interests, including the use of political homophobia in appropriate contexts. In the Nigerian context, the article demonstrates that political homophobia was a strategic tool to protect colonial interests and maintain the legitimacy of colonisation by creating laws that criminalised same-sex relationships. The outcome of – and also incentive for – this process of elitist hegemony includes the social exclusion of a large majority of the population: On the one hand, the preservation of elite interests has resulted in the continuing social exclusion of the majority of Nigerians. On the other hand, the pervasiveness of social exclusion has led to the continued use of political homophobia as a tool for justifying elite hegemony and preserving elite legitimacy. However, these subtle interactions between history, hegemony and governance do not feature in the rhetoric of contemporary promoters of the criminalisation of same-sex relationships. Instead, they base their arguments on a historically-false argument of preserving 'African' cultural or religious values, while preserving an elite hegemonic project that began with the colonial conquest of Africa.