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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Protection against violence and discrimination based on sexual orientation and gender identity

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, submitted in accordance with Human Rights Council resolution [50/10](#).

* [A/78/150](#).



Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz

Summary

In the present report, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, explores the impact of colonialism and decolonization on the continued formation and perpetuation of harmful social mores associated with sexual orientation and gender identity, and how these relate to the enjoyment of human rights. He analyses colonialism as one of the root causes of violence and discrimination based on sexual orientation and gender identity, and he proposes measures to foster protection, sustainable development and peace for all persons, communities and peoples through the expansion and reform of policies within the United Nations system and by Member States.

I. Introduction

1. In the present report, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, explores the impact of processes of colonialism and decolonization on the continued formation and perpetuation of harmful social mores associated with sexual orientation and gender identity. Desk research was carried out at the Independent Expert's academic home, at the Human Rights Program of Harvard Law School, in Cambridge, Massachusetts, and at the Center for Justice, Law and Society of the Jindal Global Law School, in India. In response to the call for contributions issued in April 2023, written submissions were received from 76 stakeholders, including States, national human rights institutions, civil society organizations and academics. In addition, more than a dozen experts took part in an online consultation convened by the Centre for Human Rights of the University of Pretoria, in South Africa, on 6 July 2023.

2. The term "colonialism" is used in daily and political language in an extremely broad way. It signifies the processes through which a State acquires or maintains full or partial political control over another sovereign nation or the subjugation of groups or entities by others, including through economic, cultural or ideological colonialism. Human history has been marked by dynamics of power and mobility, such as through the movement of peoples to areas where the inhabitants had been subjugated, dominated or exterminated; the emergence of syncretism and resistance; and the construction or deconstruction of imperial nation States.

3. A much more limited definition of colonialism is derived from Article 73 of the Charter of the United Nations, on non-self-governing territories, and General Assembly resolution 1514 (XV), containing the Declaration on the Granting of Independence to Colonial Countries and Peoples (in which reference is made to "Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence"). States Members of the United Nations have regularly declared their conviction of the need to eradicate colonialism and have established it as one of the priorities of the Organization (see General Assembly resolution 77/149). The universe delimited by this frame coincides to a very large extent with the contexts and colonial processes described in the evidence received by the Independent Expert. These two parameters therefore guided the delimitation of scope of the present thematic report. In that sense, in the present report the Independent Expert describes only a small number of the processes through which all of the world's cultural, legal and social traditions have been formed, and in which sexuality and gender are known to play a primary role.

4. The Independent Expert has identified the *corpus juris* in international human rights law through which gender has been recognized as the term used to describe sociocultural constructs that assign roles, behaviours, forms of expression, activities and attributes according to meanings given to biological sex characteristics (see A/HRC/47/27 and A/76/152). Gender theory, queer theory, gender-based approaches and intersectionality provide a framework for addressing multiple asymmetries of power connected to the meanings attributed to sex. The concept of gender is traditionally understood as referring only to the male-female binary and its associated asymmetries of power. However, persons who suffer violence and discrimination based on sexual orientation and gender identity may self-identify beyond that axis. Some examples are seen in the lived experience of *kathoey* (Thailand), *bakla* (the Philippines), *travestis* (Argentina and Brazil), *fa'afafine* (Samoa) and *leiti* (Tonga). These and other non-binary identities may operate under an understanding of gender that is broader than the male-female binary.

5. Similarly, the term lesbian, gay, bisexual and trans, and its widely used acronym LGBT, used by the mandate holder as a form of shorthand, and the terms gender-diverse, queer, questioning and asexual, refer to social, political and legal identities, the meanings of which vary depending on context. However, the evidence suggests that categorizations such as LGBT cannot fully capture the diversity of sexualities and genders in life experiences of Indigenous persons for whom sexual diversity has “historically been the norm, not the exception”.¹ The Independent Expert is aware of the risk of inadvertently globalizing acronyms and models of queerness as superior, hegemonic models; in this context, the broad scope of his mandate – protection against violence and discrimination based on sexual orientation and gender identity – is of benefit. The Independent Expert therefore focuses not only on persons, communities and populations affected by discrimination and violence on those grounds, but also on the processes through which bias or hatred are instrumentalized.

6. While colonialism may be at the source of significant violence and discrimination based on sexual orientation and gender identity, it would be flawed to proclaim that it alone is the cause of such marginalization. It would be equally flawed to make the generalized proclamation that pre-colonial or non-colonial settings were or are fully accepting of diversity. The evidence base is still scarce, but it does suggest that while some of those settings were more accepting of diversity, others were violent and cruel towards persons based on their sexual orientation or gender; in China, for example, the Qing dynasty instituted the first recorded law prohibiting consensual same-sex activity and imposing a penalty of 1 month in prison and 100 heavy blows.²

7. Therefore, understanding and addressing the impact of colonial processes is just one aspect of deconstructing violence and discrimination based on sexual orientation and gender identity, a task for which the research carried out by mandate holders must be considered in its entirety.

II. Diversity in sexual orientation and gender identity

8. From the Filipino Indigenous community’s *babaylan* spiritual protectors, who interact with or are a blend of feminine and masculine spirits,³ to *ogbanje* individuals in Nigeria,⁴ diversity in sexual orientations and gender identities has existed everywhere throughout recorded history. Individuals embodying gender-variant roles and identities have been cherished and respected in many societies, in ceremonial and advisory roles, such as the “two-spirit persons”⁵ in certain Canadian Indigenous tribes, the *bonju*⁶ in Europe, the *muxes*⁷ in Mexico, the *hijra*⁸ in India and Bangladesh,

¹ Manuela L. Picq and Josi Tikuna, “Indigenous sexualities: resisting conquest and translation”, E-International Relations (20 August 2019). Available at www.e-ir.info/2019/08/20/indigenous-sexualities-resisting-conquest-and-translation/.

² Bret Hinsch, *Passions of the Cut Sleeve: The Male Homosexual Tradition in China* (Berkeley, University of California Press, 1992).

³ Submission by ASEAN SOGIE Caucus, p. 1.

⁴ Submission by Lawyers Alert, p. 2.

⁵ Submission by ILGA World, p. 4. See also Janice Ristock and others, “Impacts of colonization on Indigenous Two-Spirit/LGBTQ Canadians’ experiences of migration, mobility and relationship violence”, *Sexualities*, vol. 22, No. 5–6 (2019), pp. 767–784.

⁶ Submission by ILGA World, p. 4. See also Ane Løvold, “The silence in Sápmi – and the queer Sami breaking it”, master’s thesis, Arctic University of Norway, 2015.

⁷ Submission by ILGA World, p. 4. See also Alfredo Mirandé, “Hombres mujeres: an Indigenous third gender”, *Men and Masculinities*, vol. 19, No. 4 (October 2016), pp. 384–409.

⁸ Submission by ILGA World, p. 4. See also Adnan Hossain, “The paradox of recognition: hijra, third gender and sexual rights in Bangladesh. *Culture, Health & Sexuality*, vol. 19, No. 12, (2017), pp. 1418–1431.

the *takatāpui*⁹ in New Zealand and the sistersgirls¹⁰ and brotherboys of the Aboriginal and Torres Strait Islander peoples in Australia.

9. Communities and peoples in East Asia, South-East Asia and the Pacific are known to have a rich history of gender diversity and gender pluralism rooted in traditional rituals and practice,¹¹ a fluidity that is reflected in language (for example, the gender-neutral pronoun *dia* in the Malay language) and traditional folklore, such as the Nusantara, Indonesia, *srikandi* folklore, considered to be a transgender legend.¹² Two-spirit shamans (*bissu*) are recognized among the Bugis people of Indonesia.¹³ The ostensible nature of gender and sexual fluidity and diversity in pre-colonial times is illustrated by the *sida-sida* in pre-colonial Malaysia and the bisexual Han dynasty rulers of Hong Kong during the Imperial China period.¹⁴

10. In the Indian subcontinent, *hijra* persons were often “powerful figures in Sultanate and Mughal courts and had the prerogative to collect taxes and duties in particular areas”.¹⁵ *Khwaja siras* in Pakistan also played an integral role during the Mughal era,¹⁶ with the term “*khwaja*” meaning “protector” or “honourable”.¹⁷ Islamic literature contains homoeroticism and erotic commentary on males,¹⁸ and the Kama Sutra contains descriptions of numerous homosexual relationships with love and trust and a variety of sex/gender “types” dating back to ancient times,¹⁹ before the advent of Islam.²⁰

11. The evidence strongly suggests that, before colonization, many peoples of the African continent did not have a binary approach to gender or correlate anatomy with gender identity.²¹ Feminist theorists have written about how sexual morality was less gendered and hierarchical in sub-Saharan pre-colonial societies.²² Tribes situated in present-day Nigeria did not have a gender-binary and typically did not assign gender at birth, waiting instead until later in the person’s life.²³ In Yoruba culture, social hierarchies did not depend on gender,²⁴ but rather largely on seniority.²⁵ In present-

⁹ Submission by ILGA World p. 4. See also Ane Løvold, “The silence in Sápmi”.

¹⁰ Submission by ILGA World, p. 4. See also Damien W. Riggs and Kate Toone, “Indigenous sistersgirls’ experiences of family and community”, *Australian Social Work*, vol. 70, No. 2, (2017), pp. 229–240.

¹¹ Submission by International Planned Parenthood Federation (IPPF) Center of Excellence on Sexual and Gender Diversity, p. 2.

¹² *Ibid.*, p. 3.

¹³ Submission by ASEAN SOGIE Caucus, p. 1.

¹⁴ Submission by ILGA Asia, p. 2.

¹⁵ Anjali Arondekar, *For The Record: On Sexuality and the Colonial Archive in India*, (Durham and London, Duke University Press, 2009), p. 90.

¹⁶ Submission by Swakshadip Sarkar, p. 2.

¹⁷ Sara Shroff, “The colonial choreography of queer value”, *Queer Asia*, 2 December 2017, cited in submission by iProbono, p. 2.

¹⁸ Jocelyne Dakhliya, “Homoeroticisms and historiographical backgrounds of the Islamic world”, *Annales. Histoire, Sciences Sociales*, vol. 62, No. 5 (2007), pp. 1097–1120.

¹⁹ Nicole Brown (2021). “From the Kama Sutra to now: the impact of colonial rule on South Asian queer culture”, *Manchester Historian*, 6 May 2021. Available at <http://manchesterhistorian.com/2021/from-the-kama-sutra-to-now-the-impact-of-colonial-rule-on-south-asian-queer-culture-by-nicole-brown/>.

²⁰ Alain Danielou, *The Complete Kama Sutra* (Rochester, Park Street Press, 1994), cited in submission by the Bandhu Social Welfare Society, p. 1.

²¹ Submission by ReportOUT, p. 9.

²² Nkolika Ijeoma Aniekwu, “Converging constructions: a historical perspective on sexuality and feminism in post-colonial Africa”, *African Sociological Review/Revue Africaine de Sociologie*, vol. 10, No. 1 (2006), pp. 143–60, 145; and submission by Amy Bryant, p. 2.

²³ Submission by Dzoë Ahmed, p. 3; and submission by ILGA World, p. 6.

²⁴ Submission by Claire S. Westman, p. 2.

²⁵ Oyèrónké Oyèwùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses* (Minneapolis, University of Minnesota Press, 1997), p. 14.

day Ethiopia, Oromo persons switched to male and female gender and roles for periods of eight years during their lifetimes.²⁶ Among the Igbo people, *ogbanje* persons were gender-fluid and alternated between male and female roles.²⁷ Depictions of sexuality and gender practices in Senegalese communities between 1898 and 1935 attest to the existence of many sexual behaviours and gender-expression fluidity, from same-sex sexual practices to transgender identities and cross-dressing.²⁸ The Dagaaba people in present-day Ghana assigned gender on the basis of the “energy one presents”, rather than on anatomical considerations.²⁹ According to anthropological studies, there is a history of same-sex marriage in Kenyan tribes, such as the Meru tribe (marriage between men), the Kalenjin tribe (marriage between women) and the Nandi tribe.³⁰ In South Africa, many authors have noted the presence of same-sex relations in pre-colonial societies.³¹

12. Certain historical accounts of Caribbean societies portray as positively valued people with sexual orientations or gender identities that would today be qualified as diverse.³² Artefacts depicting same-sex intimacy of the Mochica and Chimú cultures of the Incan Empire have been said to indicate that these groups embraced a rich diversity of sexual and affective expressions.³³ Inca women could have multiple sexual partners and participate in community decisions.³⁴ In the lands that form present-day Colombia, same-sex attraction and transgender identities have always been part of the culture of Indigenous communities.³⁵ In present-day Chile, according to information received by the Independent Expert, academic antecedents account for many pre-colonial conceptions of sex and gender that contradict the notions of normality of the European sex-gender system.³⁶

13. Many works of Kyrgyz folk art contain gender-diverse characters; for example, the main hero of the Kyrgyz folk tale known as “Arman Ai” is a transgender man, while characters in the epics *Er Töshtük* and *Zhanyl Myrza* have gender-fluid identities.³⁷ In *Manas*, a traditional epic poem of Kyrgyzstan, the tale of 40 soldiers united by same-sex intimacy is recounted.³⁸

14. Such statements of diversity are also accompanied by the Independent Expert’s findings with regard to spirituality. According to Indigenous scholarship from the Americas, South Asia and the Pacific regions, various gender-fluid identities carry spiritual significance in their respective communities; for example, the *māhū* in Native Hawaiian and Tahitian communities embrace both the feminine and masculine and are keepers of traditional practices such as hula and chant.³⁹ The *hijra* and *khawaja sira* are gender-variant communities who held the roles of spiritual advisers,

²⁶ Asmarom Legesse, *Gada: Three approaches to the Study of African Society* (London, Collier Macmillan, 1973), pp. 52–54.

²⁷ Submission by Lawyers Alert, p. 2.

²⁸ See Babacar M’Baye, “The origins of Senegalese homophobia: discourses on homosexuals and transgender people in colonial and postcolonial Senegal”, *African Studies Review*, vol. 56, No. 2 (August 2013), pp. 109–128.

²⁹ Submission by Dzoë Ahmad, p. 3.

³⁰ Submission by ReportOUT, p. 9.

³¹ Submission by Claire S. Westman, p. 2.

³² Submission by Colours Caribbean, p. 1.

³³ Submission by ILGA World, p. 5.

³⁴ Ibid.

³⁵ Submission by Colombia Diversa, p. 2; and joint submission by Queen’s University Belfast and Ulster University, p. 2.

³⁶ Submission by the Government of Chile, p. 1.

³⁷ Submission by Kyrgyz Indigo, p. 2.

³⁸ Ibid.

³⁹ Eleisha Lauria, “Gender fluidity in Hawaiian culture”, *The Gay & Lesbian Review* (January–February 2017). Available at <https://glreview.org/article/gender-fluidity-in-hawaiian-culture/>.

military commanders and members of royal courts during the pre-colonial Mughal era in India.⁴⁰ “Two-spirit”, or *berdache*, persons are a blend of male and female spirits who are believed by several Indigenous communities in Canada to have access to a distinct realm of spirituality as healers, shamans and ceremonial leaders.⁴¹ The Special Rapporteur on freedom of religion or belief has noted that processes of sexual assimilation, criminalization and pathologization have had a profound impact on the traditional status and roles of Indigenous persons in the postcolonial period (A/77/514, para. 21).

III. Mechanisms of colonial oppression

15. Colonial oppression involved strategies to exercise strict control over colonized persons through conversion to religious institutions,⁴² the imposition of a rigid gender binary on colonized peoples⁴³ and the criminalization of gender and sexual nonconformity.⁴⁴ The separation of Indigenous children from their communities in territories now comprising Canada and their subjection to imprisonment in a system of sex-segregated residential schools are telling examples of such mechanisms.⁴⁵

16. Colonial occupation also became inextricably linked to capitalism from the time of companies such as the Dutch and British East India companies. The primary objectives of such colonial projects were to extract resources from the colonies for the benefit of the colonizer and to patronize colonized persons in order to retain control.

17. Colonization entailed the imposition of systems of differentiation, hierarchization and domination, with scholars suggesting that, despite the presumed oneness of colonized persons, there were invariably two categories – a modernizing elite and a yet-to-be-modernized peasantry.⁴⁶ The rise of the former is a characteristic of colonial projects, seen in countries where the elite remained in power through the process of decolonization, after which the elite would continue to control societies for resource extraction in order to further commercial interests, in a sort of continuation of the colonial project. In other cases, such as in Colombia, truth and reconciliation mechanisms have noted the use of colonial social norms in nation-building projects, with one of its consequences being the exclusion of LGBT persons from that historical endeavour.⁴⁷

⁴⁰ Sara Shroff, “Operationalizing the ‘new’ Pakistani transgender citizen: legal gendered grammars and trans frames of feeling”, in *Gender, Sexuality, Decolonization; South Asia in the World Perspective*, Ahonaa Roy, ed. (London, Routledge India, 2021), p. 265.

⁴¹ Submission by OCAM-D, p. 2, for thematic report A/HRC/53/37. See also Jean E. Balestrery, “Intersecting discourses on race and sexuality: compounded colonization among LGBTIQ American Indian/Alaskan Natives”, *Journal of Homosexuality*, vol. 59, No. 5 (2012), p. 645.

⁴² Wolfgang Gabbert, “Social and cultural conditions of religious conversion in colonial South-west Tanzania, 1891–1939”, *Ethnology*, vol. 40, No. 4 (2001), pp. 291–308.

⁴³ María Lugones, “The coloniality of gender”, *Worlds & Knowledges Otherwise* (2008), p. 7. Available at https://globalstudies.trinity.duke.edu/sites/globalstudies.trinity.duke.edu/files/file-attachments/v2d2_Lugones.pdf.

⁴⁴ Submission by Global Action for Trans Equality (GATE), p. 2.

⁴⁵ Ibid.

⁴⁶ Dipesh Chakrabarty, “Postcoloniality and the artifice of history: who speaks for ‘Indian’ pasts?”, *Representations*, No. 37, special issue entitled “Imperial Fantasies and Postcolonial Histories” (Winter, 1992), pp. 1–26, p. 18.

⁴⁷ Commission for the Clarification of Truth, Coexistence and Non-Repetition, Colombia, *Mi cuerpo es la verdad: experiencias de mujeres y personas LGBTIQ+ en el conflicto armado* (Bogotá, 2022), p. 296. Available at www.comisiondelaverdad.co/mi-cuerpo-es-la-verdad (in Spanish).

18. Colonial projects rested on certain political strategies, including “political homophobia”, which could be used in several ways for colonizers to further their own interests. The enforcement of gender roles in colonies also coincided with times of “sex panic” or “moral panic” in the global North, where State institutions and non-State actors, including Governments, medical structures and the mainstream media, banded together to oppress groups who did not follow dominant “correct” sexual practices, labelling masturbation as an “unhealthy practice”, passing broad anti-obscenity laws⁴⁸ and equating female sex work with venereal disease, leading to the passing of so-called Contagious Diseases Acts, in which the compulsory inspection of women “suspected of being carriers” was prescribed.⁴⁹ Nineteenth century morality crusades in Western countries focusing on “vices” and their elimination led to the creation of the “sex offender” category, in which the distinctions between non-consensual sexual assault and adult consensual same-sex intimacy were blurred, thereby automatically labelling “homosexual” men as “sex offenders”.⁵⁰

19. Heteronormative views of sexuality instilled by colonial Powers were inextricably linked to racist characterizations of gender and sexuality, and it is suggested that the racialization of gender radically transformed several African societies.⁵¹ In one submission received by the Independent Expert it was stated that: “Within colonial discourse, Black sexuality was positioned as rampant and insatiable, and thus in need of regulation through the policing of Black sexuality and Black persons’ bodies. The threat that Black persons supposedly posed to White minority dominion came to be located specifically in Black female sexuality and the reproductive capacities of Black women through which the assumed threat of overpopulation would arise.”⁵² Similar patterns have been noted in the assimilationist goals that target Indigenous Peoples and, in particular, Indigenous women,⁵³ whose societies are considered as “uncivilized” or “oddities”.⁵⁴ Indeed, in colonial settings (and often in postcolonial settings) the ability to thrive was and is heavily dependent on a person’s ability to assimilate to white, patriarchal and heteronormative customs.⁵⁵ Indigenous women as “givers of life” and mothers, and as heads of family units in matrilineal societies, are viewed as both a “symbolic and physical threat” to colonial agendas.⁵⁶ In submissions received by the Independent Expert, the institutionalized racism in pre-colonial and postcolonial societies in South Africa⁵⁷

⁴⁸ Gayle S. Rubin, “Thinking sex: notes for a radical theory of the politics of sexuality”, in *Pleasure and Danger: Exploring Female Sexuality*, Carole S. Vance, ed. (Boston, Routledge and Kegan Paul, 1984), p. 269.

⁴⁹ Jeffrey Weeks, *Sexuality and its Discontents: Meanings, Myths and Modern Sexualities* (London and New York, Routledge, 1985), p. 49. Available at https://edisciplinas.usp.br/pluginfile.php/4241156/mod_resource/content/1/Weeks_sexuality_its_discontents.pdf.

⁵⁰ Gayle S. Rubin, “Thinking sex: notes for a radical theory of the politics of sexuality”.

⁵¹ Boris Bertolt, “Thinking otherwise: theorizing the colonial/modern gender system in Africa”, *African Sociological Review/Revue Africaine de Sociologie*, vol. 22, No. 1 (2018), pp. 2–17, p. 6. See also Jillian Hernández, “Racialized sexuality: from colonial product to creative practice”, *Oxford Research Encyclopedia of Literature* (28 February 2020).

⁵² Submission by Claire S. Westman, p. 3; and submission by Arnold Ochieng Oginga, p. 2. See also Michel Foucault, *The History of Sexuality: An Introduction* (Pantheon Books, 1978).

⁵³ Submission by Eloise Decoste, p. 2.

⁵⁴ Submission by Zharina Nikko Tomas Casil, p. 6.

⁵⁵ Submission by Reuniting of African Descendants (ROAD), p. 4.

⁵⁶ D. Memee Lavell-Harvard and Jennifer Brant, “Introduction: forever loved”, in *Forever Loved: Exposing the Hidden Crisis of Missing and Murdered Indigenous Women and Girls in Canada*, D. Memee Lavell-Harvard and Jennifer Brant, eds. (Bradford, Ontario, Demeter Press, 2016), p. 3, cited in the submission by Eloise Decoste, p. 2; and submission by ROAD, p. 4.

⁵⁷ Submission by Phoebe E. Sheppard, p. 2.

and Brazil,⁵⁸ where lesbians of colour have historically been targeted for failing to conform to a view of femininity predicated on a heteronormative system, is described.

20. The regulation of sexuality and gender in colonized territories was often carried out through the enactment of laws by which sexual conduct and expressions of gender identity were explicitly regulated. So-called sodomy laws outlawed conduct typified as “buggery”, “carnal knowledge against the order of nature”, “crime against nature”, or “nefarious crime”, depending on the jurisdiction and specific pattern of colonialism of the country concerned. Such terms share a common root in Judeo-Christian tradition and canonic law, according to which non-procreative sexual acts – especially between, but not limited to, individuals of the same sex – were deemed to be “detestable”, “abominable” and a “vice”.⁵⁹ The term “sodomy” is derived from the biblical tale of Sodom and Gomorrah, in the Book of Genesis, and it became dominant in Christian theology in around the eleventh century.⁶⁰

21. Other colonial laws, such as the Code of Municipal Police and Correctional Police of 1791, enacted in France, introduced offences such as “public indecency”⁶¹ and “encouraging debauchery”,⁶² as well as “vagrancy laws”.⁶³ Some of those legal provisions did not directly ban or restrict sexual or gender-divergent conduct, but their application (as seen in French, Spanish and British patterns of colonization) was discriminatory in that it had a disproportionate impact on people living in poverty, gender and sexual minorities and persons with disabilities.⁶⁴

22. Furthermore, colonial Powers used the law to enforce binary norms of gender through expression. In medieval Europe, Elizabethan England and colonial North America, sumptuary laws regulated public attire according to occupation, class and gender.⁶⁵ Such regulations were exported to many countries around the world through the mechanisms of colonial systems, leading to the regulation of practices described as “cross-dressing”. For instance, in the Sudan, laws prohibiting “indecent” or “immoral” dress have been used to punish men who wear women’s clothing, women who wear trousers and men who wear make-up, even as part of their job as actors or models.⁶⁶

23. In addition to sexual orientation and gender identity, the racialized and gendered division of labour,⁶⁷ as well as other factors related to race, migrant status, caste,

⁵⁸ Submission by Brazilian Lesbian Articulation, pp. 2 and 3.

⁵⁹ Douglas E. Sanders, “377 and the unnatural afterlife of British colonialism in Asia”, *Asian Journal of Comparative Law*, vol. 4, No. 1 (2009), pp. 2 and 3.

⁶⁰ Louis Crompton, *Homosexuality and Civilization* (Cambridge, Massachusetts; and London, Belknap Press, 2003), p. 175.

⁶¹ Michael D. Sibalis, “The regulation of male homosexuality in revolutionary and Napoleonic France, 1789–1815” in *Homosexuality in Modern France*, Jeffrey Merrick and Bryant T. Ragan, eds. (New York and Oxford, Oxford University Press, 1996), p. 86.

⁶² Ibid.

⁶³ The Chinese University of Hong Kong, “Vagrancy and vagrancy-type laws in colonial history and today. Available at www.law.cuhk.edu.hk/app/wp-content/uploads/2022/10/Vagrancy-and-Vagrancy-Type-Laws-in-Colonial-History-and-Today.pdf.

⁶⁴ Submission by Amnesty International, p. 7; and The Chinese University of Hong Kong, “Vagrancy and vagrancy-type laws in colonial history and today”.

⁶⁵ See www.icj.org/sogi-casebook-introduction/chapter-seven-gender-expression-and-cross-dressing/#footnote-1; and Matthew Gayle, “Female by operation of law: feminist jurisprudence and the legal imposition of sex” *William and Mary Journal of Women and the Law*, vol. 12, No 737 (Spring, 2006), pp. 737–759, p. 742.

⁶⁶ BBC News, “Cross-dressing men flogged in Sudan for being ‘womanly’”, 4 August 2010; Amnesty International, “Sudan: abolish the flogging of women” (London, 2010); BBC News, “Sudan male models fined for make-up ‘indecent’”, 8 December 2010.

⁶⁷ Rosemary Hennessy, “Queer visibility in commodity culture”, *Cultural Critique*, No. 29 (Winter, 1994–1995), pp. 31–76, p. 69.

religion or Indigenous status, play an important role in determining the impact of colonial capitalism and the rule of law on the rights of LGBT persons. As a result of colonial occupation, laws on same-sex relations have been firmly embedded in the criminal justice system, which is based on individualizing harms committed by “offenders” and suffered by “victims”, thereby neglecting larger structural factors.⁶⁸

24. While the law was a principal means of enforcement, it also formed the basis for complex systems of socialization that included policing, medicine, literature and education, all of which were placed at the service of controlling sexuality and gender in the colonies, which were construed as allegedly being in opposition to European sexual mores.⁶⁹

25. The strict enforcement of laws varied greatly across colonies, and even between those administered by the same colonizing Power. In the literature reviewed, differences in enforcement may account for the differing degrees of permeation of colonial moral ideas into the social fabric, as well as for the survival of diverse traditional practices of sexuality and gender identity among local persons.

IV. Different patterns of colonial regulation of sexual orientation and gender identity

A. Predominantly religious narratives

26. From the late fifteenth century through to the 1850s, “*pecado nefando*” (nefarious sin) was criminalized in Portugal through canon law and royal ordinances.⁷⁰ In the first of those ordinances – the Afonsine ordinances, in force from 1446 to 1514 – “sodomy” was defined as the “filthiest and most offensive sin against God”, wording that was reproduced in subsequent laws.⁷¹ In the Portuguese Criminal Code of 1852 that position was changed, as “sodomy” was not criminalized, but a 1912 reform enforced the criminalization of same-sex relations through the overly broad crimes of “vagrancy” and “mendicancy” and the concept of “vices against nature”.⁷²

27. Similarly, Spain repressed a variety of sexual practices, with special emphasis on those between males,⁷³ in the criminalization of “sodomy” “*pecado nefando*” and “*crimen contra natura*”.⁷⁴ During Spanish colonization, policies were violently

⁶⁸ Jacob Schuman, “Sentencing rules and standards: how we decide criminal punishment”, *Tennessee Law Review*, vol. 83 (2015), p. 1.

⁶⁹ See www.amnesty.org/en/documents/afr01/012/2013/en/.

⁷⁰ António Fernando Cascais, “A homossexualidade nas malhas da lei no Portugal dos séculos XIX e XX”, *International Journal of Iberian Studies*, vol. 29, No. 2 (2016), pp. 95–112, p. 95.

⁷¹ Bruno Rafael Silva Nogueira Barbosa and Robson Antão de Medeiros, “Dos povos nativos ao surgimento dos movimentos sociais: influências dos discursos jurídicos, religiosos e médicos para a construção do conceito de homossexualidade no Brasil”, *Revista de Direito Internacional/ Brazilian Journal of International Law*, vol. 15, No. 3 (2019), p. 274.

⁷² Gustavo Gomes da Costa Santos and Matthew Waites, “Comparative colonialisms for queer analysis: comparing British and Portuguese colonial legacies for same-sex sexualities and gender diversity in Africa – setting a transnational research agenda”, *International Review of Sociology*, vol. 29, No. 2 (2019), p. 304; and submission by NOVA School of Law, p. 2.

⁷³ Emanuele Amodio, “El detestable pecado nefando: diversidad sexual y control inquisitorial en Venezuela durante el siglo XVIII”, *Nuevos Mundos, Mundos Nuevos*, (11 July 2012). Available at <https://doi.org/10.4000/nuevomundo.63177> (in Spanish).

⁷⁴ Martin Nesvig, “The complicated terrain of Latin American homosexuality”, *The Hispanic American Historical Review*, vol. 81, Nos. 3–4 (1 August 2001), pp. 689–729, p. 693. footnote 11. Available at <https://www.umass.edu/legal/Benavides/Fall2005/397U/Readings%20Legal%20397U/12%20Martin%20Nesvig.pdf>.

imposed through the Catholic Church, resulting in the isolation and destruction of local customs and beliefs that did not align with those parameters; the discourse of “sin” and “guilt” was used against Indigenous persons, persons of African descent, women and gender-diverse persons, with the religious-pedagogical discourse prescribing a redeeming heaven for souls anxious to be saved.⁷⁵ Both the Portuguese and Spanish inquisitorial courts applied their “sodomy” laws inconsistently, sometimes to cover anal intercourse alone, and sometimes to include non-procreative sexual acts, such as “bestiality” and masturbation.⁷⁶ For instance, the Inquisition Court of Cartagena in New Granada (present-day Colombia, Ecuador, Panama and Venezuela (Bolivarian Republic of)) prosecuted “homosexual” acts occurring among predominantly African and Indigenous slaves, with those acts labelled as “sodomy” and “sin”.⁷⁷ The penalties for sodomy in both of those empires were severe, including prison, confiscation of property, torture and even death by burning.⁷⁸

B. Predominantly secular narratives

28. The French Revolution was a watershed moment in European history of gender and sexuality, as the French Republic was founded on the values of secularism, liberalism and the strict separation between the public and private spheres.⁷⁹ As a result, with the adoption of new legislation in 1791, “sodomy” was no longer a crime, as it was regarded not only as religious baggage but also as an excessive intrusion of the State into peoples’ private lives. Nevertheless, the law introduced the broadly worded offence of “public indecency”, under which same-sex relations were considered a threat to public order,⁸⁰ still socially clustered together with prostitution, public disorder and deviation.⁸¹ Control of sexuality and gender was entrusted to the police, as the guardians of public order.⁸²

29. A new rationale for the control of gender and sexuality therefore emerged and travelled around Europe, through Napoleonic conquests, and then to colonized territories in the Americas, Africa and Asia. In Senegal, for example, according to colonial French accounts native persons were characterized as having lower levels of moral education and being perverted individuals and criminals.⁸³ Such narratives were perpetuated intentionally to generate support for the French administration of Senegalese persons and the spread of the “*mission civilisatrice*”.⁸⁴ The French protectorate era in Morocco was also marked by newly introduced laws criminalizing illicit sexual intercourse and “lewd or unnatural acts”, with the aim of aligning Moroccan society with French colonial ideals around Christian morality and,

⁷⁵ Submission by the Red de Litigantes LGBT de las Américas, pp. 3 and 4.

⁷⁶ Lee M. Penyak and Zeb Tortorici, “Sins against nature in colonial Latin America”, in *Global Encyclopedia of Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) History*, Howard Chiang, ed. (Farmington Hills, Michigan, Charles Scribner’s Sons, 2019).

⁷⁷ Submission by Colombia Diversa, pp. 3 and 6.

⁷⁸ Emanuele Amodio, “El detestable pecado nefando”; and submission by the Red de Litigantes LGBT de las Américas, p. 6.

⁷⁹ Scott Gunther, *The Elastic Closet: A History of Homosexuality in France, 1942–Present* (Basingstoke, Palgrave Macmillan, 2009), p. 1.

⁸⁰ Michael D. Sibalis, “The regulation of male homosexuality”, p. 86.

⁸¹ Andrew Israel Ross, “Sex in the archives: homosexuality, prostitution, and the Archives de la Préfecture de Police de Paris”, *French Historical Studies*, vol. 40, No. 2 (1 April 2017), pp. 267–290.

⁸² Elwin Hofman, “The end of sodomy: law, prosecution patterns, and the evanescent will to knowledge in Belgium, France, and the Netherlands, 1770–1830”, *Journal of Social History*, vol. 54, No. 2 (Winter, 2020), pp. 480–502, p. 488.

⁸³ Babacar M’Baye, “The origins of Senegalese homophobia”, pp. 116 and 117.

⁸⁴ Submission by Asmae Ourkiya, pp. 2 and 3.

ultimately, controlling the local people by limiting personal autonomy with regard to sexual matters.⁸⁵

30. Colonial regimes did not introduce laws solely to control the local people. For example, although under article 292 of the Penal Code of the Dutch West Indies⁸⁶ adult same-sex relationships were not directly criminalized, in the 1930s, the Christian Party and the Anti-Revolutionary Party complained of increasing instances of same-sex relations among European officials in Indonesia.⁸⁷ From December 1938 to January 1939, 223 Europeans were arrested for same-sex relations;⁸⁸ 171 were found guilty, sentenced and dismissed from their positions, under terms that included “*grote schoonmaak*” (moral cleansing) and “*reinigingsproces*” (purification process).⁸⁹

31. In other cases, the outlawing of same-sex intimacy did not correspond with metropolitan patterns. In Tunisia, for example, there were no references to same-sex relations in laws during the pre-French protectorate era; however, in 1913, almost a century after sodomy laws had been abolished in France, article 230 of the Penal Code of Tunisia was created to criminalize acts of sodomy and “homosexuality”.⁹⁰ The enforcement of the provision often involved coercive anal examination as evidence of a person’s “homosexuality”. To date, article 230 is used by the police to detain and coerce people into “confessing they are gay”, as well as to conduct invasive and intrusive anal examinations, often against the person’s will, to “prove” that they have engaged in same-sex relations (A/HRC/50/27/Add.1, annex, para. 27).

C. Hybrid narratives

32. The criminalization of same-sex relations throughout the British Empire harks back to a 1534 buggery law in Britain, by which “acts of sodomy” were criminalized in an effort to target “supposed sexual immorality” in the Catholic Church.⁹¹ In 1825, the British politician Thomas Babington Macaulay was tasked with drafting laws for the then British colony of the Indian subcontinent.⁹² The motivation behind the same arguably lay in the British colonial policymakers’ perception, cultivated by reports from British explorers, of the pervasiveness of same-sex relations across the colonized world.⁹³ Following the establishment of the Indian Penal Code, a British Member of Parliament, Henry du Pré Labouchère, introduced an amendment to the Offences Against the Person Act of 1861 in Britain to punish “gross indecency” between two men, which was considered to include consensual non-penetrative sexual acts between men, even in private.⁹⁴

33. The Indian Penal Code reflected the widespread adoption of “anti-homosexuality” laws across the British Empire, in particular in late-nineteenth century Asia-Pacific

⁸⁵ Ibid.

⁸⁶ Jonathan I. Israel, *Empires and Entrepots: The Dutch, the Spanish Monarchy and the Jews, 1585–1713* (London, Hambledon Press, 1990), pp. x–xii.

⁸⁷ VOI, “Dutch use natives to eradicate homosexuals in the archipelago” 14 April 2021. Available at <https://voi.id/en/memori/44431>.

⁸⁸ Submission by Free and Equal Rights, p. 1.

⁸⁹ VOI, “Dutch use natives to eradicate homosexuals”.

⁹⁰ Submission by Oumaima Derfoufi, p. 1.

⁹¹ Douglas E. Sanders, “377 and the unnatural afterlife of British colonialism in Asia”.

⁹² Martin L. Friedland, “Codification in the Commonwealth: earlier efforts”, *Commonwealth Law Bulletin*, vol. 18, No. 3 (July 1992), p. 1172.

⁹³ Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism* (New York, December 2008), p. 16. Available at www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf.

⁹⁴ Ibid. p. 20.

and Africa,⁹⁵ but it also reverberated outside of it. In 1871, the provisions of the Code were replicated in a law in the Straits Settlements, a group of British territories comprising modern-day Brunei Darussalam, Malaysia and Singapore;⁹⁶ in 1886, the same provisions were enacted in what was then British Burma, pursuant to which “carnal intercourse against the order of nature” was criminalized.⁹⁷ Thereafter, African colonies, such as Uganda and Kenya, adopted variations of the Indian Penal Code between 1897 and 1902.⁹⁸ The British also criminalized “eunuchs”, an erroneous and reductive homogenous category created for what was otherwise a very diverse social group.⁹⁹ “Eunuchs” were criminalized under the Criminal Tribes Act of 1897 on the basis of Victorian ideals of masculinity.¹⁰⁰ In 1899, the Sudanese Penal Code was enacted, containing provisions that differed to those of other colonies with regard to “unnatural offences”. Section 318 of the Code provided for non-consensual “carnal intercourse against the order of nature” to be punished, while section 319 provided for penalties for only non-consensual acts of “gross indecency”.¹⁰¹

34. Besides the Indian Penal Code, the criminal code of the Australian colony of Queensland, which came into force in 1901, was the second most influential.¹⁰² Under section 208 of that Code, not only were persons who had or intended to have “carnal knowledge” punishable, but so too were those who “permitted” others to have “carnal knowledge” of them, thereby indicating that all parties involved would be criminalized.¹⁰³ The Chief Justice, Henry Cowper Gollan, who drafted the Northern Nigerian Code of 1904, drew heavily on the Queensland Criminal Code. In turn, the Northern Nigerian Code of 1904 was the basis for the Federal Nigerian Code of 1916,¹⁰⁴ which was itself the model followed by Kenya, Nigeria, Nyasaland (now Malawi), Tanganyika (now the United Republic of Tanzania) and Uganda (replacing the earlier Indian Penal Code), and later by Fiji, the Gambia, New Guinea,¹⁰⁵ Northern Rhodesia (now Zambia), Seychelles, Solomon Islands and Zanzibar.¹⁰⁶ The Queensland Criminal Code was also used by the British Colonial Office in Cyprus and to influence colonial laws in Palestine.¹⁰⁷

35. In Nigeria, the vagrancy law in the Nigerian Criminal Code of 1916, introduced during British colonial rule, has been described as being “part of the colonial legacy ...

⁹⁵ Ibid, p. 19.

⁹⁶ Dominic Chan, “Oral sex: a case of criminality or morality?”, *Singapore Law Gazette*, September 2004, cited in Human Rights Watch, *This Alien Legacy*, p. 21.

⁹⁷ Submission by ILGA World, p. 7.

⁹⁸ James S. Read, “Criminal law in the Africa of today and tomorrow”, *Journal of African Law*, vol. 17, No. 1 (Spring, 1963), pp. 5–17, cited in Human Rights Watch, *This Alien Legacy*, p. 21.

⁹⁹ Dipika Jain, “Shifting subjects of State legibility: gender minorities and the law in India”, *Berkeley Journal of Gender, Law & Justice*, vol. 32, No. 1 (2017); Aniruddha Dutta, “Contradictory tendencies: the Supreme Court’s NALSA judgment on transgender recognition and rights”, *Journal of Indian Law and Society*, vol. 5 (Monsoon, 2014), pp. 226–236; and Gee Imaan Semmalar, “Unpacking solidarities of the oppressed: notes on trans struggles in India”, *Women’s Studies Quarterly*, vol. 42, No. 3/4 (Autumn/Winter, 2014), pp. 286–291.

¹⁰⁰ Walter Penrose, “Hidden in history: female homoeroticism and women of a ‘third nature’ in the South Asian past”, *Journal of the History of Sexuality*, vol. 10, No. 1 (January 2001), pp. 3–39.

¹⁰¹ Alan Gledhill, *The Penal Codes of Northern Nigeria and the Sudan* (London, Sweet & Maxwell; Lagos, African Universities Press, 1963), p. 443, cited in Human Rights Watch, *This Alien Legacy*, p. 22.

¹⁰² Martin L. Friedland, “Codification in the Commonwealth: earlier efforts”, p. 1177, cited in Human Rights Watch, *This Alien Legacy*, p. 22.

¹⁰³ Human Rights Watch, *This Alien Legacy*.

¹⁰⁴ H. F. Morris, “How Nigeria got its Criminal Code”, *Journal of African Law*, vol. 14, No. 3 (Autumn, 1970), pp. 137–54, cited in Human Rights Watch, *This Alien Legacy*, p. 23.

¹⁰⁵ Submission by Benjamin Hegarty and others, p. 1.

¹⁰⁶ See <https://legalheritage.sclqld.org.au/griffith-the-code-maker>.

¹⁰⁷ Ibid.

and used to purge public spaces of unwanted groups”.¹⁰⁸ In 1929, Cyprus incorporated the British Criminal Law Amendment Act of 1885 by which “male homosexuality” was made a crime.¹⁰⁹ As recent as 1969, the British colonial government in Trinidad and Tobago restricted immigration of LGBT persons through the Immigration Act of 1969, in which “homosexuals” and “persons living on the earnings of homosexuals” were identified as categories who were prohibited from entering the territory, unless they had been issued an exemption certificate by the Minister of National Security.¹¹⁰ Such laws have been termed as a “tool of social control” that preserve prevailing gender norms and reinforce discriminatory hierarchies using legally sanctioned harassment and arrest of persons characterized as “deviant” by law enforcement.¹¹¹

V. Impact of colonialism on sexual orientation and gender identity

36. In the decades since the adoption of the Charter of the United Nations and the Universal Declaration of Human Rights, social, cultural and religious developments have influenced the ways in which colonial laws and policies on gender and sexuality have been interpreted, revised and amended. The resulting trajectories vary considerably, as some States have advanced in the work of deconstructing frameworks on the basis of international human rights standards, notably through decriminalization, while others have placed themselves at the forefront of human rights protection by enshrining anti-discrimination protections on the ground of sexual orientation and/or gender identity at the constitutional level.

37. In some cases, even after independence, colonial dynamics appear to have had a significant influence on law and policy reform processes.¹¹² Brazil, for example, adopted approaches similar to those existing in Portugal for its Imperial Criminal Code of 1830, introducing crimes “against morality and decency”, as well as offences of “vagrancy” and “indecent exposure”. Police forces harnessed those legal provisions to “‘cleanse’ cities of effeminate or ‘scandalous’ men and overly conspicuous she-males”.¹¹³ Cameroon and Senegal, both former French colonies, criminalized same-sex relations after gaining independence in 1960,¹¹⁴ legal reforms that have been described by scholars as “efforts by local politicians to ‘localize’ penal codes inherited from colonial overlords”.¹¹⁵ In Cameroon, the reforms can be rationalized as having originated from a “deep-seated African nationalism” that prioritizes heterosexual relationships as part of a “pan-African redemptive mission to recover the lost African self” after colonization.¹¹⁶

¹⁰⁸ University of Miami School of Law, “Clinic addresses gender impacts of vagrancy laws before African Court on Human and Peoples’ Rights”, 9 November 2019. Available at <https://news.miami.edu/law/stories/2019/09/clinic-addresses-gender-impacts-of-vagrancy-laws-before-african-court-on-human-and-peoples-rights.html>.

¹⁰⁹ Submissions by the Human Rights Platform and Queer Cyprus Association, pp. 1 and 2.

¹¹⁰ Submission by Madison Ali, p. 4.

¹¹¹ University of Miami School of Law, “Clinic addresses gender impacts of vagrancy laws”.

¹¹² Submission by the International Commission of Jurists, p. 7.

¹¹³ James N. Green, “Homossexualidades e a história: recuperando e entendendo o passado”, *Revista Gênero*, vol. 12, No. 2 (2012), p. 68.

¹¹⁴ Human Rights Watch, *This Alien Legacy*, p. 7.

¹¹⁵ David J. Frank, Steven Boutcher and Bayliss Camp, “The reform of sodomy laws from a world society perspective”, in *Queer Mobilizations: LGBT Activists Confront the Law*, Scott Bailey, Mary Bernstein, and Anna-Maria Marshall, eds. (New York, NYU Press, 2009), p. 130.

¹¹⁶ Basile Ndjio, “Post-colonial histories of sexuality: the political invention of a libidinal African straight”, *Africa: Journal of the International African Institute*, vol. 82, No. 4 (November 2012), pp. 609–631, p. 626.

38. Colonial trends of criminalization also affected policies in countries that had not been colonized. For instance, in the nineteenth century, Japan and Thailand amended laws in an effort to mirror Western systems and as a sign of modernization. Those efforts included the adoption of laws against same-sex relations, which Japan criminalized in 1873 in the Meiji Legal Code, while Thailand (then known as Siam) borrowed directly from section 377 of the Indian Penal Code for its Criminal Code of 1908 banning acts “against human nature”.¹¹⁷

39. In conjunction with other laws oppressing LGBT persons, the effects of sumptuary laws banning cross-dressing, with the aim of regulating diverse gender identities and expressions, were seen in British colonies across the world. For example, criminal provisions prohibiting same-sex relationships were introduced in 1936 in the Federated Malay States, as reflected in section 377 of the Criminal Code.¹¹⁸ The Government of Malaysia uses those provisions, in combination with sharia law, to prohibit “cross-dressing”.¹¹⁹

A. Continued criminalization in violation of international human rights law and standards

40. The mandate holder has produced evidence that the criminalization of consensual same-sex intimacy between adults and of gender diversity and expression violates the obligations of States under international law, including the obligation to protect self-determination, dignity, privacy, equality and freedom of expression and to guarantee non-discrimination. Criminalization of same-sex relations fuels stigma, legitimizes prejudices and exposes individuals to family and institutional violence, thereby ultimately giving rise to human rights abuses, such as hate crimes, death threats, torture, use of the death penalty, and extrajudicial executions.¹²⁰

41. A recent study concluded that former British colonies were more likely to maintain laws criminalizing same-sex relations than other former colonies or States in general.¹²¹ For example, Bangladesh, Brunei Darussalam, the Gambia, Ghana, Jamaica, Kenya, Malawi,¹²² Malaysia, Myanmar, Nigeria, Pakistan, South Sudan, Sri Lanka, Uganda and the United Republic of Tanzania still preserve the anti-sodomy laws enacted during the colonial period.¹²³ Furthermore, criminal laws in countries such as Dominica, Grenada, Guyana, Saint Lucia and Saint Vincent and the Grenadines still retain “buggery” and “indecent” provisions dating from the colonial era.¹²⁴

¹¹⁷ Douglas E. Sanders, “377 and the unnatural afterlife of British colonialism in Asia”, p. 14.

¹¹⁸ Amnesty International, “Malaysia: end discrimination and backlash against LGBTI people”, 11 July 2018. Available at www.amnesty.org/en/documents/asa28/8770/2018/en/; and Human Dignity Trust, “Malaysia”. Available at www.humandignitytrust.org/country-profile/malaysia/ (accessed on 31 May 2023).

¹¹⁹ Amnesty International, “Malaysia: end discrimination and backlash against LGBTI people”.

¹²⁰ A/HRC/38/43, paras. 20, 52–57 and 90.

¹²¹ Enze Han and Joseph O’Mahoney, “British colonialism and the criminalization of homosexuality”, *Cambridge Review of International Affairs*, vol. 27, No. 2 (3 April 2014), pp. 268–88.

¹²² Adrian Jjuuko and Monica Tabengwa, “Expanded criminalisation of consensual same-sex relations in Africa: contextualising recent developments”, in *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, Resistance and Hope*, Nancy Nicol and others, eds. (University of London Press, 2018), paras. 72 ff., cited in submission by University of Bayreuth, p. 2.

¹²³ ILGA World, “Legal frameworks: criminalisation of consensual same-sex sexual acts”, database. Available at <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts>. For Myanmar, see submission by ASEAN SOGIE Caucus, p. 2.

¹²⁴ Submission by Human Rights Watch, p. 1.

42. The Independent Expert has called for all such provisions to be repealed as part of the responsibilities of States Members of the United Nations under international human rights law. At the time of writing the present report, 67 countries still criminalized same-sex consensual acts, often referring explicitly to sexual intimacy between men;¹²⁵ 41 countries criminalized sexual intimacy between women;¹²⁶ and 20 countries explicitly criminalized and persecuted trans persons through laws banning “cross-dressing”, “impersonation” and the wearing of “disguises”.¹²⁷ Unequivocally, those countries are in violation of international human rights law.

43. The mandate holder has also provided evidence of the detrimental impacts of the continued criminalization of sexual orientation and gender identity. According to a recent study carried out in 10 countries of sub-Saharan Africa, HIV/AIDS prevalence among gay men and men who have sex with men in countries that criminalize same-sex intimacy is five times higher than in countries that do not have such laws. In countries with recent prosecutions, HIV/AIDS prevalence is almost 12 times as high.¹²⁸ The impact of criminalization is felt even in contexts where de facto moratoriums are in place, as the law is used by law enforcement as a tool to persecute, blackmail and harass members of the LGBT community. Maintaining such laws therefore has the effect of fostering an ongoing hidden and dire environment for LGBT people and has a significant impact on their access to goods and services, employment, education and health.

44. Colonial legislation and social mores lie at the origin of current legal frameworks that provide for discrimination against or persecution of LGBT persons. However, continued criminalization resulting from deliberate or negligent legal reform (or, worse, reforms that set the applicable standards even lower), the responsibility lies with the State once it has attained self-governing status, including through the methods described under principle VI of the principles contained in General Assembly resolution 1541 (XV).

45. In modern times, the colonial vestiges penalizing diversity in sexual orientation and gender identity have repeatedly been defended by politicians. In 2015, the then President of Zimbabwe, Robert Mugabe, criticized Western nations for pressing for human rights of LGBT persons that were “contrary to our values, norms, traditions and beliefs”;¹²⁹ in 2010, the then Prime Minister of Jamaica, Bruce Golding, stated that recognition of gay persons’ rights would undermine “the basic fabric of a society”;¹³⁰ and, in 2023, the President of Uganda, Yoweri Museveni, sought to visibly oppose Western nations¹³¹ by stating that the West should stop giving lectures, while at the same time signing a bill instituting State-sponsored persecution and arbitrary killings.¹³² According to one submission, “anti-gender actors are using the

¹²⁵ See <https://lawsandpolicies.unaids.org/summarytables?lan=en>.

¹²⁶ Human Dignity Trust, “Breaking the silence: criminalisation of lesbians and bisexual women and its impacts”, May 2016. Available at www.humandignitytrust.org/wp-content/uploads/resources/Breaking-the-Silence-Criminalisation-of-LB-Women-and-its-Impacts-FINAL.pdf.

¹²⁷ Human Dignity Trust, “Map of countries that criminalise LGBT People” (accessed on 10 July 2023); and submission by the Joint United Nations Programme on HIV/AIDS, p. 1.

¹²⁸ Submission by the Joint United Nations Programme on HIV/AIDS, p. 2.

¹²⁹ Rose Troup Buchanan, “Robert Mugabe tells UN General Assembly: ‘We are not gays!’”, *The Independent*, 29 September 2015. Available at www.independent.co.uk/news/people/robert-mugabe-tells-un-general-assembly-we-are-not-gays-a6671316.html.

¹³⁰ Big Think, “Is Jamaica homophobic?”, video. Available at <https://bigthink.com/videos/is-jamaica-homophobic/>.

¹³¹ Submission by the Global Interfaith Network for People of all Sexes, Sexual Orientations, Gender Identities and Expressions, p. 3.

¹³² CIVICUS, “Commonwealth Africa: LGBTIQ+ rights under attack – anti-rights reaction in Ghana, Kenya and Uganda seeks to erase LGBTIQ+ people”, CIVICUS Lens, 19 April 2023. Available at <https://lens.civicus.org/commonwealth-africa-lgbtqi-rights-under-attack/>.

language of decolonization in ways that ultimately reinforce colonial-era ideologies in which notions of racial hierarchy were entangled with cis-heteronormative constructions of the gender binary, hierarchy, and the nuclear family model”.¹³³

46. The Special Rapporteur in the field of cultural rights has addressed the instrumentalization of anti-colonial discourse to justify the exclusion of certain groups from the enjoyment of their human rights. In the report entitled “Universality, cultural diversity and cultural rights” (A/73/227), the Special Rapporteur noted that anti-rights actors have been using the term “culture” as a “trope for cultural relativism in human rights debates” (ibid., para. 51), and that those working to defeat colonialism “were fighting for more freedom, not less; for more rights, not less; for the right to be considered equally human and entitled to equal rights, not inherently different and entitled to different rights” (ibid., para. 49). Moreover, the misuse of colonial history to “justify contemporary human rights abuses” was an insult to the memory of those who fought against it and served only to undermine their achievements (ibid.).

47. Today, some countries still retain remnants of colonial institutions, such as the British Judicial Committee of the Privy Council, which acts as the final court of appeal in seven Caribbean countries, three other States Members of the United Nations and a series of overseas territories.¹³⁴ The Judicial Committee is described as “the last remnant of British colonialism holding effective imperial power”, the ethos of which is evidenced by a recent decision of 2022 restricting LGBT persons’ enjoyment of rights in Trinidad and Tobago by using a conservative interpretation of the “general savings clause” to prevent a constitutional challenge to colonial laws.¹³⁵ The Caribbean Court of Justice has declared a similar savings clause to be “an unacceptable diminution” of freedoms, depriving persons “in perpetuity” of their fundamental rights,¹³⁶ and the Inter-American Court of Human Rights has found that a similar clause effectively denies citizens the right to seek judicial protection against human rights violations, including violations of their right to life, and is therefore at the source of the State’s failure to meet its obligations under article 2 of the American Convention on Human Rights.¹³⁷

B. Alignment of legislation with international human rights law and standards

48. Throughout the twentieth century there has been a global trend towards the decriminalization of same-sex intimacy occupiers, which remains a work in progress. Following the publication of the so-called Wolfenden report in 1957,¹³⁸ consensual “homosexual conduct” had been decriminalized in England and Wales by 1967. Several African countries, including Burkina Faso, the Central African Republic, Côte d’Ivoire, Madagascar, Mali and the Niger, attained independence from France and adopted criminal codes that did not criminalize same-sex relations. Former British colonies, on average, decriminalized same-sex relations long after countries that had not been colonized or those following different colonization patterns had done so. Hong Kong repealed its sodomy laws in 1991 and India struck down its sodomy provision in 2018. Starting in the 2010s, former colonies, including Botswana, Fiji, Lesotho, Seychelles and Singapore, successfully decriminalized same-sex relations

¹³³ Submission by the United Nations Research Institute for Social Development, p. 1.

¹³⁴ See www.jcpc.uk/about/role-of-the-jcpc.html#crowndependencies.

¹³⁵ Other decisions in 2022 also concerned the overseas territories of Bermuda and Cayman Islands. Submission by Colours Caribbean, annex I, p. 4.

¹³⁶ See <https://caribbeanddeathpenaltyresearch.files.wordpress.com/2018/07/full-judgment-2018-ccj-19-aj.pdf>, paras. 58 and 59.

¹³⁷ See www.corteidh.or.cr/docs/casos/articulos/seriec_169_ing.pdf, paras. 79 and 80.

¹³⁸ See www.bl.uk/collection-items/wolfenden-report-conclusion.

and, in the Caribbean, Antigua and Barbuda, Barbados, Belize, Saint Kitts and Nevis, and Trinidad and Tobago and all decriminalized same-sex intimacy between 2016 and 2022. Within this process, the key to success has been long-term strategic thinking by civil society and the role of courts and legislatures in decolonizing their legal frameworks and anchoring their democracies in human rights.

49. Post-apartheid South Africa was the first country to explicitly prohibit discrimination on the grounds of gender and sexual orientation in its Constitution,¹³⁹ described by its Supreme Court as “‘transformative’ ... to ensure that, by the realisation of fundamental socio-economic rights, people disadvantaged by their deprived social and economic circumstances become more capable of enjoying a life of dignity, freedom and equality that lies at the heart of our constitutional democracy.”¹⁴⁰

50. In Fiji, following a landmark 2005 ruling in *Nadan and McCoskar v. the State of Fiji*¹⁴¹ that struck down sodomy laws so that they apply only to non-consensual sexual acts, the Crimes Decree 2009 entered into force in 2010 as an anti-discrimination law, formally decriminalizing private, consensual same-sex sexual activity.¹⁴² In 2015, Fiji further expanded its non-discrimination protections through its Constitution, thereby prohibiting discrimination on the ground of sexual orientation, gender identity and gender expression.¹⁴³

VI. Practices with regard to reparations and redress

51. Debates have emerged in the fields of international law and international human rights law concerning the legality and viability of reparations for gross human rights violations, including colonialism and slavery. From the perspective of legal analysis, the duty to provide reparation is the consequence of a State’s breach of its international obligations and has both backward- and forward-looking dimensions, namely cessation and non-repetition.¹⁴⁴

52. The Caribbean region has been among the active proponents of postcolonial reparatory justice. In 2013, Caribbean Heads of Governments established the Reparations Commission of the Caribbean Community with a mandate to establish the moral, ethical and legal case for the payment of reparations by the Governments of all the former colonial Powers.¹⁴⁵ In a lamentable example of the reiteration of wrongs committed against some of the communities most affected by colonial and postcolonial legislation, however, the resulting political statement did not even mention persons affected by violence and discrimination based on sexual orientation and gender identity.

53. States must end the continuation of human rights violations, such as those created by legislation criminalizing same-sex intimacy or gender identity, in accordance with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General

¹³⁹ Submission by the Government of South Africa, p. 3.

¹⁴⁰ Constitutional Court of South Africa, *Road Accident Fund and Another v. Medyide*, Case No. CCT10/10, Judgment, 30 September 2010, para. 125.

¹⁴¹ High Court of Fiji at Suva, *Nadan and McCoskar v. State of Fiji*, Case Nos. HAA0085 and 86.2005, Judgment, 26 August 2005.

¹⁴² See www.humandignitytrust.org/lgbt-the-law/a-history-of-criminalisation/.

¹⁴³ *Ibid.*

¹⁴⁴ See https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

¹⁴⁵ Submission by the Caribbean Programme of Outright International, p. 6; Reparations Commission of the Caribbean Community, “About us”. Available at <https://caricomreparations.org/about-us/> (accessed 24 May 2023).

Assembly in its resolution 60/147. The Independent Expert applauds all States who have done so, recalling the extraordinary words of the Supreme Court of India in the case of *Navtej Singh Johar v. Union of India*,¹⁴⁶ through which it famously decriminalized same-sex intimacy in India:

A hundred and fifty-eight years ago, a colonial legislature made it criminal, even for consenting adults of the same gender, to find fulfilment in love. The law deprived them of the simple rights as human beings to live, love and partner as nature made them ... Eighty seven years after the law was made, India gained her liberation from a colonial past. But Macaulay's legacy – the offence under Section 377 of the Penal Code – has continued to exist for nearly 68 years after we gave ourselves a liberal Constitution. Gays and lesbians, transgenders and bisexuals continue to be denied a truly equal citizenship seven decades after Independence.¹⁴⁷

...

Citizens of a democracy cannot be compelled to have their lives pushed into obscurity by an oppressive colonial legislation.¹⁴⁸

54. Public apologies form part of the “satisfaction” element of reparations and are meant to contribute to establishing the truth. For example, on 17 April 2018, the Prime Minister of the United Kingdom of Great Britain and Northern Ireland expressed deep regret for the fact that discriminatory legislation had been introduced across the Commonwealth and the resulting “legacy of discrimination, violence and even death that persists today”.¹⁴⁹ The Independent Expert valued that statement highly, noting that it included both acknowledgment of the facts and acceptance of responsibility (A/HRC/38/43, para. 76); he is persuaded that it has been a valuable building block in the process of eradication of violence and discrimination based on sexual orientation and gender identity, as proven in the reference made by one of the Justices, Indu Malhotra, to that apology in the *Navtej Singh Johar* case.¹⁵⁰

55. The Commission for the Clarification of Truth, Coexistence and Non-Repetition of Colombia represents an example of good practice. In its 2022 report, it gave considerable weight to the analysis of the colonial past and dedicated substantial analysis to its consequences in terms of the violence and discrimination to which LGBT persons have been disproportionately exposed during the armed conflict and recommended (within an broad catalogue of reparation measures) that State officials carry out acts of acknowledgment of the historical violence suffered by LGBT persons.¹⁵¹ Similar exercises are possible in all latitudes, if there is sincere political will. Studies of reconciliation events in Australia, New Zealand and the United States of America have shown that the most effective decolonizing events “stem from Indigenous-led grass-roots campaigns, work across cultures and carry an element of risk”, as they fully acknowledge historical atrocities.¹⁵²

¹⁴⁶ Supreme Court of India, *Navtej Singh Johar v. Union of India*, Writ petition (criminal) No. 76 of 2016, Judgment, 6 September 2018.

¹⁴⁷ *Ibid.*, pp. 267 and 268.

¹⁴⁸ *Ibid.*, p. 337.

¹⁴⁹ Pippa Crerar, “Theresa May says she deeply regrets Britain’s legacy of anti-gay laws”, *The Guardian*, 17 April 2018. Available at www.theguardian.com/world/2018/apr/17/theresa-may-deeply-regrets-britain-legacy-anti-gay-laws-commonwealth-nations-urged-overhaul-legislation.

¹⁵⁰ *Navtej Singh Johar v. Union of India*, p. 452.

¹⁵¹ See <http://comisiondelaverdad.co/mujeres-y-personas-lgbtqi> (in Spanish).

¹⁵² Alexandra Roginski, “‘Settler Colonialism and (Re)conciliation: frontier Violence, Affective Performances and Imaginative Refoundings’ by Penelope Edmonds” (book review), *Aboriginal History Journal*, vol. 41 (2017), p.180. Available at <https://press-files.anu.edu.au/downloads/press/n4117/pdf/book.pdf#page=201>.

56. In its general recommendation No. 39 (2022) on the rights of Indigenous women and girls, the Committee on the Elimination of Discrimination Against Women noted that lesbian, bisexual, trans, intersex and Indigenous women and girls regularly face intersecting forms of discrimination because of their identities, including as a result of the legacy of colonialism. The Working Group of Experts on People of African Descent, in its report entitled “The urgency of now: systemic racism and the opportunities of 2021” (A/76/302, para. 93), has also recommended a starting point for reflection on reparations by looking back into the archives on slave trade, enslavement and colonialization to determine the links between colonialism, systemic racism and some of the challenges that people of African descent face, such as increased vulnerability to poverty, economic inequality and environmental harms. It was stated in one submission that “reparatory justice has its main focus on racial inequalities existing in formerly colonized countries as a lasting legacy of colonialism”.¹⁵³

57. Several submissions called for in-depth study of and reflection on international responsibility resulting from criminalizing laws and current constitutional frameworks that, like in the Caribbean, prevent judicial scrutiny,¹⁵⁴ including dimensions resulting from the framework established under Chapter IX of the Charter of the United Nations. The Independent Expert encourages that exploration, while noting that some immediate action is a must; under international human rights law, there can be no justification for the continued criminalization of same-sex intimacy or gender diversity.

58. In May 2023, other actions were outlined by the Independent Expert who joined 60 other United Nations anti-racism mechanisms and global and regional human rights experts in calling upon States to adopt intersectional, non-binary approaches to public policy that address the needs of LGBT persons and to involve them in the development of policies that affect them, including, where security is guaranteed, by collecting disaggregated data to take into account their declared race, ethnicity and social status; developing a broader and authentic understanding of how racism and LGBT-phobia intersect; addressing racial and ethnic disparities in access to goods, facilities and services for LGBT and gender-diverse individuals; and understanding the impact and legacy of colonialism on inequalities within and between countries, nation-building and the exclusion of these persons.¹⁵⁵

59. In several submissions received by the Independent Expert it was noted that an approach based on the identification of challenges faced by key populations within the Sustainable Development Goals might be a technical and depoliticized way to address discrimination against sexual and gender minorities. It was also noted that, from an intersectional perspective, the adaptive use of frameworks such as the Durban Declaration and Programme of Action can significantly address discrimination based on sexual orientation and gender identity. In the words of one scholar, “gender reaches into disability; disability wraps around class; class strains against abuse; abuse snarls into sexual orientation; and sexual orientation folds on top of race, with everything finally piling into a single human body” (A/HRC/47/28, para. 15).¹⁵⁶

60. In the present analysis, it is important to be cognizant of the language of rights in the context of sexual orientation and gender identity, which tends to be universally

¹⁵³ Submission by the University of Pretoria, p. 7.

¹⁵⁴ Submission by Colours Caribbean, annex I, p. 7.

¹⁵⁵ Office of the United Nations High Commissioner for Human Rights, “States must tackle racism and stigma against LGBT persons”, public statement, 16 May 2023. Available at www.ohchr.org/en/statements-and-speeches/2023/05/states-must-tackle-racism-and-stigma-against-lgbt-persons.

¹⁵⁶ Eli Clare, *Exile and Pride: Disability, Queerness, and Liberation* (Cambridge, South End Press, 1999), p. 123.

recognized in accordance with Western standards, in particular the acronym LGBT and some of its variations.¹⁵⁷ For example, westernized images that universalize “the closet” as a system of oppression based on sexual orientation and gender identity are hardly representative of communities living in poverty or homelessness everywhere, including in the global North. Colonial aims of “civilization” should not find a place within the common objective of ensuring that every human being lives free from violence and discrimination based on sexual orientation and gender identity. This implies actively resisting views of the global West or North as an archetype of inevitable progress, while framing the global South or East as backwards.¹⁵⁸ This directly ties into a critique of human rights frameworks, which, perhaps counterintuitively, may exacerbate inequality.¹⁵⁹

61. In the context of gender identities, the use of “human rights” discourses in “granting” rights to gender-diverse persons has been seen to confine diversity to identities that are “palatable by the state” and “legally legible”, thereby causing further marginalization and rendering other diverse identities invisible.¹⁶⁰ To combat the socialization of colonial mores regarding sexual orientation and gender identity, intersectional perspectives considering race, migration status, caste, religion and Indigenous status, among others, are imperative in order to understand holistically the impacts of colonial capitalism and colonial legal frameworks on protections against violence and discrimination based on sexual orientation and gender identity.

VII. Conclusions and recommendations

62. Diversity in sexual orientations and gender identities has existed everywhere and throughout recorded history. Most colonial projects regulated sexuality and gender as part of their broader enterprise to dominate peoples and territories, and colonization processes account for various forms of violence and discrimination against LGBT individuals.

63. Colonial oppression, inextricably tied to colonial capitalism, imposed systems of differentiation, hierarchization and domination to exercise strict control over colonized persons. This was done through conversion to the colonizer’s religious institutions, the imposition of a rigid gender binary on colonized persons and the criminalization of gender and sexual nonconformity. Colonial projects were particularly successful in concretizing political strategies, such as political homophobia and the imposition of racialized, heteronormative views of sexual orientation and gender identity, often regulated through laws that explicitly or implicitly targeted sexual conduct and expressions of gender identity. Such laws were at the base of complex systems of socialization that included policing, medicine, literature and education.

64. Many States have made progress in deconstructing frameworks on the basis of international human rights standards, notably through decriminalization; some have enshrined protections against discrimination based on sexual orientation and gender identity at the constitutional level, while others have retained or entrenched colonial-era legislation. There is no justification for

¹⁵⁷ Stewart Chang, “The postcolonial problem for global gay rights”, *Boston University International Law Journal*, vol. 32, No. 309 (2014).

¹⁵⁸ Katherine M. Franke, “Dating the State: the moral hazards of winning gay rights”, *Columbia Human Rights Law Review*, vol. 49, No. 1 (Autumn, 2012).

¹⁵⁹ Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Cheltenham, Edward Elgar Publishing, 2018).

¹⁶⁰ Dipika Jain and Debanuj DasGupta, “Law, gender identity, and the uses of human rights: the paradox of recognition in South Asia”, *Journal of Human Rights*, vol. 20, No. 1 (2021), pp. 110–126.

perpetuating the exclusion of persons, communities and populations from the full enjoyment of their human rights based on their sexual orientation or gender identity, and the review of colonial obstacles should be seen as an integral part of the global objective of decolonization that is one of the key objectives of the United Nations.

65. The Independent Expert recommends that States:

(a) Repeal or reform laws, policies and practices that criminalize consensual same-sex intimacy and gender identity and expression. Legal reform must be undertaken efficiently and be guided by international human rights law. States should take stock of other laws, policies and practices that may have a negative impact on people based on the basis of their sexual orientation and gender identity, such as laws on vagrancy, public decency or morality;

(b) Remove structural barriers to access to justice, such as the savings clauses found in legislation in several Caribbean countries that are obstacles to gaining access to justice in relation to human rights violations;

(c) Adopt effective legislation and policy frameworks for the legal recognition of gender identity on the basis of best practice with regard to self-identification and self-determination;

(d) Adopt affirmative anti-discrimination measures, including laws, policies and other relevant actions, established through a human rights-based approach, in the health, education, employment and housing sectors and in relation to political participation;

(e) Adopt effective measures to provide universal, free and affordable health care for LGBT and other gender-diverse persons and to enable them to obtain gender-affirmative care and gain access to sexual and reproductive health care;

(f) Adopt affirmative protections and anti-discrimination legislation to end practices of conversion for LGBT and other gender-diverse persons;

(g) Undertake legal reform to provide for the full and public participation of LGBT and other gender-diverse persons in all aspects of social life, including to ensure the recognition of the human rights of persons belonging to non-heteronormative family formations;

(h) Nurture spaces and promote research for in-depth study of and reflection on international responsibility resulting from laws criminalizing diversity in sexual orientation and gender identity, including ways in which the eradication of colonialism, a principal objective of the United Nations, and the institutional and legal frameworks for decolonization put in place by Member States can play a role in facilitating the full enjoyment of human rights by LGBT and other gender-diverse persons;

(i) Adopt intersectional, non-binary approaches to public policy that address the needs of LGBT and other gender-diverse persons in their full diversity and involve them in the development of relevant policies. Where data security is guaranteed, this includes collecting disaggregated data that takes into account their declared race, ethnicity and social status, and understanding the colonial impact and legacy of inequalities within and between countries, nation-building and exclusion of populations;

(j) Decolonize and indigenize existing categorizations used to define and organize gender and sexuality diversity by creating space for the emergence of geographically and culturally specific linguistic terms that embody strong

cultural contexts and are considered more connected to the lived experience of gender and sexually diverse persons; and cultivate space on the international stage for the development, elevation and promotion of human rights relating to Indigenous gender and sexuality diversity, including by supporting inclusive interpretations of international human rights instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples;

(k) Conduct sensitization and awareness-raising campaigns for the general public, journalists, public officials, the judiciary, law enforcement officials and medical professionals in order to promote respect for diversity, including gender identity and sexual orientation;

(l) Engage in international cooperation and partnerships to exchange best practices, expertise and resources on addressing discrimination and violence based on sexual orientation and gender identity.
