



## The impact of colonial legacies in the lives of LGBTI+ and other ancestral sexual and gender diverse persons

*Submission to the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*

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## Introduction

In this report, we use evidence from different latitudes and cultural contexts, ranging from Latin America, Africa, and Asia, to highlight the multiple conceptions of gender and sexual orientation that the human experience has constructed throughout history. We seek to expand on what the Independent Expert on Sexual Orientation and Gender Identity (SOGI) has expressed in previous reports<sup>1</sup>, on how “the rigid understandings of the male/female binary as a main ordering social principle are the result of colonialism”<sup>2</sup>. In addition, we provide grassroots information about specific laws, policies, and social contexts in which sexual orientation and/or gender identity are still criminalized or regulated due to colonial legacies.

By analyzing **postcolonial laws** that are still in place today or repealed, it is possible to affirm that some precolonial cultures had a broader conception of gender and SOGI than many colonial and postcolonial legal systems, contrary to the rhetoric pushed by anti-LGBTI actors that gender identity and sexual orientation are a Western import and another form of colonization by the West<sup>3</sup>.

Postcolonial laws regulating gender and sex have had a significant impact on the enjoyment of human rights by LGBTQI+ and other ancestral sexual and gender diverse identities. These laws have often been used to criminalize same-sex sexual acts and to justify discrimination and violence against LGBTQI+ and other ancestral sexual and gender diverse identities. For instance, it is unfortunate how the legacies from former British, French, and Spanish colonies still retain “anti-sodomy” laws in India, Pakistan, Sri Lanka, Nigeria, Democratic Republic of Congo, and the Philippines. Furthermore, as stated by the Special Rapporteur on the right to health, some “European colonial regimes set in place specific laws, including restrictions on abortion and consensual same-sex acts, which remain on the books today in formerly colonized countries”<sup>4</sup>.

Additionally, some postcolonial laws have often been used to impose heteronormative and binary norms of gender and sexuality, and to repress LGBTQ+ and other ancestral sexual and gender diverse practices and identities that do not fit within these norms. The women/men binary enshrined in many societies reflects an understanding of gender shaped by colonial legacies. This approach ignores, however, more nuanced and diverse gender categories of several ancestral groups and cultures in all regions of the world. Historically, certain indigenous communities have incorporated gender roles moving

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<sup>1</sup> Independent Expert on Sexual Orientation and Gender Identity. Report “Practices of Exclusion”. [A/76/152](#).

<sup>2</sup> Ibid. Para. 36.

<sup>3</sup> For instance, see arguments related to the controversial anti-LGBTIQ+ bill in Uganda. (Information provided by Gender Dynamix). See: [Uganda’s president refuses to sign new hardline anti-LGBTQ+ bill](#).

<sup>4</sup> Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Report “Sexual and reproductive health rights: challenges and opportunities during the COVID-19 pandemic”. [A/76/152](#). Para. 6.

beyond the male-female or homosexual-heterosexual binaries<sup>5</sup>. With some exceptions, individuals who embody cultural gender-variant roles and sexual identities are integrated into their communities and occupy respected social and ceremonial roles<sup>6</sup>. Examples are the Two-Spirits<sup>7</sup> in North America, the Bonjus<sup>8</sup> in Europe, the Muxes<sup>9</sup> in Mexico, the Hijras<sup>10</sup> in South Asia, the Takatāpui<sup>11</sup> in Aotearoa/New Zealand and the Sistergirls<sup>12</sup> from the First Nation Cultures in Australia.

The imposition of colonial laws regulating sex and gender also shaped social and moral ideas about SOGI in former colonized societies, which produced discrimination and violence against LGBTQ+ and other ancestral sexual and gender diverse people. In this regard, it is pivotal to explore the link between the development of certain religious moralities during colonial and postcolonial times and its relationship with discriminatory conceptions of SOGI. For example, in El Salvador and Bolivia there is still rejection of sexual and gender diversities since both were Spanish colonies, so the Catholic faith was inherited and still practiced extensively, even though they are both secular States<sup>13</sup>. Unfortunately, previous and current strong alliance between the political and religious power has directly

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<sup>5</sup> Examples of indigenous groups that move away from the gendered and sexual binary are the Non-binary and “third gender” people that held important social and spiritual positions in many cultures: the Isangoma of the Zulu for instance; or the Babaylan of the Philippines. See: Chitando, Ezra, and Mateveke, Pauline. (2017). [“Africanizing the discourse on homosexuality: challenges and prospects”](#). *Critical African Studies*, 9:1: 124-140.

<sup>6</sup> Walters, K.L, et al. (2006). [“My Spirit in My Heart”](#): Identity Experiences and Challenges Among American Indian Two-Spirit, *Journal of Lesbian Studies*, 10:1-2, 125-149.

<sup>7</sup> An umbrella term that involves all gender and sexual variance among people of Indigenous North American descent: including lesbian, gay, bisexual, transgender and/or queer identities. For more information, see Ristock, J., et al. (2019). [Impacts of colonization on Indigenous Two-Spirit/ LGBTQ Canadians’ experiences of migration, mobility and relationship violence](#), *Sexualities* 2019, Vol. 22(5–6) 767–784.

<sup>8</sup> *Bonju* is a word in north-Sami that is directly translated from the Norwegian word for queer, *skeiv*. The term *bonju* is coined by queer Sami in the Sami language, and not by outsiders, and is therefore based on queer indigenous conditions. For more information, see Løvold, A. (2015). [The silence in Sápmi - and the queer Sami breaking it](#). Master Thesis. UiT The Arctic University of Norway.

<sup>9</sup> *Muxes* are biological males who also manifest feminine identities in their dress and attire, but they are not transgender or consider themselves women. They both self-identify and are generally recognized and accepted as a third gender, rather than as men or women, adopting characteristics of each gender. For more information, see Mirandé, A. (2016). [Hombre Mujeres: an Indigenous Third Gender, Men and Masculinities](#), Vol. 19(4) 384-409.

<sup>10</sup> Traditionally, *hijras* are male-bodied feminine-identified people who sacrifice, although not always, their male genitals in return for spiritual power to bless and curse the newlywed and the newborn. A wide range of terminology, ranging from transsexual to transvestite and intersex, is used in South Asian and international popular media to describe the *hijra*. For more information, see Hossain, A. (2016). [The paradox of recognition: hijra, third gender and sexual rights in Bangladesh](#). *Culture, Health & Sexuality*, 2017 Vol. 19, No. 12, 1418–1431.

<sup>11</sup> The term *takatāpui* is used to describe queer persons from the Maori culture in New Zealand. The word *takatāpui* originates in the indigenous *te Reo Maori* language, which originally means “intimate friendship”, but it has come to take on a new meaning in the recent 20-25 years, and is now recognized as the word for “intimate relationship with same sex”. It has been reclaimed to embrace all Māori who identify with diverse genders, sexualities and sex characteristics such as *whakawāhine*, *tangata ira tāne*, lesbian, gay, bisexual, trans, intersex, non-binary and queer. For more information, see Løvold, A. (2015). [The silence in Sápmi - and the queer Sami breaking it](#). Master Thesis. UiT The Arctic University of Norway, and Kerekere, E. [Takatāpui: Part of the Whānau](#).

<sup>12</sup> Sistergirls and Brotherboys are terms used to describe trans and gender diverse people in some Aboriginal or Torres Strait Islander communities. For more information, see Riggs D.W. & Toone K. (2017). [Indigenous Sistergirls’ Experiences of Family and Community](#). *Australian Social Work*, 70:2, 229-240.

<sup>13</sup> Information provided by Mano Diversa and COMCAVIS TRANS.

impacted the enjoyment of the rights of LGBTQ+ and other ancestral sexual and gender diverse people, as well as in their advocacy efforts to change those realities.

On the other hand, colonization and the spread of fundamentalist Christian attitudes by the British meant that many countries in Africa were compelled to reject their cultural attitudes and adopt "new British values" in the 19th and 20th centuries. Homophobia was legally enforced by colonial administrators and Christian missionaries. In 1910, Christians accounted for approximately 9 percent of the population in sub-Saharan Africa; by 2010, this figure had skyrocketed to 63 percent. Anti-LGBT laws were not only incorporated into constitutions but also ingrained in the minds of many African people, and after several generations, this has become dogma<sup>14</sup>. Generations later, many Africans now believe that an anti-LGBTI attitude is a part of their culture<sup>15</sup>. For that matter, the effect of conservative morality in controlling sexuality and gender constitutes a heritage from colonial conquest<sup>16</sup>.

## Gender and sexual diversity prior colonization: evidence from Latin America and Africa

### Latin America<sup>17</sup>

From archaeological discoveries, which include numerous ceramics, paintings, sculptures, and jewels that survived the European conquest, it becomes evident that upon the arrival of Europeans to the American continent, native peoples and their civilizations in the Americas had a markedly different perspective on SOGI. Their cultural practices embraced a rich diversity of sexual and affective expressions, which held significant importance in their rituals.

Pre-Columbian societies depicted a wide range of erotic scenes, encompassing both heterosexual and homosexual encounters. For instance, the *Mochica* and *Chimú* cultures from the Inca Empire are well known for their homosexual ceramics<sup>18</sup>. Additionally, among the Incas, Female homosexuality was also much better known than in late 1400s and early 1500s in Europe, since Incas women could have multiple sexual partners and participate in community decisions<sup>19</sup>.

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<sup>14</sup> Information provided by Gender Dynamix.

<sup>15</sup> For instance, former and late Zimbabwean President Mugabe labeled homosexuality as a "white disease". (Information provided by Gender Dynamix).

<sup>16</sup> Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Report "Strategic priorities of work". [A/HRC/47/28](#). Para. 77: "Colonialism made morality a commodity possessed by colonial powers, which was subsequently used to found nationhood and which is underpinned by norms and values applied to subjects that are marginalized in relation to sexuality and gender".

<sup>17</sup> This section was developed thank to the contribution of [Francisco Córdoba](#), under his thesis work title: "The Imposed Patriarchy: Brief research on the condition of women and of what is now called the "LGBTQIA+ community" in Latin America from 1492 to 2022. Socio-cultural, economic, historical and artistic expressions".

<sup>18</sup> The [Larco Museum](#) in Perú has one of the largest [collection of erotic art](#) in both *Mochica* and *Chimú* cultures.

<sup>19</sup> Arantxa Robes Santana. (2014). [Una aproximación al rol de la mujer precolombina en América](#). Cuadernos del Ateneo, 92-109, Revista 32 4ª Prueba. Fundación Dialnet, Universidad de La Rioja.

These artistic and cultural expressions were interpreted through the patriarchal and Catholic lens dominant in 15th-century Europe, where the Inquisition condemned and eradicated any expression that deviated from heteronormative views. In this context, this cultural collision elevated same-sex sexual acts, exclusively conceptualized as "sodomy," to the status of "abominable sins", "unmentionable", "unpronounceable crime", turning homosexual relations into taboo and subject to legal and social criminalization<sup>20</sup>.

## Africa<sup>21</sup>

As far back as 2400 BC, tombs have been excavated in ancient Egypt, revealing the presence of two men, Niankhkhnum and Khnumhotep<sup>22</sup>, embracing each other as lovers. In addition to their acceptance of same-sex relationships, ancient Egyptians, like other civilizations of that time, not only acknowledged a third gender but also venerated it. Many deities were depicted as androgynous, and goddesses such as Mut (the goddess of Motherhood) and Sekmeht (the goddess of war) are often portrayed as women with erect penises.

This was not unique to Egypt or that era. In the 16th century, the Imbangala people of Angola had "men in women's apparel, with whom they kept amongst their wives". The Igbo and Yoruba tribes, primarily found in present-day Nigeria, did not adhere to a binary gender system and typically did not assign gender to babies at birth; instead, they waited until later in life. Similarly, the Dagaaba people (present-day Ghana) assigned gender not based on one's anatomy but rather on the energy of the person. For centuries, across the African continent, there existed a completely different attitude towards sexual and gender identities.

## Gender and sexual diversity colonial laws present today

This section will highlight examples of legal provisions dating from the colonial era that are unfavorable to LGBTQI+ and other ancestral sexual and gender diverse communities today and directly affect the enjoyment of their human rights.

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<sup>20</sup> For instance, the Title XIII, Book V of the Filipe's Ordinances colonial law in Brazil established that any person who committed the "sin of sodomy" should be "burnt to dust, so that their body and grave can never be remembered and all their possessions shall be confiscated to the Crown of our Kingdoms, even if they have descendants; for the same reason, their sons and grandsons shall be considered ineligible and infamous just as those that commit the crime of Lèse-majesté" (See: [Livro 5 Tit. 12: Dos que fazem moeda falsa, ou a dispendem, e dos que cerceiam a verdadeira, ou a desfazem \(Conc.\) Livro 5 Tit. 13: Dos que cometem pecado de sodomia, e com alimarias](#)). Information obtained from the [ILGA World database](#).

<sup>21</sup> This section was developed thanks to the contribution of Gender Dynamix.

<sup>22</sup> For more information, see: [The Tomb of Niankhkhnum and Khnumhotep At Saqqara](#); [Evidence of gay relationships exists as early as 2400 B.C](#); [Mwah ... is this the first recorded gay kiss?](#).

## Legacies from former British colonies

Many former British colonies still retain “anti-sodomy” laws that date back to their colonial past. In 1886, the Indian Penal Code (1860) was brought into British Burma by British colonizers, along with the Code of Penal Procedure (Act No. 24) (1861) and the Evidence Act (Act No. I) (1872).

Under Section 377 of this Code, whoever voluntarily had “carnal intercourse against the order of nature” with any man, woman, or animal was punished with transportation for life or with imprisonment of either description (i.e., simple or rigorous imprisonment) for a term which could extend to ten years, and/or a fine. The penalty of “transportation for life” consisted in sending a convict into banishment or exile and was a legally prescribed penalty for serious crimes. Prisoners would be sent to penal colonies established throughout the British Colonial Empire, including South West Sumatra and the Andaman Islands, where ironically, as documented in academic work, “unnatural offenses” among male inmates proliferated. While in most countries, the penalty of transportation was later replaced by other types of penalties (such as in India, where it became “imprisonment for life” as per Act 26 of 1955), Article 377 has remained unchanged in the Penal Code (1860) of Myanmar<sup>23</sup>.

In India, Article 377 of the Indian Penal Code also remains in effect. In 2018, the Supreme Court ruled that the manner of its interpretation with respect to homosexuality violated fundamental rights to privacy<sup>24</sup>. The law’s scope was subsequently limited to exclude consensual private sexual acts between consenting adults<sup>25</sup>. Before then, a total of 4,690 cases of violations of Article 377 were prosecuted between 2014 and 2016<sup>26</sup>. On the other hand, Article 377 of the Pakistan Penal Code states that the penalty “shall be not less than two years”<sup>27</sup>. This was later amended by the Hudood Ordinances in 1980 to increase the penalty to a minimum punishment of ten years and a fine. The Hudood Ordinances were created to align criminal law with the Shariat and are applicable to both Muslims and non-Muslims. Discriminatory narratives and stigmatization of *hijras* brought about by British colonial rule and imposition of Victorian ideologies of gender and sexuality remain prevalent in contemporary India and Pakistan. *Hijras* continue to face social and economic

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<sup>23</sup> Myanmar, [The Penal Code](#) (1860). Information obtained from the [ILGA World database](#).

<sup>24</sup> The Special Rapporteur on freedom of religion or belief welcomed the decision in 2018 by the Supreme Court of India that struck down the colonial-era criminal law against homosexuality, however, she also mentioned that “elsewhere in South Asia, similar colonial-era laws prohibiting same-sex relations are found in the penal codes of Bangladesh, Pakistan and Sri Lanka. Participants in the consultations noted that attempts to push for regulations that safeguard the existence of LGBT+ individuals in Afghanistan, Maldives and Pakistan struggled against tenets of Islamic law.” For more information, see: Special Rapporteur on freedom of religion or belief. Report “Gender-based violence and discrimination in the name of religion or belief”. [A/HRC/43/48](#). Para. 23.

<sup>25</sup> Mandal, Saptarshi. (2018). [Section 377: Whose Concerns Does The Judgment Address?](#) Engage EPW.

<sup>26</sup> For more information, see: [Section 377 verdict: Some of these 4,690 cases are no longer crimes](#).

<sup>27</sup> Han, Enze & O’Mahoney, Joseph. (2018). [British Colonialism and the Criminalization of Homosexuality: Queens, Crime and Empire](#).

exclusion, making it difficult for them to secure legal employment. In turn, many resort to begging or sex work to survive<sup>28</sup>.

In **Sri Lanka**, Article 365 of the Sri Lankan Penal Code reproduced Section 377 of the Indian Penal Code and is interpreted to target LGBTQI+ and other ancestral sexual and gender diverse individuals<sup>29</sup>. Furthermore, section 365A render same-sex relations between consenting adults illegal, even in private. The retention of these laws allows for the mistreatment of LGBTQI+ and other ancestral sexual and gender diverse people by both the public and state officials. Due to repeated police harassment and mistreatment, some transgender women and men who have sex with men are hesitant to report crimes committed against them<sup>30</sup>.

The British colonial Offences Against the Person Act<sup>31</sup> (1861) remains in force in **Sierra Leone**. Under Section 61 of this legislation, any man found guilty of “buggery” is liable to imprisonment of 10 years to life. And in **Mauritius**, same-sex relations are still criminalized under section 250 of the Criminal Code, a legacy of the colonial era.

“Carnal intercourse against the order of nature” was criminalized under Section 377 of the Penal Code of the Federated Malay States (F.M.S. Cap. 45) (1936) enacted during the colonial occupation of some of the territories that form modern **Malaysia**. Malaysia maintained the FMS Penal Code after independence and extended its application to the entire country in 1976. A revised version of this Penal Code<sup>32</sup> (1997) is still in force today. In 1976, the Penal Code (Amendment and Extension) Act (Act A-327)<sup>33</sup> (1976), increased the penalties for Section 377, which were raised from 10 to 20 years in prison and whipping was introduced as an alternative new penalty. Furthermore, in 1989, the Penal Code (Amendment) Act (Act A-727) (1989) overhauled Section 377 and inserted several new provisions, three of which are applicable to consensual same-sex sexual acts. The revised amendment defined carnal intercourse as anal or oral sex and made gross indecency gender-neutral, extending its application to lesbian women<sup>34</sup>.

Moreover, Section 377A included a clear definition of “carnal intercourse against the order of nature” which, in line British tradition, had remained undefined in the FMS Penal Code. The criminal act was defined as a “sexual connection with another person by the

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<sup>28</sup> Information provided by ILGA ASIA.

<sup>29</sup> Center for International Human Rights of Northwestern University School of Law Heartland Alliance for Human Needs & Human Rights, Global Initiative for Sexuality and Human Rights. (2014). [Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender \(LGBT\) People in Sri Lanka: A Shadow Report](#). (Submitted for consideration at the 110th Session of the Human Rights Committee).

<sup>30</sup> Human Rights Watch. (2016). [“All Five Fingers Are Not the Same”: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka](#).

<sup>31</sup> [Offences against the Person](#): An Act to consolidate and amend the Statute Law of England and Ireland relating to Offences against the Person.

<sup>32</sup> Malaysia, [Act 574 Penal Code](#) (2015). Information obtained from the [ILGA World database](#).

<sup>33</sup> Malaysia, [the Penal Code \(Amendment and Extension\) Act \(Act A-327\)](#). Information obtained from the [ILGA World database](#).

<sup>34</sup> Sanders, Douglas. (2008). [377 and the unnatural afterlife of British colonialism in Asia](#).



introduction of the penis into the anus or mouth of the other person". Section 377B maintained punishment for this crime by keeping the penalty of imprisonment for 20 years (as increased in 1976) but removed the fine and incorporated whipping as an additional penalty (not an alternative penalty, as per the 1976 text). Finally, Section 377D criminalized "outrages on decency" by punishing public or private acts of gross indecency with imprisonment for up to 2 years.

The existence of anti-LGBTIQ discriminatory laws and social attitudes is ostensible throughout Malaysia. Recently, there has been an upsurge in rhetoric advocating for the "rehabilitation" or "curing" of LGBTQI+ and other ancestral sexual and gender diverse individuals. Article 377 has also been used by Members of Parliament as a springboard for discussions relating to the imposition of harsher laws and punishments against LGBTQI+ and other ancestral sexual and gender diverse individuals<sup>35</sup>.

**Gambia** has criminalized same-sex sexual activity since the implementation of the colonial Criminal Code<sup>36</sup> (1934), instituting prison sentences of up to 14 years for anyone with "carnal knowledge of any person against the order of nature" under Chapter XV, Section 143(1). Part 4(c) of the Criminal Code (Amendment) Act<sup>37</sup> (2005) clarified the meaning of "carnal knowledge against the order of nature" to include anal and oral sex, the use of "any object or thing" to "simulate sex", and "committing any other homosexual act with the person". Moreover, Article 147(2) of the 2005 version of the Criminal Code limits women to 5-year sentences for "gross indecency". The law was expanded again with the Criminal Code (Amendment) Act<sup>38</sup> (2014). Part 4 of the Act introduces the category of "aggravated homosexuality", laying out factors such as the spread of HIV and being a "serial offender" as grounds for life-imprisonment<sup>39</sup>.

In **Nigeria**, at the federal level, the Criminal Code Act<sup>40</sup> (2004) contains provisions criminalizing consensual same-sex sexual acts (framed as "carnal knowledge of any person against the order of nature") imposing a penalty of imprisonment for 14 years, as per Section 241. Moreover, Section 217 of this Code also punishes acts of "gross indecency" among men, whether in public or private, with imprisonment for three years. Most of the Southern states use the provisions of this Code as their state law, including those aspects that deal with consensual same-sex sexual acts. Across the North of the country, however, the Penal Code (Northern States) Federal Provisions Act<sup>41</sup> (1959) (usually referred to as the "Penal Code") applies as both federal and state law in the states that succeeded the colonial Northern Region. Section 284 of the Penal Code criminalizes consensual same-sex sexual acts ("unnatural offences") with imprisonment for up to 14 years and a fine.

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<sup>35</sup> Information provided by ILGA ASIA.

<sup>36</sup> Gambia, [Criminal Code](#) (1934). Information obtained from the [ILGA World database](#).

<sup>37</sup> Gambia, [Criminal Code \(Amendment\) Act](#) (2005). Information obtained from the [ILGA World database](#).

<sup>38</sup> Gambia, [Criminal Code \(Amendment\) Act](#) (2014). Information obtained from the [ILGA World database](#).

<sup>39</sup> *Ibid.*, Part 4.

<sup>40</sup> Nigeria, [Criminal Code Act](#) (2004). Information obtained from the [ILGA World database](#).

<sup>41</sup> Nigeria, [Penal Code \(Northern States\) Federal Provisions Act](#) (1959). Information obtained from the [ILGA World database](#).

## Legacies from former French colonies<sup>42</sup>

The Penal Code of the **Democratic Republic of Congo** (DRC) was enshrined in 1940 (before its independence from Belgium in 1960) and currently has negative implications for LGBTQI+ and other ancestral sexual and gender diverse people. Article 174 of the DRC's Penal Code<sup>43</sup> criminalizes acts of sodomy, which are defined as sexual relations between persons of the same sex. Those convicted of “sodomy” can be sentenced to up to five years in prison. Article 175 also criminalizes the "attempted corruption of a minor through homosexual acts," punishable by two to five years' imprisonment. Moreover, Article 176 states: “Whoever publicly outrages morals by actions that offend modesty, shall be punished by penal servitude of eight days to three years and a fine of twenty-five to one thousand *zaïres* or one of these penalties only.” Additionally, the Family Code prohibits the adoption of a child in these terms: “Can only adopt people of full age and capacity, with the exception of those who are deprived of parental authority, homosexuals, transsexuals (...)”. Following these articles, most of the Congolese judicial police officers use it to arrest and repress LGBTQIA+ and other ancestral sexual and gender diverse people in the DRC<sup>44</sup>.

The legal, moral, and socio-cultural justifications for maintaining laws criminalizing LGBTQI+ and other ancestral sexual and gender diverse behavior in the DRC are often based on religious and cultural beliefs, particularly due to Christianity. Courts have sometimes used religion to justify the criminalization of homosexuality and other LGBTQI+ and other ancestral sexual and gender diverse behavior.

## Legacies from former Spanish colonies

In **the Philippines**, many existing laws have been informed by standards of morality inculcated by the Catholic Church. The Family Code of the Philippines specifically limits marriage “between a man and a woman” and is undoubtedly informed by the worldviews and morals imposed by Catholic missionaries. The same Code also includes homosexuality and lesbianism as grounds for marriage annulment, along with alcoholism and drug addiction.<sup>45</sup> The passage of certain laws that would codify rights protections on the basis of sexual orientation, gender identity, and expression have been continuously blocked by various conservative Christian denominations<sup>46</sup>.

In **Bolivia**, the Family Code<sup>47</sup> currently has a colonizing approach that regulates SOGI rights, since it determines the invalidity of marriages and civil unions between persons of

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<sup>42</sup> The French repealed their anti-sodomy laws after the first French Revolution in 1750, two centuries prior to the British in 1967. This is then echoed in La Francophonie nations.

<sup>43</sup> Democratic Republic of Congo, [Code Penal](#). Information obtained from the [ILGA World database](#).

<sup>44</sup> Information provided by OASIS RD Congo.

<sup>45</sup> The Philippines, [Executive Order No. 209, s. 1987](#). Information obtained from the [ILGA World database](#).

<sup>46</sup> Annabel Consuelo Petinglay. (2019). [Antique religious sector opposes SOGIE bills](#). Republic of the Philippines, Philippine News Agency.

<sup>47</sup> Bolivia, [Family Code](#) (2014). Information from the [ILGA World database](#).

the same sex. This Code remains in force because few institutions have promoted normative changes either with new laws or by filing constitutional actions against them<sup>48</sup>.

## Repealed colonial laws regulating sexual orientation and gender identity<sup>49</sup>

In this section, we present five examples of colonial laws that regulated SOGI under the classification of “sodomy”, but when these laws were repealed during the end of the colonial period, the subsequent legislation no longer included provisions criminalizing SOGI.

### Brazil

The first Criminal Code<sup>50</sup> (1830) of Brazil contained no provision on sodomy. This Code repealed the crime established under Title XIII, Book V of the colonial law (“Filipe’s Ordinances”)<sup>51</sup> which established that any person who committed the “sin of sodomy” should be “burnt to dust”. Despite this early decriminalization, it has been indicated that other provisions of that Code were used to persecute persons who engaged in same-sex sexual acts. In 2015 the Supreme Court of Brazil declared that the expressions “pederasty or other” and “homosexual or not” under article 235 of the 1969 Military Penal Code were unconstitutional.

### El Salvador

The first Penal Code (1826) of El Salvador was enacted following the Spanish Criminal Code (1822) that contained no provisions on consensual same-sex sexual acts between adults and repealed other existing colonial laws that punished “sodomy”. In 2003, the Human Rights Committee noted that local provisions (“misdemeanour ordinances”) were being used to discriminate against people on account of their sexual orientation.

### Guinea-Bissau

The colonial Penal Code<sup>52</sup> (1886), as amended by other colonial provisions such as Law No. 177<sup>53</sup> (1912) and Executive Order-Law No. 39,688<sup>54</sup> (1954), remained in force after independence from Portugal and penalized “vices against nature”. This Code was repealed in 1993 with the enactment of a new Penal Code<sup>55</sup> (1993) which contains no provisions criminalizing consensual same-sex sexual acts between adults.

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<sup>48</sup> Information provided by Mano Diversa.

<sup>49</sup> All the information and sources of this section were obtained from the [ILGA World database](#).

<sup>50</sup> Brazil, [Criminal Code](#) (1830). Information obtained from the [ILGA World database](#).

<sup>51</sup> [Livro 5 Tit. 12: Dos que fazem moeda falsa, ou a dispendem, e dos que cerceiam a verdadeira, ou a desfazem \(Conc.\) Livro 5 Tit. 13: Dos que cometem pecado de sodomia, e com alimarias](#). Information obtained from the [ILGA World database](#).

<sup>52</sup> Guinea-Bissau, [Penal Code](#) (1886). Information obtained from the [ILGA World database](#).

<sup>53</sup> Guinea-Bissau, [Law 177](#) (1912). Information obtained from the [ILGA World database](#).

<sup>54</sup> Guinea-Bissau, [Executive Order-Law No. 39,688](#) (1954). Information obtained from the [ILGA World database](#).

<sup>55</sup> Guinea-Bissau, [Penal Code](#) (1993). Information obtained from the [ILGA World database](#).

## Ireland

Until 1993 male homosexual acts were criminalized by two statutes inherited from the British colonial era, the Offences against the Person Act<sup>56</sup> (1861), which covered anal intercourse, and the Criminal Law (Amendment) Act<sup>57</sup> (1885), which covered "gross indecency" (all other sexual acts between men). Prior to its annexation into the United Kingdom in 1801, same-sex sexual acts had been criminalized by An Act for the Punishment for the Vice of Buggery (1634).

In 1977, David Norris commenced proceedings in the Irish High Court on the basis that these anti-gay laws were unconstitutional. His case was rejected in both this Court, and in the Supreme Court, but was eventually supported by the European Court of Human Rights in 1988. Finally, in 1993, Section 2 of the Criminal Law (Sexual Offences) Act<sup>58</sup> (1993) repealed the provisions described above.

In August 2022, it was reported that the Department of Justice had been sent consultation documents drafted by an "expert working group" tasked with examining how the State can overturn historical convictions of men found guilty of same-sex conduct. The Department of Justice is slated to begin a public consultative process to determine how best to implement these recommendations, and whether any form of reparations or redress are feasible.

## Macao (China)

In Macao, decriminalization was brought about in 1996 with the entry into force of the Penal Code<sup>59</sup> (1995, effective 1996), revoking the colonial Portuguese Penal Code<sup>60</sup> (1886) which punished consensual same-sex sexual acts between adults.

## Hong Kong

Hong Kong's legal history under British colonial rule included articles 49 to 53 of the Offences Against the Person Ordinance, which criminalized homosexuality until their repeal in 1991<sup>61</sup>.

## Botswana

In June 2020, Botswana overturned the colonial-era laws which criminalized homosexuality, with the judge, Michael Leburu, declaring that "the anti-sodomy laws are a

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<sup>56</sup> Ireland, [Offences against the Person Act](#) (1861). Information obtained from the [ILGA World database](#).

<sup>57</sup> Ireland, [Criminal Law Amendment Act](#) (1885). Information obtained from the [ILGA World database](#).

<sup>58</sup> Ireland, [Criminal Law \(Sexual Offences\) Act](#) (1993). Information obtained from the [ILGA World database](#).

<sup>59</sup> Macao, [Penal Code](#) (1995). Information obtained from the [ILGA World database](#).

<sup>60</sup> Macao, [Portuguese Penal Code](#) (1886). Information obtained from the [ILGA World database](#).

<sup>61</sup> Han, Enze & O'Mahoney, Joseph. (2018). [British Colonialism and the Criminalization of Homosexuality: Queens, Crime and Empire](#).

British import” and were developed “without the consultation of local peoples”. It was viewed as a massive success and a historic moment across the continent<sup>62</sup>.

## **Reparations and redress for the legacy of colonialism on gender and sexual diversity**

Reparation policies are generally limited due to the complexity of the situation in former colonies, including poverty, insecurity, corruption, and weak institutions. However, it's important to acknowledge some efforts made by States to compensate the aftermath of colonialism, such as the following.

In **Bolivia**, there is the Law 045 against Racism and all forms of Discrimination, which responds to the historical social struggles against discrimination, struggles that began in the colony and continued until the republican era. This law considers discrimination based on SOGI, but unfortunately, it has not been implemented accordingly. So far, no real reparation action has been carried out, nor have LGBTQI+ and other ancestral sexual and gender diverse people promoted laws or policies or specific support for the reparation or compensation of damages for the legacy of colonialism<sup>63</sup>.

The **Democratic Republic of Congo** has taken a few steps in this regard, including recognition of the suffering and human rights violations suffered by the Congolese during colonization, as well as commemorating the country's independence. However, reparative justice for the lasting consequences of colonialism in the DRC should certainly include measures to address issues related to violence and discrimination based on SOGI<sup>64</sup>. This could include measures such as education programs to raise awareness of gender and discrimination issues, training programs for justice professionals to ensure that cases of violence and discrimination are handled appropriately, and initiatives to improve access to employment, education, and health care for women and LGBTQI+ and other ancestral sexual and gender diverse people.

In **Bangladesh**, Hijras have been legally recognized as a third gender since 2004. However, the legal recognition of Hijra is based on the interpretation of Hijra as a sex, rather than a gender or cultural identity. In fact, there is no definition of the Hijra sex provided by the state, and there is a widespread misconception that all Hijras are intersex or have undergone some form of genital procedure. In December 2014, the Ministry of Social Welfare invited Hijras to apply for an employment scheme, however, participants had to undergo an invasive medical examination to determine whether they were “authentic” Hijras<sup>65</sup>. The legal recognition of Hijras is thus exclusionary to many in the community and

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<sup>62</sup> Information provided by Gender Dynamix.

<sup>63</sup> Information provided by Manodiversa.

<sup>64</sup> Information provided by OASIS RD Congo.

<sup>65</sup> Barua, Mithila. (2018). [Third Gender of Bangladesh: An under privileged community](#). Society for Critical Legal Studies, University of Chittagong.

is generally insufficient to tackle stigmatisation. Even when living in community, Hijras continue to face severe marginalization and a lack of adequate support from the state<sup>66</sup>.

### Measures to effective reparative justice

- Recognition of past injustices: It is essential that the States recognize the historical injustices committed against people based on their SOGI. This implies a collective acceptance of historical responsibility due to colonialism and an understanding of how these injustices have had lasting consequences in the lives of those affected.
- Active participation: It is also important to recognize that reparative justice cannot be effective without the active participation of affected communities. Therefore, working closely with civil society organizations, including indigenous communities, members of the LGBTQ+, and other ancestral sexual and gender diverse persons is essential to ensure that reparative justice measures are responsive to the needs and concerns of those directly affected.
- Material and symbolic reparations: Material measures may include financial compensation, access to health and education services, employment and housing opportunities, among others. Symbolic measures may include public apologies, official recognition of the injustices committed, and the promotion of diversity and inclusion in all spheres of society.
- Decriminalization of SOGI and repeal of colonial laws: Countries where legacies of colonial laws are still present today required urgent social and normative changes that should be in line with international human rights standards and that adequately tackle the multiples realities of their population, which includes LGBTQ+ and other ancestral sexual and gender diverse persons.
- Raising awareness of the rights of LGBTQ+ and other ancestral sexual and gender diverse persons: It is fundamental to call for more critical societies in countries where colonial legacies are tight with certain religious moralities and norms and, therefore, prevent recognition and advancement of SOGI rights.
- Recognition of ancestral identities with diverse SOGI in indigenous and racialized communities: It is crucial to strengthen the social and political participation of LGBTQ+ and other ancestral sexual and gender diverse persons and guarantee their active agency in all aspect of public life.
- Increase the global awareness regarding unfortunate anti-LGBT laws currently being discussed and promoted in countries such Uganda and Tanzania: using a misleading rhetoric of importing western values in African cultures. Therefore, it is necessary to promote a global awareness to States to reject these laws.

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<sup>66</sup> Harvard Divinity School. (2018). [The Third Gender and Hijras](#): Hinduism case study.