



COLONIALISM AND SEXUAL ORIENTATION AND GENDER IDENTITY

**SUBMISSION TO THE INDEPENDENT EXPERT ON PROTECTION
AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL
ORIENTATION AND GENDER IDENTITY**

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INTRODUCTION

In response to the call for contributions¹ by the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Amnesty International puts forward this submission for consideration in the upcoming thematic report on colonialism and sexual orientation and gender identity to be presented at the 87th session of the General Assembly.

Today 62 countries across the world have laws that criminalize same-sex conduct, many of which trace their origins back to colonialism.² These laws often overlap and intersect with other criminal provisions that discriminate against LGBTI people. Some of these laws directly discriminate against gay and bisexual men or lesbian and bisexual women, when they specifically criminalize same-sex sexual conduct. In other instances, these laws indirectly discriminate against LGBTI people as their implementation has a disproportionate impact on them, as well as on other marginalized communities, such as people experiencing poverty or sex workers. Despite these complexities, many of these laws are part of the legacy of the system of racial domination that colonial powers imposed on their colonies. While these laws discriminate against all LGBTI people, their negative impact intersects with other systems of oppression, thus resulting in a disproportionate impact on racialized LGBTI people, including LGBTI migrants and refugees.³ It is of the utmost importance to analyse the discriminatory impact of these laws through the historical context that led to their adoption, as well as by accounting for the linkages between past and present human rights violations.

However, the devastating impact of colonization is not limited to these laws, for it has had a more far-reaching role in shaping how gender and sexuality are understood today. The governance and disciplining of non-normative experiences of sexuality and gender identity and expression played a crucial role in justifying the colonization project. Colonization was often justified as necessary to 'correct', 'modernize', and 'civilize' diverse practices of gender and sexuality within different populations, which were seen as 'sexual perversion' and as a sign of 'backwardness' and 'savagery'.⁴ Heteronormativity and rigid gender binaries unilaterally introduced by colonial powers through laws, policing, field of medicine, literature and education were meant to discipline and control this 'sexual perversion' of the colonies construed in opposition to European sexual mores.⁵

A range of laws contributed to establishing these systems of social control, surveillance and 'sanitization' of public spaces. For example, to curb the diverse forms of intimacies that existed between men in pre-colonial contexts and to guard the European society against the 'moral contagion of homosexuality', Section 377 which criminalized 'carnal intercourse against the order of nature', was first introduced in the Indian Penal Code in 1860 and subsequently spread to other parts of British Empire.⁶ Many laws that continue to criminalize same-sex sexual conduct till today can be traced back to this law. Other laws criminalized 'cross-dressing' (being a man or a woman and dressing in female and male attire respectively) and 'gross indecency' (which criminalized a broad range of sexual acts between two men or between two women). Vagrancy laws were initially introduced to control freedom of movement and ensured cheap labour. They subsequently were used to control public expression and assembly and through criminalisation of 'idle and disorderly' conduct, 'indecent' public acts and expressions were sought to be disciplined.⁷ In India, 'eunuchs' (how British colonialists referred to the native *hijra* population) were criminalized as a whole as a 'criminal tribe', allowing local authorities to conduct surveillance on them and maintain a register of all 'suspected eunuchs', who were understood to be 'criminally

¹ <https://www.ohchr.org/en/calls-for-input/2023/call-inputs-report-colonialism-and-sexual-orientation-and-gender-identity>

² According to ILGA World, 62 out of the 193 UN Member States criminalize consensual same-sex acts: <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts>. According to the information collected by the Human Dignity Trust, 67 countries criminalize aspects of LGBTI identities: https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?type_filter_submitted=&type_filter%5B%5D=crim_gender_exp

³ UN Special Procedures, "States must tackle racism and stigma against LGBTI persons", 16 May 2023,

<https://www.ohchr.org/en/statements-and-speeches/2023/05/states-must-tackle-racism-and-stigma-against-lgbt-persons>

⁴ Scott Lauria Morgensen, "Settler Homonationalism: Theorizing Settler Colonialism within Queer Modernities", April 2010, *GLO: The Journal of Lesbian and Gay Studies*, Volume 16, Issue 1-2, pp.105–131.

⁵ See for instance the impact of colonization process on long existing same-sex sexuality and transgender identities in Sub-Saharan Africa: Amnesty International, *Making Love A Crime Criminalization of Same-sex Conduct in Sub-Saharan Africa*, (Index: AFR 01/012/2013), 11 September 2013, *Africa: Making love a crime: Criminalization of same-sex conduct in Sub-Saharan Africa - ERRATUM - Amnesty International*

⁶ Nancy Nicol and others (editors), *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, Resistance and Hope*, 2018.

⁷ Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*, 17 December 2008, [This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism](https://www.hrw.org/report/2008/12/17/this-alien-legacy-the-origins-of-sodomy-laws-in-british-colonialism) | HRW

and sexually deviant'.⁸ Many of these laws continue to exist in different forms today and criminalize certain acts, behaviours and categories of persons themselves (See section 2).

The economic, social and political devastation and inequities institutionalized by different forms of colonialism continue to shape LGBTI rights today. Central to the colonization project was its power to determine and establish 'modernity' for itself and 'backwardness' in the colonies in how gender and sexuality are understood. The power of the Eurocentric conceptual framing promoted as a universal norm continues to hold sway in determining the framing of gender and sexuality. A key fallout of this is the solidification of LGBTI rights discourse around categories of narrowly defined identities to be protected, that echo a limited understanding of gender and sexuality, rather than offering protection for a range of non-normative sexuality and sexual and gender identities and expressions, which were evident in erstwhile colonies prior to processes of colonization and which continue to exist today.⁹ The term LGBTI is itself rooted in western conceptualisation that fail to capture these diverse forms of sexualities and gender identities and expressions, even as these meanings are beginning to shift in some spaces. This has repercussions in several domains, including asylum processes where LGBTI refugees often must fit their localized forms of sexualities and gender identities and expressions within these narrow pre-defined categories, to avail protections.¹⁰

The legacy of colonialism, therefore, needs to be looked at beyond the continuation of some discriminatory laws to understand how the colonial encounter shaped acceptable and respectable forms of gender and sexuality. Acknowledging and recognizing the reverberations that the colonial past has on the present contexts of discrimination and human rights violations experienced by LGBTI people is a step in tackling the legacy of colonialism. However, LGBTI rights are intrinsically intertwined with global systems of power hierarchies and often weaponized by governments to promote their vested foreign policy interests and by business corporations to maximize their profits.

A call to looking at the impact of colonialism on LGBTI rights must account for the full spectrum of impacts and ensure that local LGBTI groups from contexts that have experienced colonization, including settler-colonialism, are supported in making their realities, needs and demands prioritized in global spaces such as the UN.

COLONIAL-ERA LAWS THAT DISCRIMINATE AGAINST LGBTI PEOPLE¹¹

The colonial legacy of social control through legislations has been cemented by many countries across the world. As noted earlier, sixty-two countries still criminalize same-sex consensual acts, often referring explicitly to sex between men. Forty-one countries explicitly criminalize sex between women, as many extended the British colonial notions of 'gross indecency' or 'unnatural offences' to women.¹² Fourteen countries explicitly criminalize the gender identity and/or expression of transgender people through laws targeting 'cross-dressing', 'impersonation' or 'disguise laws'. Transgender people are often criminalized through laws targeting same-sex conduct, 'cross-dressing' laws and/or vagrancy and petty offence laws.¹³

⁸ Jessica Hinchy, "Obscenity, Moral Contagion and Masculinity: Hijras in Public Space in Colonial North India", May 2014, *Asian Studies Review*, Volume 38, Issue 2, pp.274-294, DOI: 10.1080/10357823.2014.901298.

⁹ Amir Wahab, 'Queer affirmations: negotiating the possibilities and limits of sexual citizenship in Saint Lucia', in Nancy Nicol and others (editors) *Envisioning Global LGBT Human Rights: (Neo) colonialism, Neoliberalism, Resistance and Hope*, 2018, pp. 131-156.

¹⁰ Gary Kinsman, 'Policing borders and sexual/gender identities: queer refugees in the years of Canadian neoliberalism and homonationalism', in Nancy Nicol and others (editors) *Envisioning Global LGBT Human Rights: (Neo) colonialism, Neoliberalism, Resistance and Hope*, 2018, pp. 97-129.

¹¹ The examples included in this section are not exhaustive and mainly refer to criminal laws introduced by the UK in their former colonies, which have been the main focus of Amnesty International's campaign work. This is partly because many of the laws transposed by the UK in its former colonies remain unchanged and are still in force nowadays. However, other countries, such as Portugal transposed similar laws in their former colonies, which remain today applicable in, for example, Guinea Bissau. France decriminalized homosexuality in 1791 but maintained a dual legal system in its colonies, which resulted in the criminalization of same-sex sexual activities applicable to local populations but not to French residents in the colonies. Amnesty International calls on the Independent Expert to analyze the similarities and differences regarding the impact that policies and practices enforced by different former colonial powers still have on LGBTI people nowadays.

¹² Human Dignity Trust, *Breaking the Silence: Criminalisation of Lesbians and Bisexual Women and its Impacts*, May 2016, <https://www.humandignitytrust.org/wp-content/uploads/resources/Breaking-the-Silence-Criminalisation-of-LB-Women-and-its-Impacts-FINAL.pdf>.

¹³ Human Dignity Trust, *INJUSTICE EXPOSED The Criminalisation of Transgender People and its Impacts*, <https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminalisation-of-trans-people.pdf>

For example, in **Kenya**, articles 162, 163 and 165 of the Criminal Code criminalize same-sex sexual acts through provisions outlawing 'carnal knowledge against the order of nature' and 'gross acts of indecency between men'.¹⁴ These provisions were introduced by the British colonial powers in 1930s and were subsequently retained after independence. In **Uganda**, three provisions introduced in 1950s under the British rule, punishes 'carnal knowledge against the order of nature' with life imprisonment and 'indecent acts' with up to seven years' imprisonment.¹⁵ These provisions were retained after Uganda gained independence in 1962. On 2 May 2023, Uganda's Parliament adopted a bill that harshens the penalties for acts of 'aggravated homosexuality', which includes consensual sex among people living with HIV, and punishes the vaguely defined offence of 'propaganda of homosexuality' with 20 years' imprisonment.¹⁶

In **Malaysia**, the criminal provisions currently proscribing consensual same-sex acts stem from section 377 of the Criminal Code, which criminalized 'carnal intercourse against the order of nature' and was introduced in 1936 by the British rulers in the Federated Malay States.¹⁷ The authorities also rely on these provisions, as well as other Sharia law provision prohibiting cross-dressing, to target transgender people with arbitrary arrest and detention.¹⁸ Similar colonial-era laws remain in force in other countries in South-Asia and South-East Asia, including in **Bangladesh**, **Pakistan** and **Sri-Lanka**.¹⁹

Vagrancy laws criminalize a wide range of conduct, including 'being without a fixed home, employment or means of subsistence', 'being idle and disorderly', 'being without fixed abode', 'being a rogue and vagabond', 'being a reputed thief' and 'being a homeless or a wanderer'.²⁰ These laws, which date from 14th century England, were introduced in the colonies and remain in force in at least 33 countries on the African continent, as well as in many other countries and regions in the world.²¹ These laws punish people based on outdated notions that largely reflect colonial perceptions and are used to dehumanize individuals with a perceived lower socio-economic status. Vagrancy laws are discriminatory as they have a disproportionate impact on people experiencing poverty, LGBTI people and people living with disability, among others.²²

For example, the Criminal Code of **Malawi**, a former British colony, punishes people for 'being a rogue and a vagabond', which often results in mass arbitrary arrests targeting people who live in poverty. In 2017 and 2022, the High Court of Malawi ruled that these provisions were unconstitutional and ordered Parliament to review the Criminal Code before 2024.²³ In December 2022, the Constitutional Court of **Uganda**, ruled that similar provisions against 'rogues and vagabonds' were unconstitutional as they lacked legal clarity.²⁴ In **Sierra Leone**, the criminal provisions on 'loitering', a conduct criminalized since the introduction of the 1861 Offences against the Person Act, has resulted in arbitrary arrest and detention, gender-based violence and violations of the rights to liberty and/or security of sex workers, LGBTI people and people experiencing homelessness.²⁵

¹⁴ Amnesty International, *Making Love a Crime* (previously cited), pp. 83-84; See also: ILGA World, Database: Kenya, <https://database.ilga.org/kenya-lgbti> (accessed on 31 May 2023); Amnesty International, "Justice like any other person" – Hate crimes and discrimination against LGBTI refugees (Index: AFR 32/6578/2023), 19 May 2023, [Kenya: "Justice like any other person" - Hate crimes and discrimination against LGBTI refugees - Amnesty International](https://www.amnesty.org/en/documents/af32/6578/2023/)

¹⁵ Amnesty International, *Making Love a Crime* (previously cited), pp. 92-93; Human Dignity Trust, "Uganda", <https://www.humandignitytrust.org/country-profile/uganda/> (accessed on 31 May 2023).

¹⁶ Amnesty International, "Uganda: President's failure to veto anti-LGBTI Bill an 'abhorrent' violation of LGBTI rights", 2 May 2023, <https://www.amnesty.org/en/latest/news/2023/05/president-must-veto-anti-lgbti-law/>

¹⁷ Amnesty International, "Malaysia: End discrimination and backlash against LGBTI people", 11 July 2018, <https://www.amnesty.org/en/documents/asa28/8770/2018/en/>; Human Dignity Trust, "Malaysia", <https://www.humandignitytrust.org/country-profile/malaysia/> (accessed on 31 May 2023).

¹⁸ Amnesty International, "Malaysia: End discrimination and backlash against LGBTI people" (previously cited).

¹⁹ Amnesty International, *Sri Lanka: Spectrum: Four stories of discrimination faced by LGBTI people in Sri Lanka*, (Index: ASA7/1477/2019), 6 December 2019, <https://www.amnesty.org/en/documents/asa7/1477/2019/en/>

²⁰ African Court on Human and People's Rights, Advisory Opinion 001/2018, <https://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/001-2018 - PALU-Advisory Opinion.pdf>

²¹ Campaign to decriminalize poverty and status, submission on the Decriminalization of Homelessness and Extreme Poverty, <https://www.ohchr.org/sites/default/files/2022-03/CampaigntoDecriminalizePoverty.docx>

²² Amnesty International, "Sierra Leone: Criminalizing loitering is discriminatory and contrary to the right to dignity: Third-party intervention filed at the Community Court of Justice of ECOWAS", 23 March 2023, <https://www.amnesty.org/en/documents/af31/6586/2023/en/#:~:text=On%2022%20March%202023%2C%20Amnesty,widespread%20human%20rights%20violations%20stemming>

²³ Campaign to Decriminalise Poverty and Status, *Malawi High Court Declares Mass Arrests (Sweeping Exercises) Unconstitutional*, 9 November 2022, <https://pettyoffences.org/police-sweeping-unconstitutional-malawi/>

²⁴ Constitutional Court of Uganda, *Tumwesige Francis v Attorney General (Constitutional Petition 36 of 2018)* [2022] UGCC 5, 02 December 2022, <https://www.ulii.org/ug/judgment/constitutional-court-uganda/2022/5>.

²⁵ Amnesty International, "Sierra Leone: Criminalizing loitering is discriminatory and contrary to the right to dignity: Third-party intervention filed at the Community Court of Justice of ECOWAS", 23 March 2023, <https://www.amnesty.org/en/documents/af31/6586/2023/en/>

THE HUMAN RIGHTS IMPACT OF COLONIAL ERA LAWS ON THE RIGHTS OF LGBTI PEOPLE

There is a wide range of literature on the disproportionate impact of these colonial-era laws on the daily lives of LGBTI persons.²⁶ These laws negatively affect human rights, including the rights to dignity, equality and non-discrimination of LGBTI individuals. For LGBTI communities and individuals facing discrimination and marginalization, criminal and other punitive sanctions often result in an increased risk of abuse within the criminal justice system, such as lack of access to fair trial rights.²⁷ Even when such laws are not enforced, they foster stigmatization, surveillance and prosecution of people whose sexual orientation or gender identity and/or expression do not conform to strict societal norms grounded in heteronormativity. A study by the African Commission on Human and Peoples' Rights recognized the problems faced by the LGBTI community and that laws criminalizing same-sex sexual acts "have significant negative consequences on the HIV epidemic and public health, contributing to an environment of fear that drives LGBT and intersex people away from HIV services".²⁸

The discriminatory, exclusionary and unequal treatment of diverse sexual orientations and gender identities and expressions, first introduced through the colonial rule have become entrenched in erstwhile colonies in disturbing ways. The recent threats against LGBTI people's human rights and anti-gay rhetoric by public and religious leaders in Zambia are revealing examples. Following the hosting of a fashion and lifestyle event known as the Lusaka July in Lusaka, government officials, leaders of faith-based organizations, and other citizens made public statements in the media and on social media condemning consensual same-sex acts and LGBTI persons as being a sponsored attack on Zambian religious and cultural values.²⁹ Members of the homophobic #BanNdevupaNdevu #BanHomosexuality movement held a protest and used WhatsApp to call for the killing of and encourage different forms of violence and even killings of people perceived as being gay. The Government of the Kingdom of Eswatini rejected an application for registration by 'Eswatini Sexual and Gender Minorities', the country's first openly LGBTI organization, in 2019. The High Court upheld this decision.³⁰ This is another example of how laws criminalizing sexual orientation and gender identity violate the rights of LGBTI people, including their rights to freedom of association, expression, equality before the law, and of non-discrimination, a fundamental principle of all international human rights treaties including regional treaties such as the African Charter on Human and Peoples' Rights. Such laws also violate the right to equality before the law.

CONCLUSIONS AND RECOMMENDATIONS

Contemporary human rights violations and abuses experienced by LGBTI people largely stem from the colonial legacy of discriminatory laws and practices. As emphasized by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and related intolerance, the abolition of colonialism has not addressed its structures of racial inequalities.³¹ Similarly, the end of colonial rule has not tackled the impact of laws and policies that have entrenched discrimination and violence against LGBTI people during colonial times.

As discussed in this submission, discriminatory colonial-era laws remain in force in dozens of countries in the world. More generally, colonial powers have contributed to fuelling and entrenching gender-based stereotypes,

²⁶ See, for example, Amnesty International, *Body Politics: a Primer on Criminalization of Sexuality and Reproduction* (Index: POL 40/7763/2018), 12 March 2018, <https://www.amnesty.org/en/documents/pol40/7763/2018/en/> pages 60 to 68 and 76 to 89. See also *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae) MAHGB000591-16*, paras 135, 181 and 189.

Attorney-General v Motshidiemang (LEGABIBO as amicus curiae) Court of Appeal Civil Appeal No. CACGB-157-19, para 67, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2021/11/Judgement-LEGABIBO-Appeal-29-Nov-21.pdf>

²⁷ See, for example: Amnesty International, "Russia: Court upholds lengthy prison sentences for Chechen LGBTI siblings", 25 October 2022, <https://www.amnesty.org/en/latest/news/2022/10/russia-court-upholds-lengthy-prison-sentences-for-chechen-lgbti-siblings-2/#:~:text=%E2%80%9CThe%20court's%20decision%20today%20is,criticism%20of%20the%20local%20authorities>.

²⁸ African Commission on Human and Peoples' Rights 'HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses' (2018) page 87, https://www.unaids.org/sites/default/files/media_asset/HIV_Law_AfricanHumanRightsSystem_en.pdf

²⁹ See, for example, Amnesty International Report 2022/23, pages 27, and 407-408 https://www.amnesty.org.au/wp-content/uploads/2023/03/Amnesty-International-Annual-Report-The-State-of-the-Worlds-Human-Rights-202223_English.pdf

³⁰ *Simelane and Others v Minister for Commerce and Industry and Others* (1897 of 2019) [2022] SZHC 66 (29 April 2022), <https://media.eswatini.org/files/judgments/szhc/2022/66/2022-szhc-66.pdf>. See also, Amnesty International Report 2022/23, pp. 27 and 161.

³¹ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, 21 August 2019, UN document A/74/321: <https://promiseinstitute.law.ucla.edu/wp-content/uploads/2022/04/Reparations-for-Racial-Discrimination-Slavery-and-Colonialism-August-2019-A74321.pdf>

generating misconceptions about diverse sexualities and gender identities and entrenching discrimination and violence through law and systems of governance. These continue to have a pervasive and long-lasting effect. It is in the backdrop of this homophobic and transphobic social climate that more recent proposals to criminalize aspects of LGBTI identities have been recently proposed or passed in countries such as Ghana, Uganda and Pakistan (see Section 3).

Former colonial powers, including France, Germany, the Netherlands and the United Kingdom, have decriminalized same-sex sexual conduct in their jurisdictions and adopted laws and policies that have, to some extent, improved the rights of LGBTI people. However, some colonial era laws that also have an impact on marginalized groups other than LGBTI people remain in force. These include, for example, vagrancy offences in the England and Wales (United Kingdom), which discriminate against people experiencing homelessness and poverty.³² These laws must be repealed without further ado.

States must:

- Acknowledge both the historical and contemporary damage of their colonial-era homophobic and transphobic laws and the connections between past and contemporary forms of discrimination and violence faced by LGBTI people;
- Set up effective mechanisms through which individuals and communities could access reparations for past human rights wrongs, including instances where they were subject to arrest and detention, as well as torture and other ill-treatment, based on discriminatory laws;
- Adopt a comprehensive approach to reparative justice, accounting for persisting structures of injustice, intersectional forms of discrimination and oppression and violations of social, economic and cultural rights;
- Repeal all laws and policies that discriminate against LGBTI people, including laws that criminalize consensual same-sex sexual activities among adults and vagrancy laws and ensure that LGBTI people can exercise their rights, including the rights to freedom of expression, peaceful assembly and association without any discrimination;
- Take steps to repair the damage of discriminatory laws, such as expunging the criminal records of LGBTI individuals within their current jurisdictions who were convicted in the past on the basis of these laws;
- Ensure that LGBTI individuals and civil society organizations, human rights defenders, especially those affected by unjust criminalization, are able to participate fully, meaningfully and effectively in the design, decision making, implementation and monitoring of laws and policies that impact them, at local, national, regional and international levels, reflecting their realities, needs and priorities in all international and regional human rights instruments and mechanisms.

³² Amnesty International, *An Obstacle Course: Homelessness Assistance and the right to adequate housing in England*, 9 June 2022, Index: 03/5323/2022: <https://www.amnesty.org/en/documents/euro3/5343/2022/en/>

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