

Silent, Spoken, Written, and Enforced: The Role of Law in the Construction of the Post-Colonial Queerphobic State

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Silent, Spoken, Written, and Enforced: The Role of Law in the Construction of the Post-Colonial Queerphobic State

Chan Tov McNamara[†]

Debates over the origins of queerphobia in post-colonial African nations are legion. The conversation is dominated by opinions that paint Africans as inherently more violent towards, and less tolerant of sexual minorities than their Western counterparts. Less present in the conversation is the view that colonially-imposed laws have played a significant role in the creation of queerphobic, post-colonial African states. However, as this Note contends, neither perspective fully accounts for regional variations in levels of queerphobia throughout the African continent. In response, this Note presents a model that tracks the role of law in the production of queerphobic sentiment prior to, during, and after colonialism. In doing so, the model accounts for regional variations and elucidates the role of colonial-era laws in creating legacies of intolerance.

The model is rooted in scholarship that documents the effects of unenforced, codified sodomy laws. From there, the model branches out dyadically, explaining the role, power, and effects of unwritten laws (oral customary laws) and written laws that are enforced. This Note then applies the model to four post-colonial African societies, Uganda, South Africa, Nigeria, and Zimbabwe. It demonstrates that prior to colonial contact, several African societies did not condemn sexual minorities. With the establishment of colonially-imposed laws, indigenous attitudes shifted from tolerance of queer sexualities, to intolerance. This Note concludes that in societies where colonially-imposed anti-queer laws were routinely enforced, modern post-colonial societies experience high levels of queerphobia. In contrast, where such laws were not routinely enforced, post-colonial societies more readily accept LGBTQ persons as equal citizens.

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Introduction	496
I. The Model: Silent, Spoken, Written and Enforced	500
A. Oral Law	502
B. Written Law	504
II. Applying the Model to Pre-colonial African Law	509
A. The Nature of Pre-colonial Customary Law	509
B. Customary Law as ‘Silent’ Law	510
1. Zimbabwe	510
2. South Africa	512
C. Customary Law as Spoken & Enforced Law	513
1. Uganda	513
2. Nigeria	514
III. Applying the Model to Imposed Colonial Laws	516
A. Colonial Law & Colonial Control	516
B. Colonial Law as Written & Unenforced Law	518
1. South Africa	518
C. Colonial Law as Written & Enforced Law	521
1. Nigeria	521
2. Zimbabwe	522
3. Uganda	523
IV. Queerness in Post-colonial African Society	523
A. Case Studies Revisited— Post-colonial Queerphobia	524
1. Uganda	525
2. Nigeria	526
3. Zimbabwe	528
4. South Africa	529
Conclusion	531
Appendix: The F&M Global Barometer of Gay Rights (GBGR)TM ..	532

Introduction

Much ink has been spilled over queerphobia in Africa. Resounding global narratives paint African societies as violently opposed to sexual minorities, with headlines declaring: “Homophobia: Africa’s New Apartheid”¹ and “Corrective Rape: The Homophobic Fallout of Post-Apartheid South Africa.”² Others have labeled Africa “the most homophobic continent.”³ In African nations, government officials rou-

1. Azad Essa, *Homophobia: Africa’s New Apartheid*, ALJAZEERA (Feb. 1, 2014), <http://www.aljazeera.com/indepth/opinion/2014/02/homophobia-africa-new-apartheid-20142194711993773.html> [https://perma.cc/UJ7L-U3VA].

2. Lydia Smith, *Corrective Rape: The Homophobic Fallout of Post-Apartheid South Africa*, AMERICAN RENAISSANCE (May 21, 2015), <https://www.amren.com/news/2015/06/corrective-rape-the-homophobic-fallout-of-post-apartheid-south-africa/> [https://perma.cc/8M64-8Y3C].

3. David Smith, *Why Africa is the Most Homophobic Continent*, THE GUARDIAN (Feb. 22, 2014), <https://www.theguardian.com/world/2014/feb/23/africa-homophobia-uganda-anti-gay-law> [https://perma.cc/DU3B-4Z6S].

tinely threaten violence against homosexuals,⁴ and deem homosexuality an unnatural, “[w]estern practice”⁵ that is “un-African.”⁶ Some go as far as to describe queerfolk⁷ as “worse than dogs and pigs.”⁸

But underneath the international narratives and oft-repeated views that Africans are innately more intolerant, more violent, and more “savage” in their resistance to accepting sexual minorities than their Western counterparts, is there something more?⁹ Perhaps these accounts mischaracterize the complex reasons that explain queerphobia in post-colonial African nations.¹⁰ Specifically, many conversations on the topic of queerphobia in

4. See Kapyia Kaoma, *Globalizing the Culture Wars: U.S. Conservatives, African Churches, & Homophobia*, POLITICAL RES. ASSOC. (Dec. 1, 2009), <http://www.publiceye.org/publications/globalizing-the-culture-wars/pdf/africa-full-report.pdf> [https://perma.cc/MC52-D3JB] (“They dare not come to the open. They will be shot. I can assure you that they will be stoned to death. We don’t do it in Africa. It is only in the West that they are doing rubbish.”).

5. Elizabeth Landau et al., *Uganda President: Homosexuals are ‘Disgusting.’* CNN NEWS (Feb. 25, 2014), <http://www.cnn.com/2014/02/24/world/africa/uganda-homosexuality-interview/index.html> [https://perma.cc/ZX6F-LWJF].

6. In a May 2015 interview, the spokesman for Kenya’s Deputy President called homosexuality “unnatural and un-African.” See “No Room” for Gays in Kenya, Says Deputy President, REUTERS (May 4, 2015), <http://af.reuters.com/article/africaTech/idAFKBNONP11T20150504?pageNumber=1&virtualBrandChannel=0> [https://perma.cc/9SCW-WXXR].

7. This Note uses the term “queer” and its derivatives, such as “queerfolk,” and “queer forms,” interchangeably with the term “sexual minorities.” Both are intended to refer to non-heterosexual, non-cisgender based identities. This includes those individuals mentioned under the acronym LGBTQ (lesbian, gay, bisexual, transgender, queer, and questioning). This usage is consistent with the APA (American Psychological Association) style and recent scholarship on LGBTQ issues. See Diane L. Zosky and Robert Alberts, *What’s in a Name? Exploring Use of the Word Queer as Identification Within the College-Aged LGBT Community*, J. HUMAN BEHAVIOR SOC. ENV’T 597, 601 (2016). In addition, the use of the catch-all term “queer” is an explicit acknowledgement that the standard Western abbreviation “LGBT” fails to sufficiently capture the experiences of non-Western, indigenous African (homo)sexualities, queer intimacies, relationships, and behaviors. For additional background on the differences between Western and indigenous African gay culture, see generally A.J.G. M. Sanders, *Homosexuality and the Law: A Gay Revolution in South Africa?*, 41 J. AFR. L. 100 (1997) (arguing that the “gay lifestyle” is foreign to Africa, but same-sex intimacy is not).

8. Jeffrey Moyo, *Worse Than Dogs and Pigs: Life as a Gay Man in Zimbabwe*, REUTERS (Sept. 3, 2017), <https://www.reuters.com/article/us-zimbabwe-rights-lgbt/worse-than-dogs-and-pigs-life-as-a-gay-man-in-zimbabwe-idUSKCN1BF03Z> [https://perma.cc/WK3Q-B43W].

9. See, e.g., Smith, *supra* note 3 (describing Ugandan anti-gay laws as “savage”).

10. See Victor Asal et al., *Original Sin: A Cross National Study of the Legality of Homosexual Acts*, 46 COMP. POL. STUD. 320, 323 (2012) (providing empirical evidence that societal homophobia is the result of numerous factors); Madeleine Bunting, *African Homophobia Has Complex Roots*, THE GUARDIAN (May 21, 2010), <https://www.theguardian.com/commentisfree/2010/may/21/complex-roots-africa-homophobia> [https://perma.cc/M76D-BV2A] (opining that African homophobia is the result of religion, custom, and contemporary discourse on HIV and AIDS); Hyeon-Jae Seo, *The Origins and Consequences of Uganda’s Brutal Homophobia*, 38 HARV. INT’L REV. 40, 42 (June 19, 2017), <http://hir.harvard.edu/article/?a=14531> [https://perma.cc/P2A5-2ZRZ] (describing homophobia in Uganda as “a complex labyrinth of historical remnants, foreign influences, socioeconomic obstacles, and political manipulations.”); see also Patrick Awondo et al., *Homophobic Africa? Toward a More Nuanced View*, 55 AFR. STUD. REV. 145, 148 (2012) (describing homophobia in postcolonial African nations as “complicated”).

Africa fail to account for the possibility that modern-day intolerance might be the result of colonially-introduced laws.¹¹

Indeed, many African nations retain colonial-era anti-queer laws,¹² and several have reinforced colonially-instituted laws by enacting new legislation in the decades since their independence.¹³ Of the thirty-three African countries that currently criminalize homosexuality, eighteen were former British colonies that inherited versions of the colonial “sodomy law.”¹⁴ Although France decriminalized same-sex conduct in 1791, it also imposed sodomy laws upon its African colonies.¹⁵ Likewise, in German colonies, Paragraph 175 of the German Criminal Code punished same-sex acts by male partners.¹⁶ Many Dutch-ruled African colonies also had similar penalties for same-sex conduct.¹⁷ Summarily, historic evidence supports the idea that there is a connection between modern queerphobia and European colonialism.¹⁸

The imposition of colonial-era anti-queer legislation, however, is not unique to African nations.¹⁹ Other post-colonial countries have struck down colonial-era laws and have fully embraced sexual minority citizens as

11. While scholars have examined homosexuality and homophobia in African contexts, very few law journal articles have tracked the role of colonial-era sodomy laws on modern day homophobia within the continent. *cf.* Susan Haskins, *The Influence of Roman Laws Regarding Same-Sex Acts on Homophobia in Africa*, 14 AFR. HUMAN RIGHTS L.J. 393 (2014) (providing examples of Roman-Dutch sodomy laws); Kalembe Kizito, *Bequeathed Legacies: Colonialism and State-Led Homophobia in Uganda*, 15 SURVEILLANCE & Soc’y 567 (2017); *see also* Louis Staples, *In Celebrating LGBT+ History, We Can’t Ignore Britain’s Role in Exporting Homophobia*, NEW STATESMAN (Feb. 8, 2018), <https://www.newstatesman.com/2018/02/celebrating-lgbt-history-we-can-t-ignore-britain-s-role-exporting-homophobia> [<https://perma.cc/79J5-666Q>]. Some, however, resist the relationship between colonialism and modern queerphobia. *See, e.g.*, Mark Joseph Stern, *Don’t Blame Yesterday’s Colonialism for Today’s Homophobia*, SLATE (July 3, 2014), http://www.slate.com/blogs/outward/2014/07/03/don_t_blame_homophobia_on_colonialism_cultural_relativists.html [<https://perma.cc/294W-R2E2>].

12. *See* Nancy Xie, *Legislating Hatred: Anti-Gay Sentiment in Uganda*, 32 HARV. INT’L REV. 6, 6 (2010) (“Homophobia is far from a novelty in Africa. . . . For many countries, these outdated laws have been but a vestige of the colonial times, introduced by their European subjugators during the height of imperialism.”).

13. *See infra* Part IV. For example, Uganda has instituted several anti-queer measures following its independence. *See* Sylvie Namwase, Adrian Jjuuko, & Ivy Nyarango, *Sexual Minorities’ Rights in Africa: What Does It Mean to Be Human; And Who Gets to Decide?*, in PROTECTING THE HUMAN RIGHTS OF SEXUAL MINORITIES IN CONTEMPORARY AFRICA 2, 2–3 (Sylvie Namwase & Adrian Jjuuko eds., 2017).

14. These African countries include “Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.” *See* HUMAN RIGHTS WATCH, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism* (Dec. 17, 2008), <https://www.hrw.org/sites/default/files/reports/lgbt1208webwcover.pdf> [<https://perma.cc/5ZEN-DRLT>] [hereinafter *Alien Legacy*].

15. These African colonies include Benin, Cameroon, and Senegal. *See id.* at 7.

16. *See id.*

17. *See* Haskins, *supra* note 11, at 396 n.10 (providing examples of Roman-Dutch sodomy laws).

18. *See generally Alien Legacy, supra* note 14, at 4–5.

19. *See id.*

equal members of society.²⁰ While more than half of the countries that criminalize same-sex conduct²¹ are in fact former British colonies,²² the broad conclusion that colonially-imposed anti-queer laws result in modern queerphobia, fails to explain variations in intolerance evinced throughout the post-colonial world.²³

What, then, accounts for regional variations in post-colonial queerphobia in Africa? Why do some nations, such as South Africa, fully embrace equal rights for queerfolk²⁴ while others, such as Uganda and Nigeria, continue to persecute such individuals? An equally important inquiry is what were the attitudes towards sexual minorities in pre-colonial indigenous African societies?²⁵ And what role did colonially-imposed laws play in creating the modern view that sexual minorities are “a threat to the very foundation of [an African] nation’s moral and social order”?²⁶ To elucidate answers, this Note examines the role of law in the creation of queerphobic sentiment that continues to this day.

This Note is principally descriptive; it documents the role of law in the creation of societal queerphobic sentiment from before colonial contact to the present. This Note does so by employing a model that accounts for various stages of law throughout pre-colonial and post-colonial Africa. The model will demonstrate the effects of pre-colonial African customary laws and colonially-imposed laws on the creation and exacerbation of queerphobic societal sentiment through the case studies of four African nations: Uganda, South Africa, Nigeria, and Zimbabwe.

This Note proceeds in four parts. Part I presents the model which attempts to capture the historical development of law in colonized Africa. The model accounts for unwritten laws that require speech for enforcement (such as indigenous African customary laws) and codified laws (such as

20. One such example is South Africa. See *infra* Part II.B.2. Another example is India. See HUMAN RIGHTS WATCH, *India: Court Strikes Down ‘Sodomy’ Law* (July 2, 2009), <https://www.hrw.org/news/2009/07/02/india-court-strikes-down-sodomy-law> [<https://perma.cc/4CFQ-Q5GW>]. Ultimately, however, India reinstated the colonially-imposed laws. See HUMAN RIGHTS WATCH, *India: Supreme Court Revisits ‘Sodomy’ Law* (Feb. 2, 2016), <https://www.hrw.org/news/2016/02/02/india-supreme-court-revisits-sodomy-law> [<https://perma.cc/MR3K-N6DY>].

21. Siobhan Fenton, *LGBT Relationships Are Illegal in 74 Countries, Research Finds*, INDEPENDENT (May 17, 2016), <http://www.independent.co.uk/news/world/gay-lesbian-bisexual-relationships-illegal-in-74-countries-a7033666.html> [<https://perma.cc/48CM-23HE>].

22. See *Alien Legacy*, *supra* note 14, at 5.

23. See Awondo et al., *supra* note 10, at 148 (discounting the conclusion that African homophobia is solely the result of colonialism and missionary conquests and instead noting that “homophobia was also shaped by the postcolonial context, often in quite complicated ways.”); Rahul Rao, *A Tale of Two Atonements*, in *QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS* 15, 20–21 (Dianne Otto ed., 2017) (critiquing efforts to brand African homophobia a colonial imposition).

24. See Asal et al., *supra* note 10, at 322 (suggesting that colonially imposed laws are only one of many factors determining societal homophobia).

25. See *infra* Part II.

26. Basile Ndjio, *Post-Colonial Histories of Sexuality: The Political Invention of a Libidinal African Straight*, 82 AFR.: J. INT’L AFR. INST. 609, 610 (2012).

colonially-imposed laws). It then discusses the implications for each layer of law.

Part II applies the model to the pre-colonial state of LGBTQ life in the four African case studies. It examines the relationship of customary laws and queer identity in those societies to demonstrate that queerfolk were largely tolerated in, and in some cases fully accepted by, pre-colonial African societies.

Part III explores the effects of colonialism and colonial laws on the members of the case-studied societies. The model will demonstrate that because colonial-era laws were written (as opposed to being spoken), they have had a longer-lasting effect on the creation of queerphobic sentiments. It will also explore the implications for variations in the enforcement of these codified laws.

Part IV revisits the case studies to explore the effects of the colonial legacies on modern-day sentiments toward sexual minorities. It shows that, generally, African societies shifted from tolerating and accepting queerfolk prior to colonialism, to persecuting them since independence.

Finally, using the F&M Global Barometer of Gay Rights (GBGR) as a measuring tool for comparison, this Note concludes that in the case studies where colonially-imposed laws were not widely enforced against sexual minorities, societies are more tolerant of queer citizens at present. In contrast, where colonial rulers frequently enforced anti-queer laws, African societies are more queerphobic today.

I. The Model: Silent, Spoken, Written and Enforced

This Note theorizes the role of law in the construction of queerphobic post-colonial societies by presenting a model that envisions all laws that have existed in post-colonial African nations as layers, ranging from customary laws that relied on orality, to imposed colonial laws that were codified. It is represented as follows:

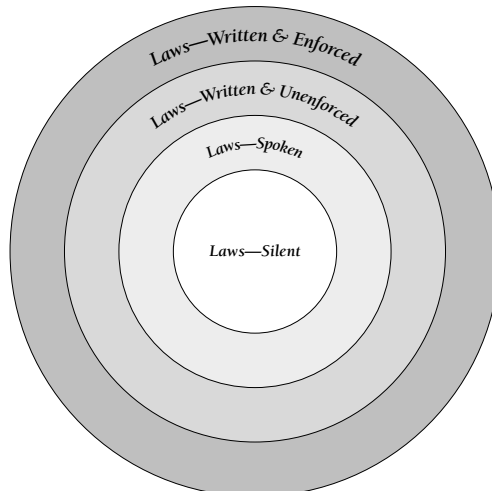


Figure 1—The Layered Model of Post-colonial African Law

The model depicts four layers of law, each subsumed by the next.²⁷ Colonized African societies developed laws in this way,²⁸ with each layer of law imposed on top of a preexisting legal system.²⁹ The model seeks to document the progressive role of law in the construction of modern-day queerphobia.

The model finds its roots in scholarship written on the symbolic power of unenforced anti-queer laws.³⁰ That is, the emblematic significance and effects of laws targeting sexual minorities that are written on the books but not enforced.³¹ From there, the model branches out dyadically to conceptualize, explain, and account for the power of unwritten law (oral law)³² and written law that is codified and enforced.³³

The model's axes are twofold: documentation and enforcement. It turns on whether laws are spoken or written, as well as whether laws are unenforced or enforced. The model assumes, as integral, the premises that written laws are characteristically more concrete, resistant to change, and longer-lasting than spoken ones,³⁴ and that enforced laws are more coer-

27. The idea for this model comes from Kenji Yoshino's seminal work on assimilation and its effects on LGBT individuals. See Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 774 (2002). There, Yoshino argues that the assimilation of minorities occurs through a series of concentric circles.

28. See Vernon Valentine Paler, *Mixed Legal Systems . . . and the Myth of Pure Laws*, 67 *LA. L. REV.* 1205, 1216 (2007) ("The empires of the Dutch, the British, the French, I Germans, the Belgians, the Portuguese, and the Italians, projected European law into territories of Africa and Asia where the indigenous peoples already had their own laws.").

29. Other scholars have used the imagery of law in colonized nations as having developed in "layers." See, e.g., TIRTHANKAR ROY & ANAND V. SWAMY, *LAW AND THE ECONOMY IN COLONIAL INDIA* 26 (2016) ("Like an archaeological excavation site, legislative principles devised in different times formed layers. . . ."); LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900* 8 (2002) (describing plural legal systems as "stacked"); Christa Rautenbach, *South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition*, 12 *ELECTRONIC J. COMP. L.* 13 n.83 (describing South African law as "consisting of common, civil and customary law layers which blend with each other") (emphasis added), available at <https://www.ejcl.org/121/art121-20.pdf> [<https://perma.cc/CAW2-T4B4>].

30. See, e.g., Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 *HARV. C.R.-C.L. L. REV.* 103, 122, 178 (2000) (documenting the "collateral" effects of unenforced sodomy laws); Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 *CALIF. L. REV.* 643, 650 (2001) (arguing that unenforced sodomy laws still have material effects); Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 *YALE L. & POL'Y REV.* 169, 171-72 (1997) (documenting "secondary applications" of unenforced laws); see also Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2032 (1996) (considering the expressive function of law; its ability to make statements about acceptable behavior, irrespective of enforcement activity).

31. See Goodman, *supra* note 30, at 650.

32. See *infra* Part I.A.

33. See *infra* Part I.B.

34. See David Pimentel, *Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, 14 *YALE HUM. RTS. & DEV. L.J.* 59, 78 (2011) (describing oral law as "flexible and highly adaptable," in contrast to the rigidity of written law); H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY*

cive than unenforced laws, and thereby produce larger-scale societal changes than laws which are not.³⁵

Within the model, as the layers of law progress from the center they increase in coercive ability, and attitude-shaping effect. Therefore, the two outermost layers representing colonially imposed laws will have the most influence on the behaviors and attitudes of modern post-colonial societies.

A. Oral Law

Within societies without written texts, laws rely on speech for transmission and enforcement.³⁶ In some instances, such oral laws may take the form of social norms or customs, which are understood by all members of the oral society.³⁷ In other cases, oral societies require “elders” or learned individuals who are familiar with the customary law and are thus able to recall, and enforce the spoken laws.³⁸ This oral law accounts for the model’s second layer.

The model’s core represents oral laws which are silent—or rather,

IN LAW 8 (2014) (“[O]ral traditions are subject to all the vicissitudes of human memory. . . . Oral traditions, by virtue of their method, or process, are constantly being rearranged, or are forgotten.”); see also T.W. Bennett & T. Vermeulen, *Codification of Customary Law*, 24 J. AFR. L. 206, 210 (1980) (describing codification of law as a means of its preservation); Muna Ndulo, *African Customary Law, Customs, and Women’s Rights*, 18 IND. J. GLOBAL LEGAL STUD. 87, 97 (2011) (noting that unless oral customary law is integrated within the written legal system “it is bound to die”). C.f. Jan Vansina, *Once Upon a Time: Oral Tradition as History in Africa*, 100 DAEDALUS 442, 444 (1971) (“A written document is an artifact; it is a manuscript. There are no problems as to what the testimony is. A verbal account is not so clearly presented, for a witness frequently gives several successive accounts of the same set of events.”).

35. For support for this premise, see *infra* Part I.B.

36. See THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 315 (2012) (describing the role of orality in the law of societies that lack written language); Peter Leman, *African Oral Law and the Critique of Colonial Modernity in the Trial of Jomo Kenyatta*, 23 L. & LITERATURE 26, 29 (2011) (“For practical reasons, as well as reasons of tradition and custom, in the absence of a writing system, legal traditions were ‘inscribed’ in oral expressions, rituals, and other symbolic practices.”); Bennett & Vermeulen, *supra* note 34, at 212 (“If no written records of the law can be kept, the community governed by the system of law in question is compelled to hand down its knowledge by word of mouth, from generation to generation.”); Cornel W. du Toit, *Religious Freedom and Human Rights in South Africa after 1996: Responses and Challenges*, 2006 BYU L. REV. 677, 688 (2006) (documenting the living unwritten law that governs oral communities); Vansina, *supra* note 34, at 443 (comparing oral and literate societies and finding that in the latter “the principal political, legal, social, and religious texts were transmitted orally”); see also *infra* notes 97–121 and accompanying text.

37. See, e.g., J.C. BEKKER, SEYMOUR’S CUSTOMARY LAW IN SOUTHERN AFRICA 11 (1989) (describing oral customary law as “[a]n established system of immemorial rules which ha[ve] evolved from the way of life and natural wants of the people, the general context of which was a matter of *common knowledge*”) (emphasis added); GLENN, *supra* note 34, at 65 (describing the oral law as “vested in a repository” that is communal); Bennett & Vermeulen, *supra* note 34, at 216 (describing the community involvement in the creation and understanding of oral law).

38. See GLENN, *supra* note 34, at 8 (“[T]he most important element in an oral tradition is not so much the spoken word as it is human memory.”); *id.* at 65 (describing the role of elders “who, by their assimilation of tradition over a longer period of time, often speak with greater authority”).

those that are unspoken.³⁹ Because the law in oral societies requires speech, societies are unable to enforce unspoken laws strongly, and, hence, those laws have less coercive power.⁴⁰ Regarding anti-queer laws in oral societies, it is unlikely that unspoken norms had coercive influence on sexual minorities.⁴¹ Presumably, in a community where participants do not discuss the status of sexual minorities, spoken law could have had only minimal influence on the behavior and attitudes of community members towards indigenous sexual minorities. Instead, the lack of oral law regarding sexual minorities resulted in a “*de facto* tolerance” for sexual minorities within such communities.⁴² Consequently, where oral laws were silent on queer identity, indigenous queer sexualities existed relatively unobstructed.

The model's second layer of law accounts for oral laws that are spoken and enforced. Within oral societies, spoken laws have enforcement power and can, therefore, influence the lives, attitudes, and behavior of community members.⁴³ In communities in which citizens used spoken laws to condemn sexual minorities, the development of indigenous queer sexualities was predictably more subdued than that of communities where laws were silent on queer identity.⁴⁴ But this did not mean that queerfolk within these communities were wholly condemned. Indeed, oral law is inherently flexible.⁴⁵ It is subject to the “vicissitudes of human memory” and human nature.⁴⁶

As other scholars have noted, oral laws are routinely “rearranged,” or “forgotten” as a consequence of their method of enforcement.⁴⁷ The enforcement of oral law relies entirely on the willingness of community

39. Relatedly, Rodolfo Sacco described a version of such law in his thesis on the development of laws in pre-language societies. See generally Rodolfo Sacco, *Mute Law*, 43 AM. J. COMP. L. 455 (1995).

40. As Professor Antony Allot has noted, “Whether spoken (as with customary law) or written (as with western law) law and legal rules are expressed in words.” Antony Allot, *Law in the New Africa*, 66 AFR. AFF. 55, 62 (1967). Consequently, when no words are expressed, the law may be powerless to control the lives of individuals.

41. For a discussion of the “*de facto*” tolerance of sexual minorities that resulted from silent laws, see text accompanying *infra* notes 97–121.

42. See Marc Epprecht, *The ‘Unsayings’ of Indigenous Homosexualities in Zimbabwe: Mapping a Blindspot in an African Masculinity*, 24 J. SOUTH. AFR. STUD. 631, 636 (1998) [hereinafter *Unsayings*]; IVY NYARANGO ET AL., PROTECTING THE HUMAN RIGHTS OF SEXUAL MINORITIES IN CONTEMPORARY AFRICA 20–21 (2017) (describing how a “code of silence” surrounding homosexuality in oral law communities allowed such practices to be ignored).

43. See sources cited in *supra* note 36.

44. See text accompanying *infra* notes 122–48.

45. See Remigius N. Nwabueze, *The Dynamics and Genius of Nigeria’s Indigenous Legal Order*, 1 INDIGENOUS L.J. 153, 164–65 (2002) (characterizing customary law as “flexible, evolutionary, and capable of adaptation.”); *id.* at 164 (quoting *Lewis v. Bankole*, [1909] 1 N.L.R. 100–01 (Nigeria). (“[O]ne of the most striking features of West African native custom . . . is its flexibility. . . . [I]t shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics.”)).

46. GLENN, *supra* note 34, at 8.

47. *Id.*

members to speak it.⁴⁸ This flexibility in enforcement opens numerous possibilities for leniency and sporadic application.⁴⁹ Within one community, the readiness to use oral law to condemn indigenous queer sexuality could vary widely.⁵⁰ As a result, even in indigenous communities with oral law that condemned sexual minorities, some degree of tolerance may have existed.⁵¹

B. Written Law

The model next accounts for written colonial laws. Unlike spoken laws, which are inherently fluid,⁵² written or codified laws are stable and resistant to change.⁵³ Because of their stability, codified laws are more likely than spoken laws to have long-term effects in shaping the lives and behaviors of citizens in post-colonial societies.⁵⁴

But not all written laws have the same capability to shape normative behavior. The laws that societies enforce ultimately have more influence and coercive effect on behavior than those that society does not.⁵⁵ To be clear, this is not an argument that unenforced laws are not injurious.⁵⁶ As numerous scholars have noted, because of the expressive, symbolic, and deterrence functions of law, codified laws may influence citizens' attitudes even outside of enforcement.⁵⁷ With respect to anti-queer laws, Professor

48. See *id.* at 9-10 (describing the durative benefits of writing over oral tradition). This is opposed to written laws, which, irrespective of enforcement, exist.

49. See Brett L. Shadle, 'Changing Traditions to Meet Current Altering Conditions': Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60, 490 J. AFR. HIST. 411, 413 (2000) (noting that the interpretation of oral law occurred "situationally"); Bennett & Vermeulen, *supra* note 34, at 213 (noting that oral law communities aim to avoid community harm, rather than have the "impartial application of rules").

50. See Bennett & Vermeulen, *supra* note 34, at 218 (describing the diversity in oral law, including "at the level of the ward and indeed, the family settlement or village").

51. See *id.* at 217 (describing the leniency, modification, and flexibility of oral law).

52. See text accompanying *supra* notes 44-46.

53. See GLENN, *supra* note 34, at 9; Bennett & Vermeulen, *supra* note 34, at 212.

54. Compare text accompanying *supra* notes 42-52 with *infra* notes 57-62.

55. Some suggest that unenforced laws are less influential than enforced laws "because people are unlikely to obey them." Matthew Berns, *Trigger Laws*, 97 GEO. L. J. 1639, 1670 (2009); see also LESLIE, *supra* note 30, at 106 n.6 (collecting examples of scholars who suggest unenforced laws are less harmful than enforced ones). Cf. Kenji Yoshino, *On Empathy in Judgment (Measure for Measure)*, 57 CLEV. ST. L. REV. 683, 685 (2009) (relaying the image that unenforced laws are like "bridles that have slipped off their horses, a lion too fat to leave its cave, and finally, the spared rod that spoils the child. . . . In this sense, an unenforced law is worse than no law at all.").

56. In fact, they are. See text accompanying *infra* notes 57-86.

57. See, e.g., Leslie, *supra* note 30, at 103 ("Unenforced laws need not be repealed, the argument goes, because they are harmless. . . . [But] a criminal law, though not enforced through prosecutions, may still affect society."); Mark Strasser, *Sex, Law and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 781-82 (2000) (describing the messages that unenforced adultery laws send to society); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 421 (1999) ("Sodomy laws, even when unenforced, express contempt for certain classes of citizens."); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996) (describing criminal laws as sending a message of "moral condemnation"). See generally Sunstein, *supra* note

Charles Leslie has argued that even unenforced laws serve to “brand [queer] individuals as criminals.”⁵⁸ He concludes that despite the lack of enforcement, the discrimination caused by the existence of sodomy laws serves to “put gay citizens under siege . . . [i]solating them from society and from each other.”⁵⁹ Indeed, such codified but unenforced anti-queer laws have the effect of stigmatizing sexual minorities as inherently criminal, associating them with inferiority⁶⁰ and making them social pariah.⁶¹ However, written but unenforced anti-queer laws arguably do not have the same coercive power as enforced laws because the latter have direct, practical effects on the imprisonment, mistreatment, and punishment of sexual minorities, among other consequences.⁶²

30 (theorizing the expressive function of law); Mark Peter Henriques, Note, *Desuetude and Declaratory Judgement: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1080 (1990) (“[A]nchronistic and unenforced statutes serve an important symbolic function in society. Such statutes, though unenforced, ‘may nevertheless enshrine norms of conduct’”) (citing Bruce E. Fein, *Court Nullification of “Obsolete” Laws Unnecessary*, LEGAL TIMES 14 (May 10, 1982)). C.f. Rebecca M. Blank et al., *State Abortion Rates the Impact of Policies, Providers Politics, Demographics, and Economic Environment*, 15 J. HEALTH. ECON. 513, 514 (1996) (finding substantial effects of unenforced anti-abortion policies on the number of abortions performed in each state); Ben Depoorter & Stephan Tontrup, *The Costs of Unenforced Laws: A Field Experiment* (N.Y.U. Pub. Law and Legal Theory Working Papers, Paper No. 557, 2016), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1559&context=nyu_plltwp [<https://perma.cc/3Z2X-8U26>] (“Unenforced laws are powerful: they can change attitudes, coordinate social expectations and trigger private enforcement.”).

58. Leslie, *supra* note 30, at 112. Specifically, Professor Leslie argues that the effects of unenforced sodomy laws include (1) creating a social hierarchy that diminishes the value of the lives of gay men and lesbians, imposing severe psychological injury on many gay men and lesbians; (2) encouraging physical violence and police harassment against gay men and lesbians; (3) justifying employment discrimination against gay and lesbian employees and job applicants; (4) separating children from their gay or lesbian parent; (5) stifling the development of gay organizations; (6) squelching speech rights of gay citizens; and (7) facilitating immigration discrimination against homosexuals. *Id.* at 116; see also Paula A. Branter, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495, 495 (1992) (describing the effects of the mere existence of sodomy laws, whether enforced or not).

59. Leslie, *supra* note 30, at 178; see also Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack*, 2001 WIS. L. REV. 29, 29 (2001) (“Because law enforcement authorities rarely prosecute private, non-commercial sodomy between consenting adults, most courts and scholars assert that sodomy laws are essentially harmless. Gay Americans know that nothing could be further from the truth; sodomy laws inflict significant injuries on the gay populace.”).

60. See Leslie, *supra* note 30, at 114 (“The symbolic function of sodomy laws is similar to Jim Crow laws in that a primary purpose of both types of law is to condemn an entire class of Americans immoral, inferior, and not deserving of society’s tolerance and protection.”).

61. See *id.* (“[Sodomy] laws send a message to society that homosexuality is unacceptable. Even without actual criminal prosecution, the laws carry meaning.”).

62. See generally HUMAN RIGHTS WATCH, *Nigeria: Harsh Law’s Severe Impact on the LGBT Community* (Oct. 20, 2016), <https://www.hrw.org/news/2016/10/20/nigeria-harsh-laws-severe-impact-lgbt-community> [<https://perma.cc/3MTC-JLHB>]; Daniel Englander, *Protecting the Human Rights of LGBT People in Uganda in the Wake of Uganda’s “Anti Homosexuality Bill, 2009,”* 25 EMORY INT’L L. REV. 1263 (2011). For a discussion of modern enforced anti-gay laws, see Jordan Blair Woods, *LGBT Identity and Crime*, 105

In the global context, laws that criminalize queer identity, but which are only rarely enforced, are not unique to post-colonial African societies.⁶³ Undeniably, American society is home to many examples of anti-queer laws that, although not enforced, have detrimental effects on the dignity, lives, and livelihoods of queer individuals.⁶⁴

Consider, for instance, the 1986 Supreme Court case upholding Georgia's sodomy law as constitutional, *Bowers v. Hardwick*.⁶⁵ In that case, the Atlanta, Georgia police officer Keith Torick entered the accused Michael Hardwick's home.⁶⁶ Upon entry, he witnessed Mr. Hardwick and another man engaged in consensual intercourse and arrested both men for sodomy, a felony under Georgia's sodomy laws.⁶⁷ Though the district attorney decided not to prosecute either individual for the charge of sodomy, Mr. Hardwick responded by countersuing for a declaratory judgment that the sodomy law was unconstitutional.⁶⁸

The U.S. Supreme Court's review of Mr. Hardwick's case on certiorari evinces the Justices' belief that because the sodomy law was unenforced, it was harmless to queer Georgians.⁶⁹ For example, though Justice Powell conceded that a twenty-year sentence for sodomy would "create a serious Eight Amendment issue,"⁷⁰ he declined to reach the constitutional issue because the sodomy law had not been enforced against Mr. Hardwick.⁷¹

In another American case, *Lawrence v. Texas*,⁷² the Supreme Court continued to concentrate on the lack of enforcement of sodomy laws.⁷³ Looking to early American history, the majority noted that "laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private."⁷⁴ However, the Supreme Court was slightly more willing to acknowledge that unenforced laws may lead to discrimination against,⁷⁵

CALIF. L. REV. 667 (2017); Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461 (2017) (describing the effects of "Don't Say Gay" curriculum laws).

63. See *infra* notes 64–81.

64. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (discussing the stigma unenforced Texan sodomy-statutes impose on homosexuals).

65. 478 U.S. 186, 196 (1986).

66. See Leslie, *supra* note 30, at 106–07.

67. See *id.* at 107. The Georgia law provided, in part:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

GA. CODE ANN. § 16-6-2 (1984).

68. See Leslie, *supra* note 30, at 107.

69. See *id.* at 107–08 ("Justice Powell seems to have assumed that sodomy laws are benign because they are not actively enforced.").

70. *Bowers*, 478 U.S. at 196–97 (1986) (Powell, J., concurring in judgment).

71. See *id.* at 198.

72. 539 U.S. 558 (2003).

73. See *id.*

74. *Id.* at 569.

75. See *id.* at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

and stigmatization of homosexuals.⁷⁶

The conclusion that unenforced codified laws have detrimental effects is also evidenced by the consequences of “unenforced” sodomy laws throughout the Caribbean.⁷⁷ For example, although Jamaica has been dubbed “the most homophobic place on earth,”⁷⁸ the island’s sodomy laws are very rarely enforced.⁷⁹ Despite this lack of enforcement, some scholars have argued that Jamaican sodomy laws bolster societal anti-queer violence.⁸⁰ Indeed, though Jamaica’s courts don’t enforce the codified sodomy, private actors often “enforce” the laws on their own.⁸¹

Finally, the model accounts for laws that are codified and enforced against sexual minorities. Generally, the goals of criminal laws are twofold, to punish and to deter.⁸² The deterrence function of criminal law directly

76. See *id.* at 575, 583 (“[B]ecause Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.”). Particularly, in Justice O’Connor’s concurrence, she focused on the consequences of Texas’s rarely enforced sodomy law. “Texas[s] sodomy law,” she highlighted, “brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else.” *Id.* at 581. She went on to note that the law “legally sanctions discrimination against [homosexuals] in a variety of ways . . . including in the areas of ‘employment, family issues, and housing.’” *Id.* at 582. Her concurrence, arguably, acknowledges the effects of anti-queer laws—written but unenforced—on the subjugation of LGBTQ people.

77. See generally Mahalia Jackman, *They Called it the ‘Abominable Crime’: An Analysis of Heterosexual Support for Anti-Gay Laws in Barbados, Guyana and Trinidad and Tobago*, 13 *SEXUALITY RES. & SOC. POL’Y* 130 (2016) (describing how Caribbean nations’ societies have accepted colonially-imposed buggery laws (written and unenforced) into the societal consciousness).

78. Tim Padgett, *The Most Homophobic Place on Earth?*, *TIME* (Apr. 12, 2006), <http://content.time.com/time/world/article/0,8599,1182991,00.html> [<https://perma.cc/GRV3-67WP>].

79. See Joseph Gaskins Jr., *‘Buggery’ and the Commonwealth Caribbean: A Comparative Examination of the Bahamas, Jamaica, and Trinidad and Tobago*, in *HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH: THE STRUGGLES FOR DECRIMINALIZATION AND CHANGE* 430 (C. Lennox & M. Waites eds., 2013).

80. See *id.* (quoting Leslie, *supra* note 30, at 103).

81. On the island, local mob attacks on homosexuals, dubbed “battyman judgements” or simply “homosexual judgements” are particularly prevalent. See generally Robert Carr, *On “Judgements”: Poverty, Sexuality-Based Violence and Human Rights in 21st Century Jamaica*, 2 *CARIBBEAN J. SOC. WORK* 71 (2003) (describing the phenomenon of ‘judgements’—mob violence against homosexuals in Jamaica). Between 2009–2012 there were 231 reported incidences of anti-gay violence on the island. See *HUMAN RIGHTS WATCH, Not Safe at Home: Violence and Discrimination Against LGBT People in Jamaica* (Oct. 21, 2014), <https://www.hrw.org/report/2014/10/21/not-safe-home/violence-and-discrimination-against-lgbt-people-jamaica> [<https://perma.cc/8AUV-F2V8>]. The Jamaican NGO JFLAG has also documented thirty murders of homosexuals between 1997–2000. Diane Taylor, *‘If You’re Gay in Jamaica, You’re Dead’*, *THE GUARDIAN* (Aug. 2, 2014), <https://www.theguardian.com/world/2004/aug/02/gayrights.gender> [<https://perma.cc/7D7X-QNRK>]. Additionally, the unenforced sodomy laws have led to difficulty in fighting HIV because of the stigma associated with the disease and has pushed local LGBT-rights NGOs underground as politicians have branded the groups as criminal, calling for the “arrest of . . . members” and “dismantling of the organization[s].” Gaskins, Jr., *supra* note 79, at 445.

82. See Leslie, *supra* note 30, at 105.

results from the enforcement of punishments.⁸³ When societies enforce criminal laws, the laws serve to “deter future violations of the criminal code, both by the convicted individual (specific deterrence) and by society at large (general deterrence), which learns from the convict’s mistakes.”⁸⁴ Consequently, laws that societies enforce will have the most deterrence function and coercive effects on the attitudes and behaviors of community members.⁸⁵ The model accounts for the deterrence function of enforced sodomy laws, by proposing that these laws will have the longest-lasting effects on shaping modern-day attitudes.

With regards to queerphobic laws, enforced sodomy laws ultimately have the most detrimental effects on sexual minorities because they serve to inflict sanctions, and in some cases physical harm against queerfolk.⁸⁶ Because the enforcement of criminal laws also shapes societal attitudes, in societies that enforce anti-queer laws routinely, it is likely that societal queerphobia will be greatest.⁸⁷

83. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 189-90 (1974) (theorizing the optimal relationship between the imposition of punishment and deterrence on behavior); John C. Ball, *The Deterrence Concept in Criminology and Law*, 46 J. CRIM. L. CRIMINOLOGY & POL. SCI. 347, 347 (1955) (“Deterrence is usually defined as the preventative effect which actual or threatened punishment of offenders has on potential offenders.”); George J. Stigler, *The Optimum Enforcement of Laws*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 55-56 (1974) (describing the relationship between punishment and deterrence); Isaac Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259, 259-61 (1972) (describing the relationship between punishment and deterrence); see also Neal K. Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2387-89 (1997) (summarizing the deterrence theories of criminal law); David S. Abrams, *Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements*, 4 AM. ECON. J.: APPLIED ECON. 32, 43-49, 54 (2012) (providing empirical support for the deterrence effects of criminal sanctions); see also Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323, 355 (1997) (“[L]aw is not merely instrumental, it is also coercive. In fact, the law’s instrumental character is often dependent on the law’s ability to command obedience.”).

84. Leslie, *supra* note 30, at 105.

85. See *id.* (summarizing the argument that it is the enforcement of punishment which deters).

86. See generally STAFF OF THE GLOBAL LEGAL RESEARCH DIRECTORATE, LAW LIBRARY OF CONGRESS, *CRIMINAL LAWS ON HOMOSEXUALITY IN AFRICAN NATIONS* (2014), <https://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf> [<https://perma.cc/SPW8-ZJ97>] (collecting data on the criminal sanctions for homosexuality in African nations); Wahid Ferchichi, *Law and Homosexuality: Survey and Analysis of Legislation Across the Arab World* (Working Paper prepared for the Middle East and North African Consultation of the Global Commission on HIV and Law, 2011), available at <http://bibliobase.sermais.pt:8008/BiblioNET/upload/PDF/0576.pdf> [<https://perma.cc/Z7Q8-5GYF>]; ORGANIZATION OF WOMEN’S FREEDOM IN IRAQ, *THE INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION & MADRE, WHEN COMING OUT IS A DEATH SENTENCE: PERSECUTIONS OF LGBT IRAQIS* (Nov. 2014), available at <http://www.law.cuny.edu/academics/clinics/hrgj/publications/Coming-Out-Death-Sentence-Iraq.pdf> [<https://perma.cc/5AE2-FAXG>]; see also Louis Crompton, *Homosexuals and the Death Penalty in Colonial America*, 1 J. HOMOSEXUALITY 277, 277-78 (1976) (providing historical evidence of criminal sanctions against homosexuality in the colonial United States).

87. See sources cited in *supra* note 83 (theorizing the relationship between enforcement, punishment, and behavior).

II. Applying the Model to Pre-colonial African Law

This section begins to chart the main premise of this Note. It will apply the model to pre-colonial customary law in Zimbabwe, Uganda, South Africa, and Nigeria. The section begins by establishing that customary law was strictly oral law. It will then demonstrate that customary law accounts for the two inner-most layers of the model: laws that are silent, and those spoken.

A. The Nature of Pre-colonial Customary Law

Prior to European colonization, customary laws governed most indigenous African communities.⁸⁸ These laws may be described as:

[A]n established system of immemorial rules which ha[ve] evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counselors, their sons and their son's sons [sic], until forgotten, or until they became part of the immemorial rules.⁸⁹

Inherent to this definition is the necessity of speech. The significance of orality in African communities is renowned. Its manifestations reverberate throughout African oral tradition, storytelling, and music.⁹⁰ Because of the significance of speech and sound in many pre-colonial African societies, the majority of customary laws can be classified as oral law.⁹¹ Moreover, "In general, writing was not widespread in pre-European contact sub-Saharan Africa."⁹² Consequently, as a necessity, African customary laws relied on orality.⁹³

These pre-colonial oral customary laws ruled most affairs and social

88. See du Toit, *supra* note 36, at 688.

89. J.C. BEKKER, *SEYMOUR'S CUSTOMARY LAW IN SOUTHERN AFRICA* 11 (1989).

90. See generally JAN M. VANSINA, *ORAL TRADITION AS HISTORY* (1985) (documenting the importance of orality and oral tradition in African cultures); RUTH FINNEGAN, *ORAL LITERATURE IN AFRICA* (2012) (collecting evidence of oral tradition in African communities). See also Gloria Chuku, *Igbo Women And Economic Transformation in Southeastern Nigeria, 1900-1960*, in *AFRICAN STUDIES* 1, 9 (Molefi Asante ed., 2005) (describing "[O]ral tradition refers to all orally transmitted testimonies about the past, especially those passed from generation to generation, as well as a people's folklore.").

91. See Vansina, *supra* note 34, at 442 ("Most precolonial African civilizations were 'oral civilizations.'"); du Toit, *supra* note 36, at 688 ("Codified law is foreign to traditional Africa and was first introduced with colonialism. Traditional African societies function as oral communities regulated by unwritten law."); Leman, *supra* note 36, at 28 ("Many African societies are oral societies; because of this . . . 'the practical expression of traditional African law, lacking a written medium, is necessarily oral.'"); Ali A. Abdi, *Oral Societies and Colonial Experiences: Sub-Saharan Africa and the de facto Power of the Written Word*, 37 *INT'L EDUC.* 42, 42 (2007) ("Pre-colonial traditional societies in Sub-Saharan Africa were mostly oral societies whose languages were not written."); Bennett & Vermeulen, *supra* note 34, at 212 ("Customary law is, of course, unwritten.").

92. Chuku, *supra* note 90, at 9. See also Kizito, *supra* note 11, at 568 (describing the "unwritten history" of African cultural practices).

93. *C.f.* Sacco, *supra* note 39, at 461 ("The structural basis of a given legal system determines to a great extent its legal instruments.").

behavior within indigenous African communities.⁹⁴ In societies which do not enforce oral law, sexual minorities are likely to receive societal tolerance.⁹⁵ In other communities which used spoken laws to condemn homosexualities, the flexibility and viscosity inherent to oral law allowed leeway for sexual minorities to escape condemnation.⁹⁶

B. Customary Law as ‘Silent’ Law

As previously described, societies without written law rely on speech to receive power.⁹⁷ Under the first category of law, customary laws that were silent, laws could only have limited coercive and deterring effects on the lives of community members.⁹⁸ As a result, they neither expressly discouraged nor favored indigenous queerforms. By applying the model to the African case-studies, where customary laws were silent on indigenous sexual minorities, this paper argues that pre-colonial queerforms existed uninhibited.

1. Zimbabwe

The demarcation of law as silent, and therefore less able to deter indigenous sexual minorities, is exemplified in pre-colonial Zimbabwe. Prior to colonialism, as with most other African nations, the majority of Zimbabwean communities relied on oral customary laws.⁹⁹ Because pre-colonial Zimbabwean customary laws were silent on homosexuality, indigenous homosexualities flourished.

In Zimbabwe, pre-colonial same-sex relationships between men have

94. See Ndulo, *supra* note 34, at 88 (“The pre-colonial law in most African states was essentially customary in character, having its sources in the practices and customs of the people. . . . [T]he majority of people conduct their personal activities in accordance with and subject to customary law.”).

95. See text accompanying *supra* notes 40-41.

96. See Desiree Lewis, *Representing African Sexualities*, in *AFRICAN SEXUALITIES: A READER* 199, 209 (2011) (Sylvia Tamale ed., 2011) (“Some research on homosexualities in Africa has therefore shown that pre-colonial societies were often more amenable to homoerotic patterns than is suggested by the virulent attacks, ostensibly defending African tradition. . . .”); Neville Hoad, *Queer Customs Against the Law*, 47 *RES. AFRICAN LIT.* 1, 2 (2016) (“One of the few generalizations that can be made about the customary is that it is constitutively not fundamentalist: its flexibility and nimbleness . . . come from the ‘customary’ being in key ways the very antithesis of ‘fundamentalist.’”). *C.f.* Ruth Morgan and Graeme Reid, *I’ve Got Two Men and One Woman: Ancestors, Sexuality and Identity Among Same-Sex Identified Woman Traditional Healers in South Africa*, 5 *HEALTH & SEXUALITY* 375, 376 (2003) (“The tension is, ultimately, between two very different ways of dealing with homosexuality, the traditional approach, which finds ways of accommodating it and not talking about it, and the modern, ‘Western’ way, which claims for homosexuals a public ‘gay’ identity.”) (quoting M. Gevisser, *Homosexuality in Africa: An Interpretation and Overview of Homosexuality in Both Traditional and Modern African Societies*, in *AFRICANA: THE ENCYCLOPEDIA OF THE AFRICAN AND AFRICAN AMERICAN EXPERIENCE* 963 (K.A. Appiah & H.L. Gates eds., 1st ed. 1999)).

97. See text accompanying *supra* note 28.

98. *C.f.* HOWARD S. BECKER, *OUTSIDERS* 162 (2008) (“Before an act can be viewed as deviant, and before any class of people can be labeled and treated as outsiders for committing the act, someone must have made the rule which defines the act as deviant.”).

99. See *supra* note 36.

existed “from time immemorial,” throughout various communities.¹⁰⁰ In most instances customary law remained silent on sexual minorities, thereby allowing them to live relatively freely.¹⁰¹ Indeed, there was, as African Historian Professor Marc Epprecht aptly phrased, a “*de facto* tolerance for sexual eccentricities,” amongst pre-colonial indigenous Zimbabwean communities.¹⁰²

Within the Zimbabwean Bushman community for example, a culture of silence prevented open discussion of any sexual practices, much less the sexual practices of sexual minorities.¹⁰³ Whilst queer indigenous practices were widely referenced in pre-colonial Zimbabwean Bushman artwork,¹⁰⁴ some indigenous Bushman languages had no terms to describe homosexuality.¹⁰⁵ Presumably, if a community has no terms for sexual minorities or same-sex practices, they can be neither condemned nor praised.¹⁰⁶ Consequently, the absence of terms to describe homosexuality within the Bushman community indicates silence, tolerance, and even suggests “social acceptance.”¹⁰⁷

Bushman culture is just one example of Zimbabwean customary law being silent on sexual minorities. Consider, for example a 1996 interview with a member of the Magamba village, in Zimbabwe.¹⁰⁸ He stated:

Yes, traditionally it [homosexuality] was there but it was never talked about. Never! As a child you would be told to stay away from the hut of a man who was known by the elders to be that way. But you were never told why. Only after you were grown and you have those same elders much beer, perhaps, they might be coaxed to say something. But it took a lot of beer.¹⁰⁹

Here again, Zimbabwean customary law is silent. From this account, the elders—who were responsible for interpreting and applying customary

100. *Unsayings*, *supra* note 42, at 631.

101. See *id.* at 636. See generally Oliver Phillips, *Zimbabwean Law and the Production of a White Man's Disease*, in *SEXUALITIES AND SOCIETY: A READER* 476 (2002) (collecting evidence of Zimbabwean historian considering some same-sex activity “normal behavior”).

102. *Unsayings*, *supra* note 42, at 636.

103. See *id.* at 635. See also Matthew Engelke, ‘We Wondered what Human Rights He Was Talking About.’ 19 *CRITIQUE OF ANTHROPOLOGY* 289, 297 (1999) (describing the culture of silence regarding African homosexualities).

104. See MARC EPPRECHT, HUNGOCHANI: THE HISTORY OF A DISSIDENT SEXUALITY IN SOUTHERN AFRICA 26 (2013) (describing a Bushman cave painting estimated to be two thousand years old that depicts a homosexual sex act).

105. See *Unsayings*, *supra* note 42, at 636 (“There are no explicit terms for homosexuality or discrete homosexual acts in Shona.”); but see EPPRECHT, *supra* note 104, at 26 (describing evidence of terms for homosexuality amongst Zimbabwean Bushmen).

106. See *Unsayings*, *supra* note 42, at 636 (“Indigenous spoken languages also removed the problem from sight, as it were.”).

107. EPPRECHT, *supra* note 104, at 26 (“Anthropologists of the Bushman . . . do confirm that same-sex sexual practices not only existed in pre-modern milieux but were common enough to be socially acceptable.”). *C.f.* Engelke, *supra* note 103, at 300 (noting the importance of orality in Zimbabwean culture, and commenting on the importance of “naming oneself and others”).

108. See *Unsayings*, *supra* note 42, at 636 n.17.

109. *Id.* at 636.

laws—did not explicitly condemn homosexual community members.¹¹⁰ Instead, as a result of the elders' reticence, customary law was likely unable to affect sexual minorities within the community.

Other examples of this silence arise in the testimonies of native Zimbabweans during early colonial-era cases punishing same-sex conduct under colonially-imposed laws. In a 1917 case of a Ndebele man for "indecent assault," he admitted to the "crime" of same-sex intimacy stating: "I admit the offence. I did not know it was a crime."¹¹¹ In another 1915 colonial-era sodomy case, the native defendant testified: "I do not . . . deny the charge. In my country it is the custom to commit Sodomy when we are unable to get a woman."¹¹² The fact that both men openly admitted to the "crimes" with which they were charged, and in almost identical testimonies, evinces that they did not know that their same-sex activity was a crime, and arguably indicates that in pre-colonial Zimbabwean societies customary laws were silent on—and therefore did not criminalize—native queer sexualities.

Early colonial-era cases also provide support that Zimbabwean customary laws were tolerant of indigenous transgender identities and cross-dressing practices. Consider, for instance, the 1927 Zimbabwean high court case *Rex v. Nomxadana alias Maggie*, suggesting that cross dressing was accepted by indigenous Zimbabwean community members.¹¹³ At trial, the prosecution accused the defendant of "posing as a female nurse and wearing female clothes (including underwear and high heels)."¹¹⁴ The defendant's father testified that "Maggie," "always dress[ed] in female clothes."¹¹⁵ He went on to say, "My son has always been wearing dresses ever since he was a baby. He has never discarded them although I have often given him males' clothes but he has refused to wear them. I have never thought him mentally affected."¹¹⁶ The father's testimony that his son's cross-dressing behavior was accepted at the *kraal* (a traditional African village) and was not viewed as "peculiar"¹¹⁷ indicates that community members were accepting of the defendant's behavior. This account adds support to the conclusion that customary law was silent on sexual minorities and thereby allowed these practices to exist un-condemned.

2. South Africa

The customary laws of pre-colonial South African peoples also exemplify oral laws that are silent on sexual minorities. Scholars have docu-

110. For a discussion of the role of elders in the interpretation and application of customary law see *supra* note 71.

111. *BOY-WIVES AND FEMALE-HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES* 200 (Stephen O. Murray & Will Roscoe eds., 2001) (citing ZNA D3/26/2 (Fon Usher, Matobo), case 247 of 26.11.1917)) [*hereinafter* *BOY-WIVES*].

112. *Id.* at 314 n.16 (quoting D3/7/32, case 409 of 7.6.1915).

113. *Id.* at 314 n.17 (quoting High Court case 3838A of 10.1.1927).

114. *Id.* at 201.

115. *Id.*

116. *Id.* at 201 (quoting High Court case 3838A of 10.1.1927).

117. *Id.*

mented a historical tolerance for same-sex sexual activities amongst indigenous communities in South Africa.¹¹⁸ For example, in 1883, Chief Moshesh of the South African Basoto tribe revealed to an anthropologist that “there were no punishments under customary law for ‘unnatural crimes.’”¹¹⁹ Largely free from punishment, indigenous homosexualities became relatively common throughout South African societies.¹²⁰

Other evidence indicates that Zulu customary law tolerated same-sex practices. For example, pre-colonial Zulu rebel Nongoloza Mathebula ordered his troops to resist sexual relations with women, and “instead, the older men of marriageable status within the regiment—the *ikhela*— were to take younger male initiates—the *abafana*— and keep them as *izinkotchane*, ‘boy wives.’”¹²¹

In totality, these examples from pre-colonial Zimbabwe and South Africa indicate that where customary laws were silent on the topic of sexual minorities, indigenous queerfolk were widely tolerated. The following subsection turns to case studies where pre-colonial customary law was used against sexual minorities.

C. Customary Law as Spoken & Enforced Law

In contrast to societies where customary laws did not condemn indigenous queerforms, are those societies where pre-colonial oral laws were enforced against sexual minorities—this includes Uganda and Nigeria.

1. Uganda

As with many other African nations, scholars of Ugandan culture have documented the existence of indigenous same-sex practices prior to the arrival of European colonists. Indeed, in Uganda, pre-colonial homosexual relationships have been reported from as far back as the late nineteenth century.¹²² One early colonial account, described “effeminate” men within the Wganda tribe in southern Uganda, as well as observed pederasty.¹²³ Likewise, homosexuality was documented in the Buganda royal court.¹²⁴

However, unlike South Africa and Zimbabwe, pre-colonial Uganda’s

118. *Id.* at 177. See also Sanders, *supra* note 7, at 108 (noting, “tolerance in sexual matters is a characteristic of African culture . . .”). See also *id.* at 103 (describing situational same-sex activity amongst indigenous South African communities); ANDREW TUCKER, *QUEER VISIBILITIES: SPACE, IDENTITY AND INTERACTION IN CAPE TOWN* 216 at n.12 (2009) (collecting examples of precolonial South African tolerance of same-sex activity).

119. *BOY-WIVES*, *supra* note 111, at 178.

120. See *id.* (discussing a minor penalty for homosexuality in some precolonial South African cultures).

121. *Id.* at 177.

122. See *id.* at 37.

123. *Id.*

124. See John Osogo Ambani, *A Triple Heritage of Sexuality? Regulation of Sexual Orientation in Africa in Historical Perspective*, in *PROTECTING THE HUMAN RIGHTS OF SEXUAL MINORITIES IN CONTEMPORARY AFRICA* 14, 21 (Sylvie Namwase & Adrian Jjuuko eds., 2017) (collecting accounts); Lydia Boyd, *The Problem with Freedom: Homosexuality and Human Rights in Uganda*, 86 *ANTHROPOLOGICAL Q.* 697, 706 (2013) (same).

unwritten customary law was not silent on same-sex activity.¹²⁵ While a minority of scholars suggest that “homosexual practices were neither fully condoned nor totally suppressed,”¹²⁶ several sources suggest that pre-colonial customary laws in Uganda explicitly condemned indigenous homosexualities.¹²⁷ In a 2008 interview, the President of the Ugandan Law Society confirmed that sodomy was criminalized in pre-colonial Uganda “for ages.”¹²⁸ He listed examples of pre-colonial Ugandan tribes where “homosexuality was punished by brutal penalties . . . including death by stoning or walking off a cliff.”¹²⁹

Anthropological accounts also confirm that pre-colonial Ugandan communities were intolerant of same-sex practices. Early anthropologists witnessed societal condemnation of same-sex intimacy in the Wganda tribe in southern Uganda.¹³⁰ In another account, Ugandan indigenous community members regarded homosexuality as “foolish,” and “scorned” transgendered individuals.¹³¹ Finally, some early accounts from European colonists noted that indigenous Ugandans did “not tolerate homosexuality in others, and . . . constantly referred to the practice in admonitory terms.”¹³²

2. Nigeria

In considering Nigeria, a distinction is necessary. Prior to the arrival of European colonists, Nigeria had two legal systems: customary law and Islamic law.¹³³ Though European colonists classified both systems of law as customary law,¹³⁴ Islamic Law does not qualify as customary law because it was imported into Nigeria in the 15th Century¹³⁵ and it is codi-

125. See Adrian Jjuuko, *The Incremental Approach: Uganda's Struggle for the Decriminalization of Homosexuality*, in *SEXUAL ORIENTATION, GENDER IDENTITY AND HUMAN RIGHTS* 384 (2013).

126. Sylvia Tamale, *Out of the Closet: Unveiling Sexuality Discourses in Uganda*, in *AFRICA AFTER GENDER?* 18 (2007).

127. See Michael Hollander, Note, *Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws*, 50 VA. J. INT'L L. 219, 225-26 (2009).

128. *Id.* at 226.

129. *Id.*

130. See *BOY-WIVES*, *supra* note 111, at 37 (recalling:

[I]n Uganda I saw two boys, a Mgisho and a Baganda, lying in bed together, whereupon another boy sneered at the with the words, 'They love each other like husband and wife.' When one of the embarrassed boys objected, the boys deriding them answering quite rightly, 'A man does not sleep with another boy in broad daylight.').

131. *Id.*

132. *Id.* at 38.

133. See A. A. Oba, *Islamic Law as Customary Law: The Changing Perspective in Nigeria*, 51 INT'L & COMP. L.Q. 817, 818 (2002).

134. See *id.*

135. See Abdulmumini A. Oba, *Lawyers, Legal Education and the Shari'ah Courts in Nigeria*, 49 J. LEGAL PLURALISM 113, 113 (2004) (describing both English common law and Islamic law as imported legal systems).

fied.¹³⁶ This section will only examine indigenous customary law in pre-colonial Nigeria.¹³⁷

To determine pre-colonial Nigerian attitudes towards same-sex intimacy, Professor Olusola Ajibade looked to Nigerian oral literature.¹³⁸ There, he found evidence of same-sex practices in pre-colonial Nigerian Yoruba communities.¹³⁹ However, Professor Olusola Ajaibade also indicated that pre-colonial Yoruba communities abhorred such practices.¹⁴⁰ Specifically, he cites oral literature that depicts same-sex practices as “harmful not only to those that engage in these acts, but also to the society as a whole.”¹⁴¹

Perhaps one exception to the conclusion that pre-colonial Nigerian customary law was enforced against sexual minorities may be woman-to-woman marriages¹⁴²—a customary staple in several Nigerian cultural groups, particularly the Igbo.¹⁴³ Debates abound as to whether such “marriages” qualify as queer,¹⁴⁴ but for the purposes of this Note they will be classified as such.¹⁴⁵ The practice included occasions where a woman

136. Recall that customary law is distinctly unwritten. See *supra* note 36; Oba, *supra* note 133, at 832 (noting that unlike customary law, Islamic law was “ascertainable from written sources which include the Qu’ran, and Hadith.”).

137. To be sure, if the model is applied to Nigerian Islamic Law, it would be classified as written and enforced law. In Northern Nigeria, Islamic anti-queer laws have predated colonization, and were widely enforced. Given the conclusions inherent in the model, one would expect these laws to lead to modern societal homophobia, which is, in fact the case. It is possible that queerphobic laws were doubled—since both Islamic and colonially imposed laws had sanctions against LGBTQ behaviors.

138. See generally George Olusola Ajiabade, *Same-Sex Relationships in Yoruba Culture and Orature*, 60 J. HOMOSEXUALITY 965 (2013).

139. See *id.* at 972 (summarizing “proof that lesbianism and homosexuality have been part of the African culture, Yoruba to be specific, prior to the advent of colonial administration.”).

140. See *id.* at 974. See also BOY-WIVES, *supra* note 111, at 100 (providing evidence that Yoruba viewed same-sex practices as “corrupt”).

141. Olusola Ajiabade, *supra* note 138, at 976.

142. For a well-rounded account of woman-to-woman marriage practices in Nigerian Igbo societies, see generally Kirsten Alsaker Kjerland, *When African Women Take Wives* (THE NORDIC AFRICA INSTITUTE, Working Paper No. 6, 1997) (discussing the practice); Egodi Uchendu, *Woman-woman Marriage in Igboland*, in GENDER AND SEXUALITY IN AFRICAN LITERATURE AND FILM (A.U. Azodo & M. Eke eds., 2006) (discussing the practice); C.O. Akpangbo, “Woman to Woman” Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles, 9 J. LEGAL PLURALISM & UNOFFICIAL L. 87 (1977) (discussing the practice); Kenneth Chukwuemeka Nwoko, *Female Husbands in Igbo Land: Southeast Nigeria*, 5 J. PAN AFRICAN STUD. 69 (2012) (discussing the practice); Chukwuemeka G. Nnona, *Woman to Woman Marriage and Cognates in Nigerian Law: An Easy Coalition Between Customary Law and Human Rights*, 42 COMMONWEALTH L. BULL. 375 (2016) (discussing the practice).

143. See CHUKU, *supra* note 90, at 9.

144. Ashley Currier & Thérèse Migraine-George, “Lesbian”/female same-sex sexualities in Africa, 21 J. LESBIAN STUD. 133, 139 (2017) (summarizing arguments as to whether woman-to-woman marriages can be classified as “lesbian relationships” or if such a label is “inaccurate”).

145. The reasons are twofold: first, recall that this Note uses the term “queer” to refer to all non-heterosexual relationships, and thus the term should apply to woman-to-woman marriages. See *supra* note 7 (defining the use of queer and its derivatives as used in this Note). Additionally, despite many scholars who are reluctant to settle that

would “assume[] a social function of a husband to another woman.”¹⁴⁶ But it primarily occurred where a woman with reproductive difficulties married another younger woman, who would then bear children with the first woman’s husband.¹⁴⁷ The marriage between the women was viewed as valid under customary law, with the ‘husband’ paying the traditional bride price. The children produced from such unions were considered the children of the first woman—in-line for inheritance purposes.¹⁴⁸ Despite the popularity of woman-to-woman marriages, Nigerian customary homosexuality laws may still be classified as spoken and enforced law because of the overwhelming evidence of customary law condemning sexual minorities,¹⁴⁹ and the veil of heterosexuality—and thus legitimacy—that cloaked woman-to-woman marriages.

This subsection has demonstrated that prior to the arrival of European colonists, customary laws relied on orality. In both South Africa and Zimbabwe, customary law was silent on sexual minorities, thereby allowing indigenous queerfolk to exist uninhibited. In contrast, in Uganda and Nigeria customary law was enforced against sexual minorities and queerfolk, leading to societal condemnation.

The next section documents the introduction of colonially imposed law. It will establish that colonial laws took the form of codified laws and were used to suppress indigenous queerforms to varying degrees within the four nations.

III. Applying the Model to Imposed Colonial Laws

A. Colonial Law & Colonial Control

Law was central to establishing colonial control in Africa.¹⁵⁰ The Europeans used laws to legitimize and rationalize the conquest and subjugation of indigenous African peoples, to justify the extraction of land and resources from indigenous communities, and to exploit indigenous labor.¹⁵¹ European colonialism resulted in a “fundamental rearrangement of indigenous African legal institutions.”¹⁵²

woman-to-woman marriages involve lesbianism, other scholars have concluded that these relationships involved female same-sex attraction, as well as the assumption of queer gender roles. See R. Jean Cadigan, *Woman-to-Woman Marriage: Practices and Benefits in Sub-Saharan Africa*, 29 J. COMPARATIVE FAMILY STUD. 89, 90-91 (1998) (collecting sources that argue “woman-to-woman marriage may involve lesbianism,” and that “female husbands” are “socially considered to assume the conceptual male role . . .”).

146. CHUKU, *supra* note 90, at 9.

147. See *id.*

148. See *id.* (noting, “[T]he female husband contracted a man to play the genital role while she played the social role as well as performed economic responsibility to her wife and children.”).

149. See *supra* note 148.

150. See Sally Engle Merry, *Law and Colonialism*, 25 L. SOC’Y REV. 890, 891 (1991); Nunn, *supra* note 83, at 352 (noting that Europeans used law to justify their conquest and colonization of Africa).

151. See generally sources cited *id.*

152. T. W. Bennett, *Conflict of Laws: The Application of Customary Law and the Common Law in Zimbabwe*, 30 INT’L & COMP. L.Q. 53, 53 (1981).

In the minds of European colonists, African communities lacked not only modern civilization, but also the rule of law.¹⁵³ To the Europeans, indigenous Africans did not have laws, but instead a set of “tribal customs.”¹⁵⁴ European settlers viewed European law as substantially advanced over the “primitive,” and “savage” customs of the indigenous African communities,¹⁵⁵ therefore, Europeans justified the domination of African peoples with the belief that imposing their laws on Africans contributed to Africa’s civilization and development.¹⁵⁶ As one scholar synthesized as the view of European colonists:

For many indigenous peoples in African and elsewhere the British Empire often brought more regular, acceptable and impartial systems of law and order than many had experienced under their own rulers . . . The spread of the English language helped unite disparate tribal areas that gradually came to see themselves as nations.¹⁵⁷

But European colonists did not completely erase African customary law. Doing so would distract from their immediate goals of extraction.¹⁵⁸ Instead, colonist allowed African customary laws to stand—except when it conflicted with “the demands of the colonial administrations or was thought to be repugnant to European ideas of justice, humanity or morality.”¹⁵⁹ As a result, European law tended to apply in areas where colonial interests lay, while customary law was allowed to govern the affairs of indigenous African populations.¹⁶⁰

To support the application of European law, colonizers implemented repugnancy clauses, which were written to ensure that in a conflict of customary and colonial law, colonial law would always supersede.¹⁶¹ Standard European repugnancy provisions acknowledged the divisions

153. See Merry, *supra* note 150, at 897.

154. *Id.* at 897.

155. *Id.* Generally, European colonialists were dismissive of indigenous African peoples considering them primitive. Multiple sources document the views of Europeans on the African persons they encountered. For example, Hegel notes “The peculiarly African character is difficult to comprehend, for the very reason that in reference to it, we must quite give up the principle which naturally accompanies all our ideas—the category of Universality. . . . The Negro, as already observed, exhibits the natural man in his completely wild and untamed state.” G.W.F. HEGEL, *THE PHILOSOPHY OF HISTORY* 93 (1956).

156. See Merry *supra* note 150, at 896 (“Many British colonizers acted with a sense of the moral superiority of Christianity, belief in progress and civilization, commitment to an idea of white racial supremacy, and faith in the rule of law and individual rights.”).

157. David Dalglish, *Pre-Colonial Criminal Justice in West Africa: Eurocentric Thought Versus Africentric Evidence*, 1 *AFR. J. CRIMINOLOGY JUST. STUD.* 55, 58 (quoting HOME OFFICE, *LIFE IN THE UNITED KINGDOM: A JOURNEY TO CITIZENSHIP* (2004)).

158. See T.W. Bennet, *supra* note 152, at 59 (“Possibly the most important reason why the settlers countenanced customary law was the necessity to economise on administrative resources in the early days of occupation. . . . There was also, no doubt, a desire on the part of the settlers to preserve tranquility among a potentially hostile population and a conviction that European law was too complex to be administered by an unsophisticated people.”).

159. *Id.*

160. See *id.* at 59–60.

161. See *id.* at 82–83 (“The repugnancy clause is a feature of all colonial legislation which accorded recognition to indigenous legal systems.”).

between written (colonial) law and spoken (customary) law. For example, provisions would supply: “customary law shall not be applied if it is ‘incompatible with any enactment’ or ‘inconsistent with any written law.’”¹⁶²

B. Colonial Law as Written & Unenforced Law

1. South Africa

Colonially imposed laws in South Africa fall within the category of written, but unenforced laws.¹⁶³ A 1907 volume of South African law provides evidence of leniency in enforcement of sodomy laws. Although the volume notes that sodomy was considered a capital offence,¹⁶⁴ it emphasizes that: “it has been the constant practice of our courts to punish the offense otherwise than capitally.”¹⁶⁵ Because of this leniency, while sodomy laws may have discouraged same-sex practices, they did not per se suppress them.¹⁶⁶ Instead, as discussed below, same-sex practices existed almost ubiquitously throughout South African history.

In the early 1650s Dutch colonialists formed the first permanent settler colonies in South Africa.¹⁶⁷ With them came Roman-Dutch common law, which criminalized acts “contrary to the law of nature,”¹⁶⁸ including same-sex intimacy.¹⁶⁹ In 1914, the National Party gained control of South Africa and continued to prohibit homosexual acts.¹⁷⁰ Throughout this period, however, the enforcement of South African anti-sodomy laws was rare, and private homosexual conduct was infrequently targeted.¹⁷¹ As a result, South African homosexuals were free from the subjugation of anti-gay laws.¹⁷²

According to South African LGBTQ-history scholars, homosexual communities have “existed in major cities (Johannesburg, Cape Town, and Durban) relatively unharassed,” since at least the 1940s.¹⁷³ While the

162. *Id.* at 83.

163. See text accompanying *supra* notes 57-82.

164. See HUMAN RIGHTS WATCH, *More Than Name: State-Sponsored Homophobia in Southern Africa* (May 13, 2003), <https://www.hrw.org/report/2003/05/13/more-name/state-sponsored-homophobia-and-its-consequences-southern-africa> [<https://perma.cc/FN5N-ZYHT>] (“[S]odomy and bestiality are punishable with death . . . although a lesser punishment may be inflicted at the discretion of the court.”) (quoting Manfred Nathan, *Common Law of South Africa* (CAPE TOWN, 1907), V.4, P. 2595) [*hereinafter* MORE THAN A NAME].

165. *Id.*

166. See text accompanying *supra* notes 82-85 for a discussion on the deterrence and coercive qualities of unenforced and enforced laws.

167. See Thomas Brown, *South Africa’s Gay Revolution: The Development of Gay and Lesbian Rights in South Africa’s Constitution and the Lingering Societal Stigma Towards the Country’s Homosexuals*, 14 ELON L. REV. 455, 456-57 (2014).

168. *Id.*

169. See *id.*

170. See *id.*

171. See MARK GEVISSER & EDWIN CAMERON, *DEFIANT DESIRE* 18 (1995) [*hereinafter* DEFIANT DESIRE].

172. See BROWN, *supra* note 167, at 157.

173. DEFIANT DESIRE, *supra* note 171, at 18.

apartheid regime segregated black and white communities, gay communities thrived because the National Party rarely prosecuted homosexual acts and was particularly lax in addressing homosexual conduct amongst South African colored communities.¹⁷⁴

Indeed, “[South African] authorities themselves had defined homosexuality as a white problem, ignoring even the possibility of black homosexuality [altogether]. . . .”¹⁷⁵ The lack of enforcement resulted in widespread LGBT events in the colored South African gay communities, including one reported widely attended “male-male marriage[] in a Black shanty town outside of Durban [in the 1950s].”¹⁷⁶

The South African government’s lax approach to enforcing sodomy laws not only allowed existing homosexuals to live relatively undisturbed, but also led to the introduction and development of new homosexual relationships.¹⁷⁷ One well-known, and extensively documented example is the case of “the wives of the mine.”¹⁷⁸ Within these relationships, or “mine marriages,” a senior gold miner would take a younger, newly arrived mine-worker as a “mine wife,” for both domestic chores and same-sex sexual activities.¹⁷⁹ European mine management largely tolerated mine marriages, with the exception of interracial relationships.¹⁸⁰

One exception to the infrequent enforcement of anti-gay laws was a 1966 police raid. Authorities raided a Forest Town house party of over 300

174. See *id.*

175. *Id.* at 34.

176. Deborah P. Amory, *Homosexuality in Africa: Issues & Debates*, 25 *ISSUE: J. OP.* 5, 7 (1997).

177. See *BOY-WIVES*, *supra* note 111, at 178 (“While the European colonialists ostensibly sought to repress and criminalize such relations, some of the conditions they introduced actually fostered them. This occurred among migratory workers in South Africa, especially miners.”).

178. See, e.g., T. Dunbar Moodie, Vivienne Ndatshe & British Sibuyi, *Migrancy and Male Sexuality on the South African Gold Mines*, 14 *J. S. AFR. STUD.* 228, 230 (1998) (describing the practice of South African miners to have sexual relationships with younger men, known as “tinkonkana” or “wives on the mine,” because women were not allowed to live on mining compounds); Marc Epprecht, *Male-Male Sexuality in Lesotho: Two Conversations*, 10 *J. MENS STUD.* 373, 374 (2002) (collecting evidence of the aforementioned “mine marriages”); EPPRECHT, *supra* note 104, at 19–20 (discussing the mine marriage practice); Josiah Taru & Hardlife Stephen Basure, *Rethinking the Illegality of Homosexuality in Zimbabwe: A Riposte to Chemhuru*, 5 *INT’L J. POL. & GOOD GOVERNANCE* (manuscript page 3) (2014), available at <https://pdfs.semanticscholar.org/be79/237541eea10db93b5875672273cae35202e1.pdf> [<https://perma.cc/VR3N-F9GR>] (suggesting these same-sex practices were the result of population composition within the mines).

179. See Sanders, *supra* note 7, at 104.

180. See *id.* (“European mine management . . . adopted a tolerant approach . . . for reasons that ‘mine marriages’ contributed to productivity.”). See also Marc Epprecht, *Slim Disease and the Science of Silence: The Erasure of Same-Sex Sexuality in ‘African Aids’ Discourse, 1983–88*, in *NEW INTIMACIES, OLD DESIRES: LAW, CULTURE AND QUEER POLITICS IN NEOLIBERAL TIMES* 190, 197 (Oishik Sircer & Dipika Jain eds., 2017) (“Male-male sexuality associated with long-distance portage, prisons, mine hostels and other modern institutions was thus somewhat embarrassing to colonial health officials but could be tolerated or even tacitly condoned as the lesser of several evils.”).

homosexual men.¹⁸¹ Prior to that event, the South African police had conducted smaller raids on homosexual establishments in Durban, but the Forest Town Raids, as they were later dubbed, sent shock waves throughout South Africa because of the large number of all white attendees from respectable positions in society.¹⁸² The raids would ultimately result in the proposed 1968 amendment to the Immorality Act that “sought to make male and female homosexuality an offense punishable by compulsory imprisonment of up to three years.”¹⁸³

In response, white gay lawyers in Johannesburg and Pretoria organized the Homosexual Law Reform movement.¹⁸⁴ In 1969, the Law Reform Movement successfully persuaded the South African Select Committee to drop the proposed legislation.¹⁸⁵

Even where queerfolk were arrested and brought to court, South African courts took a relatively lenient approach to punishing those involved. Consider for instance, the case of *S v Matsemela en 'n Ander*, decided in 1988.¹⁸⁶ There, the prosecution charged two male prisoners with engaging in the “offence of sodomy.”¹⁸⁷ However, because of a lack of evidence, the court instead convicted the men of committing “indecent assault upon one another.”¹⁸⁸

The South African Supreme Court set aside the conviction, reasoning that the charged indecent assault could not qualify as assault where the parties had consented to the assault.¹⁸⁹ Specifically, Judge Ackermann noted that “changing attitude of society generally to intimate relations between homosexuals demands greater tolerance and lenience in the sphere of sentencing adult persons for private consensual acts of intimacy which are still proscribed by the criminal law.”¹⁹⁰

Likewise, in *Van Rooyen v. Van Rooyen* the South African High Court again showed tolerance for the rights of LGBTQ individuals.¹⁹¹ The case involved a custody battle between a husband and wife.¹⁹² The court found that the mother, who after the divorce began a lesbian relationship, was in too precarious of a financial situation to receive custody of the children.¹⁹³ The court made efforts, however, to emphasize that its decision was not based upon the mother’s sexuality, and in fact “recognized that her right to

181. See *DEFIANT DESIRE*, *supra* note 171 at 30. The size of the event is indicative of the tolerance to which South African LGBT persons were accustomed.

182. See *id.*

183. *Id.* at 32.

184. See *id.*

185. See *id.*

186. 1998 (2) SA 254 (T) (S. Afr.), available at http://www.refworld.org/cases,ZAF_HC,3ae6b69a14.html [<https://perma.cc/NEJ2-56PK>].

187. *Id.*

188. Sanders, *supra* note 7, at 104.

189. See *id.* at 104.

190. See *S. v H.* 1995 (1) SA 120 (C) at 124 (S. Afr.).

191. See 1994 (2) SA 325 (W) (S. Afr.).

192. See *id.*

193. See *id.*

live and practice her sexuality had to be respected and protected.”¹⁹⁴

In sum, though South Africa had colonialist, anti-queer written laws, South African authorities rarely enforced those laws to suppress South African sexual minorities. Able to live free from the deterrence power of colonial laws, South African LGBT communities thrived, and new same-sex patterns developed.¹⁹⁵ As demonstrated later in this Note, the history of South Africa is unique, as colonial governments in the other case studies routinely enforced imposed anti-sodomy laws.

C. Colonial Law as Written & Enforced Law

The previously established model considers written and enforced laws to have the most deterrent effect, as well as the coercive force to change communal attitudes towards sexual minorities.¹⁹⁶ In this section, the model applies colonial era anti-sodomy laws to the case studied countries, to demonstrate that societies that enforced colonial era anti-sodomy laws suppressed indigenous homosexualities.

1. Nigeria

In Nigeria, the establishment of British colonialism led to written anti-queer laws.¹⁹⁷ Professor Saheed Aderinto has collected evidence of colonial-era enforcement of sodomy laws throughout Nigeria.¹⁹⁸ In addition, records from early after the British colonized Nigeria evince the enforcement of sodomy laws against Nigerian colonists.¹⁹⁹

In other cases, repugnancy laws were used to subjugate indigenous queer practices. One such case is that of *Eugene Meribe v. Joshua C. Egwu*.²⁰⁰ There, a Nigerian colonial court examined the popular indigenous practice of “woman-to-woman” marriage.²⁰¹

In that case, one of the chief’s wives had undergone a woman-to-woman marriage, paying the traditional bride price for her younger wife and having a wedding celebration.²⁰² The chief’s other natural offspring with his other wives contested the woman-to-woman’s children’s inheri-

194. Vasu Reddy, *Decriminalisation of Homosexuality in Post-Apartheid South Africa: A Brief Legal History Review from Sodomy to Marriage*, 2,3 *AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY* 146, 148 (2006).

195. See text accompanying *supra* note 177-79.

196. See discussion accompanying *supra* notes 82-86.

197. See K. RENATO LINGS, *LOVE LOST IN TRANSLATION: HOMOSEXUALITY AND THE BIBLE* 312 (2013); Emma Mittelstaedt, *Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations*, 9 *CHI. J. INT’L L.* 353, 372 (2008) (documenting the origins of Nigeria’s anti-sodomy laws).

198. See SAHEED ADERINTO, *WHEN SEX THREATENED THE STATE: ILLICIT SEXUALITY, NATIONALISM, AND POLITICS IN COLONIAL NIGERIA, 1900-1958* 97 (2014).

199. See ROBERT ALDRICH, *COLONIALISM AND HOMOSEXUALITY* n.22 (2003) (describing the trial and punishment of a British colonist for sodomy in the early days of colonization).

200. [1976] 1 All NLR 266 (Nigeria).

201. See sources cited in *supra* note 148.

202. See C.O. Akpangbo, *A “Woman to Woman” Marriage and The Repugnancy Clause: A Case of Putting New Wine into Old Bottles*, 14 *AFR. L. STUD.* 87, 90 (1977).

tance.²⁰³ The colonial judge nullified the marriage and declared that such practices were “repugnant to colonial law and good society.”²⁰⁴

In so doing, the judge invoked the repugnancy clause of colonial law. In finding the traditional custom repugnant to colonial law, and outlawing the practice, the judge destroyed a traditional custom and imposed heteronormativity upon the natives.²⁰⁵ Specifically, the judge noted:

In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be a union of a man and a woman thereby creating the status of husband and wife. *Indeed, the law governing any decent society should abhor and express its indignation of a ‘woman to woman’ marriage.*²⁰⁶

By expressing its disfavor upon a traditional queerform, the British colonial court was able to deter the practice, and likely contributed to societal attitudes about women-to-women marriages. As African legal scholar Akpamgbo noted, “The principle of the doctrine of repugnancy as at present applied by the Nigerian courts in some cases [has] often done violence to prevailing and established customs of the people.”²⁰⁷

In summary, British colonial written and enforced laws criminalized, suppressed, and invalidated traditional queerforms in Nigeria.

2. Zimbabwe

Europeans established a colony in Zimbabwe by the late 1880s, in the region presently known as Cape Town.²⁰⁸ But even prior to permanent settlement, European authorities enforced colonially introduced laws to suppress sexual minorities, often with extremely harsh punishments. Early case records from the eve of Zimbabwe’s colonization include an 1868 hanging for “that detestable and abominable crime of buggery (not to be named among Christians).”²⁰⁹ Other cases included sentences exceeding 10 years and lashes by cat-of-nine-tails.²¹⁰

During colonization, European colonists introduced far-reaching anti-queer laws, which they routinely enforced.²¹¹ Recall earlier examples of native Zimbabweans on trial for same-sex practices, as well as cross-dressing.²¹² Professor Marc Epprecht collected court records of “over 400 cases,” of homosexual behavior “between 1892 and 1932 alone.”²¹³ These

203. See *id.* at 88.

204. *Id.* at 89.

205. See *Id.*

206. *Id.* at 90 (emphasis added).

207. *Id.*

208. See MORE THAN A NAME, *supra* note 164, at 266.

209. *Unsayings*, *supra* note 42, at 645 (citing Natal State Archives, AGO 1/1/31, Regina v. Hogoza, case 58 of 12 February 1868).

210. See *id.*

211. See MORE THAN A NAME, *supra* note 164, at 267-69 (noting that Zimbabwean law’s ambiguity allowed the law to reach female same-sex practices, non-penetrative, and non-sexual practices).

212. See text accompanying *supra* notes 113-17.

213. *Unsayings*, *supra* note 42, at 639.

records indicate that “homosexual crimes amounted to 1.5 percent of all criminal court cases in 1892.”²¹⁴ Because of the enforcement of colonially imposed laws, sexual minorities were suppressed and attitudes towards homosexuals became increasingly disapproving and intolerant, leading sexual minorities to remain hidden.²¹⁵

3. Uganda

In Uganda, like many other African colonies, British settlers sought to civilize the indigenous natives by imposing Christianity.²¹⁶ As a result, “Christianity as a ‘civilizing’ practice and British sodomy laws were inherited into Uganda’s overall body of laws, and cultural way of life.”²¹⁷ The British introduced these laws at the end of the 19th Century,²¹⁸ and designed them “to punish what colonial authorities deemed as ‘unnatural sex’ among local Ugandan people.”²¹⁹

As a result of the enforcement of colonially imposed laws, records indicate that during colonialism Ugandans did “not tolerate” homosexuality, and that indigenous communities referred to homosexuality “in admonitory terms.”²²⁰

IV. Queerness in Post-colonial African Society

Upon achieving independence, every previously colonized African country adopted the legal and political system imposed upon it.²²¹ This decision meant that the laws of the previous colonizers confined post-colonial societies.²²² As a result, the vast majority of post-colonial African nations continue to have colonially established anti-queer laws on the books.²²³

This section revisits the four case studies to explore the effects that the various colonial anti-sodomy laws have on post-colonial societies. It will demonstrate that colonies which did not routinely enforce colonially-imposed queerphobic laws have post-colonial societies which are more tolerant of sexual minorities.

214. *BOY-WIVES*, *supra* note 111, at 203.

215. See *Unsayings*, *supra* note 42, at 632 (“Homosexual behaviors among black Zimbabwean men remained deep in the closet (secret, compartmentalized, unmentionable) until [after independence].”) (second alteration added).

216. See Kizito, *supra* note 11, at 568.

217. *Id.*

218. See S. M. Rodriguez, *Homophobic Nationalism: The Development of Sodomy Legislation in Uganda*, 16 *COMP. SOC.* 393, 399 (2017); Jjuuko, *supra* note 125, at 386 (documenting the introduction of British laws that criminalized same-sex intimacy in 1895).

219. Susan Dicklitch et al., *Building a Barometer of Gay Rights (BGR): A Case Study of Uganda and the Persecution of Homosexuals*, 34 *HUM. RTS. Q.* 448, 456 (2012).

220. *BOY-WIVES*, *supra* note 111, at 38.

221. See Sandra Fullerton Joireman, *Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy*, 39 *J. MOD. AFR. STUD.* 571, 576 (2001) (“Without exception in Africa, colonies adopted the legal systems of the metropole at independence.”).

222. See *id.*

223. See *supra* note 22.

A. Case Studies Revisited— Post-colonial Queerphobia

How have the variances in the enforcement of pre-colonial and colonially-imposed anti-queer laws created or exacerbated queerphobic sentiment in the case studies at present? To investigate, this section first generally considers anecdotal evidence of societal prejudice against sexual minorities in the four case studies. Specifically, it examines the reinforcement of colonially-introduced anti-queer laws and state sanctioned violence against sexual minorities within Nigeria, Uganda, Zimbabwe, and South Africa.

In estimating and juxtaposing post-colonial queerphobia between the case studies a difficulty in measurement arises. While qualitative case studies and anecdotes of queerphobia from each country may provide ‘snapshots’ of the prejudice sexual minorities face, such examples do lend themselves to relative comparisons. To circumvent this issue, the section employs the F&M Global Barometer of Gay Rights (GBGR)²²⁴ as a measuring tool to allow for “accurate comparisons within and among” countries.²²⁵ Ranking 188 countries globally, based on 29 indices of human rights, the GBGR “systematically quantif[ies] the degree to which countries are human rights protecting or persecuting of sexual minorities.”²²⁶ The barometer’s 29 indices are rooted in the Universal Declaration of Human Rights and the Yogyakarta Principles, and include the constitutional, civil, political and socio-economic rights afforded sexual minorities within a country, the presence of gay rights organizations, and the degree of societal violence that sexual minorities face.²²⁷ The variables are then tabulated into a score ranging from 0- 100%, as well as a 6-part letter grade of A-F, based on how human rights protective or intolerant an individual country is.²²⁸ The barometer further classifies countries that score an ‘F’ the cate-

224. The F&M Global Barometer of Gay Rights (GBGR) was created by Susan Dicklitch-Nelson and Berwood Yost at Franklin & Marshall College. See Dicklitch et al., *supra* note 219 (introducing the Global Barometer of Gay Rights (GBGR) and applying it to measure homophobia in Uganda); Susan Dicklitch-Nelson, Chan Tov McNamara, and Scottie Thompson, *Only ‘One Love’ Allowed in Jamaica: A Longitudinal Case Study of the Repression of Sexual Minorities in Jamaica*, (2016) (unpublished manuscript on file with Cornell International Law Journal) (applying the Global Barometer of Gay Rights to track changes in societal homophobia over time); Susan Dicklitch-Nelson et al., *Most Countries Score an F on our LGBT Human Rights Report Card*, THE CONVERSATION (June 8, 2017), <http://theconversation.com/most-countries-score-an-f-on-our-lgbt-human-rights-report-card-78732> [<https://perma.cc/GQ7D-GS4E>] [hereinafter *LGBT Human Rights Report Card*]; Susan Dicklitch-Nelson et al., *From Persecutors to Protectors: Human Rights and the F&M Global Barometer of Gay Rights (GBGR)*, (unpublished manuscript) (on file with author).

225. Dicklitch et al., *supra* note 219, at 467.

226. *Id.* The complete GBGR score card is reproduced with permission in the Appendix.

227. See *id.* at 448. The GBGR’s indices include “De Jure State Protection,” “De Facto (Civil/Political) Protection,” “Gay Rights Advocacy,” “Socioeconomic Rights,” and “Societal Persecution.” *Id.* at 470–71. See also Appendix.

228. See *Where Do We Stand? Global Barometer of Gay Rights (GBGR) Findings at Home and Abroad*, Global Barometer of Gay Rights (2018) (on file with Cornell International Law Journal) [hereinafter *2018 GBGR Report*].

gory of “persecutors”, a ‘D’ the category of “intolerant”, those with a ‘C’ the category of “resistant”, a ‘B’ the category of “tolerant”, and those that score an ‘A’ are classified as “protecting” of sexual minorities.²²⁹ Thus, the GBGR provides a useful measuring tool with which to compare queerphobia between nations.

1. Uganda

Not only have the colonial-era sodomy laws survived in Uganda, but also in the aftermath of decolonization, Uganda has increasingly targeted its native queer community.²³⁰ Since independence, Uganda has expanded the colonially imposed laws to target other aspects of LGBTQ life. In 2005, for example, President Yoweri Museveni signed a constitutional amendment to prohibit same-sex marriage.²³¹

In 2013, the Ugandan Parliament began discussions regarding the enactment of the Uganda Anti-Homosexuality Act.²³² In the originally proposed version, the law proposed the death penalty for homosexuality, causing the law to garner the name the “Kill the Gays Bill.”²³³ After the Parliament substituted life imprisonment for the death penalty, the President signed the bill into law on February 24, 2014.²³⁴

The drafters of the “Kill the Gays Bill’s” draft legislation lifted sections of the bill “verbatim from the colonial legislation.”²³⁵ Ultimately, the Ugandan Constitutional Court ruled the act invalid— not for its human rights implications— but on procedural grounds.²³⁶ Specifically, the Court annulled the law because an insufficient number of parliamentarians had been present to vote to pass the bill.²³⁷

229. See Dicklitch et al., *supra* note 219, at 467.

230. Postcolonial Ugandan homophobia has garnered numerous responses in scholarship. See, e.g., Lucy Heenan Ewins, *The Criminalization of Sexual Orientation: Why Uganda’s Anti-Homosexuality Act Threatens Its Trade Benefits with the United States*, 34 B. C. INT’L & COMP. L. REV. 147 (2011); Daniel Englander, *Protecting the Human Rights of LGBT People in Uganda in the Wake of Uganda’s “Anti-Homosexuality Bill, 2009.”* 25 EMORY INT’L L. REV. 1263 (2011); Tiffany M. Lebron, “Death to Gays!” Uganda’s ‘One Step Forward, One Step Back’ Approach to Human Rights, 17 BUFF. HUM. RTS. L. REV. 173 (2011); Hollander, *supra* note 127; Hyeon-Jae Seo, *supra* note 10.

231. See CONSTITUTION OF THE REPUBLIC OF UGANDA, (Sept. 1995), art. 31, §2(a), available at <http://www.refworld.org/docid/3ae6b5ba0.html>.

232. See Barry Malone, *Uganda’s “Kill the Gays” Bill Shelved Again*, REUTERS (May 13, 2011), <https://af.reuters.com/article/topNews/idAFJOE74C0HP20110513> [<https://perma.cc/S64Y-H83Q>].

233. See *id.*

234. See Faith Karimi & Nick Thompson, *Uganda’s President Museveni Signs Controversial Anti-gay bill into Law*, CNN (Feb. 25, 2014), <http://edition.cnn.com/2014/02/24/world/africa/uganda-anti-gay-bill> [<https://perma.cc/2YMG-2K5E>].

235. Joanna Sadgrove et al., *Morality Plays and Money Matters: towards a situated Understanding of the Politics of Homosexuality in Uganda*, 50 J. MOD. AFR. STUD. 103, 104 (2012).

236. See David Smith, *Uganda Anti-gay Law Declared ‘Null and Void’ by Constitutional Court*, THE GUARDIAN (Aug. 1 2014), <https://www.theguardian.com/world/2014/aug/01/uganda-anti-gay-law-null-and-void> [<https://perma.cc/S5VX-5Z75>].

237. See *id.*

In addition to the current state of homophobic laws, homophobic sentiments within Ugandan society are pervasive. Demonstrations against homosexuality are commonplace, and many motor vehicles feature a popular bumper sticker stating: “‘Say No 2 Sodomy; Say Yes 2 Family’ and ‘Ebisiyaga Tubigobe’ (We should drive out homosexuality).”²³⁸ Likewise, local media has bolstered queerphobic sentiment by publishing pictures and contact information of Ugandan LGBTQ rights activists, along with death threats.²³⁹

Public opinion polls suggest that colonially-imposed anti-queer laws have effectively stigmatized queer Ugandans in post-colonial society, with many popular opinion polls indicating intense queerphobia. For instance, in 2007, the Pew Global Attitudes Project found that 96 percent of Ugandans believed that “homosexuality should not be accepted by society.”²⁴⁰ This percentage was the fifth-highest rating of non-acceptance amongst all the countries surveyed.²⁴¹ Applying the 29 indices of human rights, Uganda scores an ‘F,’ with a total score of 10% on the Global Barometer of Gay Rights scale.²⁴² This indicates that the nation is “persecuting” of its sexual minorities, and places Uganda within the lowest quartile of countries ranked by the GBGR.²⁴³

2. Nigeria

In Nigeria, courts continue to enforce colonial-era laws to punish same-sex acts. As recently as 2012, a Nigerian Court sentenced 29-year-old Bestwood Chukwuemeka to three months imprisonment for engaging in same-sex intercourse.²⁴⁴ Chukwuemeka pleaded guilty after the man he had been intimate with in his private home reported him to the police.²⁴⁵

Over the past decade, the Nigerian government has actively sought to strengthen the existing colonial laws criminalizing homosexuality. In 2013, the Nigerian House of Representatives passed a bill that made same-sex displays of affection, membership in gay rights groups, and same-sex marriage criminal offenses.²⁴⁶ The bill included punishments of up to 14 years imprisonment.²⁴⁷ In January 2014, then Nigerian President Good-

238. Boyd, *supra* note 124, at 697-98.

239. See Richard Ssebagala, *Straight Talk on the Gay Question in Uganda*, 106 *TRANSITION* 44, 52 (2011).

240. PEW RESEARCH CENTER, *The Global Divide on Homosexuality* (2013), available at <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/> [<https://perma.cc/TL7T-9Y4R>].

241. See *id.*

242. See 2018 *GBGR Report*, *supra* note 228.

243. See *id.*

244. See Monica Mark, *Nigerian Court Jails Actor for Homosexuality Under Colonial Law*, *THE GUARDIAN* (Sept. 21, 2012), <https://www.theguardian.com/world/2012/sep/21/nigeria-court-jails-actor-gay-offence> [<https://perma.cc/E2SY-NPS5>].

245. See *id.*

246. See *Nigerian Lawmakers Pass Anti-Gay Marriage Bill*, *CBS NEWS* (May 30, 2013), <https://www.cbsnews.com/news/nigerian-lawmakers-pass-anti-gay-marriage-bill/> [perma.cc/TMM3-LRVV].

247. See Same Sex Marriage (Prohibition) Bill, 2011, *A Bill for an Act to Prohibit Marriage or Civil Union Entered into Between Persons of Same Sex, Solemnization or Same and*

luck Jonathan signed the bill into effect.²⁴⁸

In the aftermath of the bill's passage the former United Nations High Commissioner for Human Rights, Navanethem Pillay denounced the bill:

Rarely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights. . . . Rights to privacy and non-discrimination, rights to freedom of expression, association and assembly, rights to freedom from arbitrary arrest and detention: this law undermines all of them.²⁴⁹

Subsequently, Human Rights Watch ("HRW"), an international NGO, documented the impact of the bill on Nigeria's LGBTQ population.²⁵⁰ HRW argued that "the SSMPA [Same Sex Marriage Prohibition Act], in many ways, officially authorizes abuses against LGBT people, effectively making a bad situation worse."²⁵¹ Following the bill's passing, Nigerian NGOs reported an increase in "cases of physical violence, aggression, arbitrary detention, and harassment of human rights defenders working on sexual minority issues."²⁵²

In short, by enacting a law that criminalizes all aspects of being gay rather than just same-sex intimacy, the Nigerian government legitimized the victimization of queer communities.²⁵³ In February 2014, a mob of approximate fifty people armed with machetes, whips and clubs attacked 14 men suspected of being gay.²⁵⁴ While they dragged the men from their homes, the attackers reportedly chanted: "We are doing [President Goodluck] Jonathan's work: cleansing the community of gays" and "Jungle Justice! No more gays!"²⁵⁵

The decline of woman-to-woman marriages is additional proof that colonial-era laws have suppressed queer sexualities in Nigeria. In the shadow of colonial cases striking down the customary practice, public opinion polls indicate that the practice has been all but condemned in modern society. A recent study found that amongst Nigerian women, approximately 93.5 percent disapprove of woman-to-woman marriages.²⁵⁶

For Other Matters Related Therewith, available at <http://www.equalrightstrust.org/ertdocumentbank/Same%20Sex%20Marriage%20%28Prohibition%29%20Bill.pdf> [<https://perma.cc/LZ4R-MLPG>].

248. See Felix Onuah, *Nigerian President Signs Anti-Gay Bill into Law*, REUTERS (Jan. 13, 2014), <https://www.reuters.com/article/nigeria-gay/nigerian-president-signs-anti-gay-bill-into-law-idUSL6N0KN2PP20140113> [<https://perma.cc/67A7-DG9Q>].

249. *UN Human Rights Chief Denounces 'Draconian' Anti-Homosexuality Law in Nigeria*, UN NEWS (Jan. 14, 2014), <https://news.un.org/en/story/2014/01/459642-un-human-rights-chief-denounces-draconian-anti-homosexuality-law-nigeria> [<https://perma.cc/7Q7G-A9WZ>].

250. See generally HUMAN RIGHTS WATCH, "Tell Me Where I Can Be Safe:" *The Impact of Nigeria's Same Sex Marriage (Prohibition) Act* (Oct. 2016), https://www.hrw.org/sites/default/files/report_pdf/nigeria1016_web.pdf [<https://perma.cc/LBV2-VSZA>].

251. *Id.* at 1.

252. *Id.* at 2.

253. See *id.*

254. See *id.*

255. *Id.*

256. See Kamene Okonjo, *Aspects of Continuity and Change in Mate-Selection Among the Igbo West of the River Niger*, J. COMP. FAMILY STUD. 339, 343 (1992).

Amongst those aged fifteen to twenty-four, 95 percent disapprove of women-to-women marriages; amongst those aged twenty-five to forty-four, 91 percent disapprove of the institution; and amongst women aged forty-five to sixty-four 89 percent disapprove of women-to-women marriages.²⁵⁷ Because the practice was “widespread” prior to colonial rule,²⁵⁸ the increasing aversion to the institution suggests that colonially introduced laws and attitudes have influenced modern public opinion on the practice.

On the Global Barometer of Gay Rights, Nigeria scores a grade ‘F’ with a total score of 10%.²⁵⁹ This indicates that the nation is considered to be persecuting of its sexual minorities, and is also one of the lowest scoring nations amongst the 188 nations which the GBGR ranks.²⁶⁰

3. Zimbabwe

As with the two prior case studies, post-colonial Zimbabwe has seen high levels of queerphobic discrimination and violence, as well as the reinforcement and expansion of colonially-imposed anti-queer laws. Since independence, Zimbabwe has overhauled its sodomy laws, expanding them past sexual intimacy and to activities such as “holding hands, hugging[,] and kissing. . . .”²⁶¹ Moreover, Zimbabwe has enacted criminal statutes which target transgender Zimbabweans and curtail the creation of LGBTQ organizations.²⁶²

Zimbabwe’s former President Robert Mugabe has been particularly vocal against rights for LGBTQ Zimbabweans. Previously, Mugabe characterized sexual minorities as “worse than dogs and pigs,” “degrad[ing to] human dignity,”²⁶³ and in September 2015 he gave a speech at the UN General Assembly decrying rights for queerfolk.²⁶⁴ The former President has gone as far as to threaten and promote violence against sexual minorities, calling for their beheading, and urging for their capture and arrest.²⁶⁵

However, while Zimbabwe also scores a failing grade of ‘F’ on the GBGR, its performance is not as dismal as the two case studies prior. Instead, Zimbabwe scores a slightly higher total grade of 17% on the GBGR

257. See *id.* at 345.

258. See sources cited in *supra* note 142.

259. See 2018 GBGR Report, *supra* note 228.

260. See *id.*

261. THE OTHER FOUNDATION, *Canaries in the Coal Mines: An Analysis of Spaces for LGBTI Activism in Zimbabwe* 9 (2017), available at http://theotherfoundation.org/wp-content/uploads/2017/02/Canaries_Zimbabwe.pdf [<https://perma.cc/ER2Y-JL3>].

262. See *id.* at 10.

263. Dan Avery, *The Most Homophobic Dictator in Africa has Finally Resigned*, NEWNOWNEXT (Nov. 21, 2017), <http://www.newnownext.com/robert-mugabe-resigns-zimbabwe/11/2017/> [<https://perma.cc/S9KN-DQ2Z>].

264. See Rose Troup Buchanan, *Robert Mugabe tells UN General Assembly: ‘We are Not Gays!’*, INDEPENDENT (Sept. 29, 2015), <https://www.independent.co.uk/news/people/robert-mugabe-tells-un-general-assembly-we-are-not-gays-a6671316.html> [<https://perma.cc/JQU8-F4DS>].

265. Emma Mittelstaedt, *Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approach to Enforcing International Human Rights Obligations*, 9 CHI. J. INT’L L. 353, 353 (2008).

scale.²⁶⁶ This also classifies Zimbabwe as “persecuting” of its sexual minorities.²⁶⁷

4. South Africa

In South Africa, where authorities rarely enforced colonial-era laws, LGBTQ South Africans have been accepted as full members of society. In 1997, South Africa became the first country to adopt a constitution that “explicitly outlawed discrimination on the basis of sexual orientation.”²⁶⁸ Later, in the 1998 case *National Coalition for Gay and Lesbian Equality (NCGLE) v. Minister of Justice*, the South African Witwatersrand Local High Court declared the colonial-era sodomy laws unconstitutional.²⁶⁹ The South African Constitutional Court unanimously affirmed the judgment on October 9 of the same year.²⁷⁰ There, the Constitutional Court declared the ruling retroactive—thus applying the ruling to convictions since the adoption of the South African Interim Constitution on April 27, 1994.²⁷¹ In Justice Sachs’s concurrence, he indicated that the striking down of sodomy laws was necessary to providing LGBTQ South Africans the equal citizenship guaranteed to them under the constitution:

Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.²⁷²

In the aftermath of *National Coalition for Gay and Lesbian Equality*, South Africa has seen a number of Constitutional Court holdings upholding the equal citizenship of queer South Africans. In the decade after the adoption of South Africa’s gay friendly constitution, the Court held that same-sex relationships must be treated equally to their married heterosexual counterparts;²⁷³ same-sex couples are allowed to adopt children;²⁷⁴

266. See 2018 GBGR Report, *supra* note 228.

267. See *id.*

268. See Sanders, *supra* note 7, at 105.

269. See Pierre de Vos, *Sexual Orientation and the Right to Equality in the South African Constitution: National Coalition for Gay and Lesbian Equality & Another v. Minister of Justice & Others*, 117 S. Afr. L.J. 17, 18–19 (2000).

270. See *id.*

271. See Pat Reber, *South Africa Court Upholds Gay Rights*, ASSOCIATED PRESS (Oct. 9, 1998), http://glapn.org/sodomylaws/world/south_africa/sanews003.htm [https://perma.cc/MBU4-L8DQ].

272. *Nat’l Coal. for Gay and Lesbian Equal. v. Minister of Justice and Others* 1999 (1) SA 6 (CC) at para. 107 (S. Afr.) (Sachs, J., concurring).

273. See *Nat’l Coal. for Gay and Lesbian Equal. & Others v. Minister of Home Affairs & Others* 1999 (2) SA 1 (CC) at 48 para. 57 (S. Afr.) (holding same-sex couples must be treated equally to their heterosexual counterparts for immigration purposes); *Satchwell v. President of Rep. of S. Afr.* 2002 (6) SA 1 (CC) at 18 para. 23 (S. Afr.) (holding that same-sex spouses of judges are entitled to the same benefits as opposite-sex spouses).

274. See *Du Toit & Another v. Minister of Welfare and Population Dev. & Others* 2003 (2) SA 198 (CC) (S. Afr.).

same-sex couples may register as the parents to children born to them;²⁷⁵ and that the constitution requires that same-sex marriage be legalized and granted equal status.²⁷⁶ The South African Constitutional Court has emphasized that “[a]lthough the Constitution itself cannot destroy homophobic prejudice it can require the elimination of the public institutions which are based on and perpetuate such prejudice.”²⁷⁷

South Africa’s protection of the rights of the nation’s sexual minorities is evinced in the country’s GBGR score. South Africa has a GBGR grade of a ‘C’ with a total score of 76%; significantly higher than the other case-studied countries.²⁷⁸ Though the nation is in the third highest category of countries ranked by the GBGR—those “resistant” to the protection of sexual minorities, South Africa has the highest GBGR score of all African nations.²⁷⁹

Juxtaposing queer life in post-colonial South Africa, where pre-colonial customary law was tolerant of sexual minorities and colonially-imposed queerphobic laws were rarely enforced, with the quality of queer life in Nigeria, Zimbabwe, and Uganda, where sexual minorities were suppressed during colonization, it is obvious that queerfolk have fared better in the former. Today, South Africa is widely considered the “success story” of escaping the colonial legacy of queerphobia, and the nation is the frequently used as measuring stick for LGBTQ rights against which all other African nations are compared.²⁸⁰ Indeed, the nation’s GBGR score is 4–7 times that of the other post-colonial African nations case studies, and it is the only country within the African continent not categorized as a “persecutor” on the GBGR.²⁸¹

Consider also the variation amongst the GBGR scores of Uganda, Nigeria, and Zimbabwe. In the former two nations where, pre-colonial customary law was enforced against sexual minorities, colonially introduced laws would have only marginal effects on the virulent queerphobia that preexisted. In contrast, in Zimbabwe where there was a pre-colonial “de facto” tolerance for sexual minorities, when colonially-imposed laws were enforced against queerfolk, societal sentiment evolved from tolerance to persecution. Nonetheless, Zimbabwe still has a higher GBGR score than its other two counterparts, with a score of 17% versus the 10% of both Uganda and Nigeria. This suggests that colonially-imposed laws in Zimbabwe may have been slightly counteracted by pre-existing tolerance, whilst colonially-introduced laws in the former two case studies reinforced existence intolerance, leading to heightened levels of queerphobia today.

275. See *J and B v. Dir. Gen., Dep’t of Home Affairs & Others* 2003 (5) SA 621 (CC) (S. Afr.).

276. See *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

277. See *Nat’l Coal. for Gay and Lesbian Equal. v. Minister of Justice and Others* 1999 (1) SA 6 (CC) at para. 130 (S. Afr.).

278. See 2018 GBGR Report, *supra* note 228.

279. See *LGBT Human Rights Report Card*, *supra* note 224.

280. See generally MARK S. KENDE, *CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES* (2009).

281. See *LGBT Human Rights Report Card*, *supra* note 224.

Conclusion

In considering the origins of queerphobia in African nations, this Note has presented a model which accounts for African legal systems prior to, during, and after colonialism. The model demonstrated that African legal systems developed in a layered fashion, with each layer of imposed law developing over a preexisting legal system. The model's two axes, documentation and enforcement, captured the innate differences between oral legal systems and codified laws. In doing so, the model accounted for regional variations in queerphobic and elucidated the role of colonially-imposed law in the creation of legacies of intolerance.

Applying the model, this Note demonstrated that prior to colonialism in countries such as Zimbabwe and South Africa, indigenous oral law was largely silent on queer sexualities. This allowed indigenous sexual minorities to exist un-condemned. Where oral law was spoken and enforced against indigenous sexual minorities, in countries such as Uganda and Nigeria, pre-colonial queerfolk faced societal condemnation. However, given the flexibility inherent in oral legal systems, it is likely that the condemnation of indigenous queer sexualities was not uniform across communities.

With the establishment of European colonialism came codified law. Applying the model, this Note demonstrated variations in enforcement of codified anti-queer laws. In South Africa, though colonially imposed anti-queer laws existed, they were not widely enforced. This allowed sexual minorities to develop communities, participate in activism, and establish organizations for LGBTQ human rights. In contrast, in nations such as Nigeria, Zimbabwe, and Uganda, historical sources indicate that colonial-era anti-queer laws were harshly enforced. This led to the suppression of sexual minorities and queer identity.

Finally, turning to the post-colonial context, this Note revisited the four case studies to consider what effects the pre-colonial customary laws, and the enforcement of colonial-era anti-queer laws have had in terms of post-colonial queerphobia. This Note demonstrated that where colonially-imposed anti-queer laws were widely enforced against sexual minorities, present-day African nations see high levels of anti-queer discrimination and violence at present; where they were not, African nations, such as South Africa, see societal tolerance. Consequently, the model of developed legal systems in Africa accounts for the role of law in the construction of queerphobic sentiment in the four case studied post-colonial African nations.

* * *

Appendix: The F&M Global Barometer of Gay Rights (GBGR)TM

<i>Constitutional</i> Protection of Homosexuals
1. No death penalty for homosexuality
2. No life sentence for homosexuality
3. No prison for homosexuality
4. Homosexuality is legalized
5. Hate Crimes legislation focusing on sexual orientation
6. Homosexuals openly serve in military
7. Civil Unions for same-sex couples are allowed
8. Same-Sex Marriage
<i>De Facto</i> (Civil & Political) Protection of Homosexuals
9. Freedom from arbitrary arrest based on sexual orientation
10. Head of State supports legalization of homosexuality
11. Head of State supports civil union / same-sex marriage
12. Majority of Citizens are Accepting of Homosexuality
13. Hate speech laws exist to protect sexual minorities
14. Laws protect privacy of sexual minorities
15. Sexual minorities have right to fair trial
Gay Rights Advocacy
16. Sexual minorities allowed to organize
17. National gay rights organizations openly exist
18. Gay rights organizations are able to peacefully and safely assemble
19. Gay pride events are allowed by the state
20. Security forces provide protection to gay pride participants
Socio-Economic Rights
21. Fair Housing Anti-Discrimination laws protect sexual minorities
22. Anti-Discrimination Laws protect sexual minorities at the workplace
23. HIV/AIDS patients are not discriminated against in the workplace
Violence Against Homosexuals
24. No known acts of murder against sexual minorities
25. No known acts of violence against sexual minorities
Societal Persecution
26. Victims of hate crimes based on sexual orientation likely to report incident to police
27. Homosexuals are allowed to donate blood
28. Homosexuals are allowed to adopt
29. Homosexuals are not discriminated against in access to medical treatment because of their sexual orientation

SOURCE: The F&M GBGR was co-created by Susan Dicklitch-Nelson and Berwood Yost at Franklin & Marshall College.

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