

The impact of colonialism in violence and discrimination based on SOGI (sexual orientation and gender identity)

This report examines a specific section of the fabric that has formed all cultural, legal and social traditions of the world, and in which gender and sexuality play a fundamental role. Indeed, human history has been marked by dynamics of power and mobility; among these, movement of peoples to areas where the inhabitants were subjugated, dominated or exterminated, syncretism and resistance, and formation and deconstruction of national and imperial States. The term *colonialism* is used in daily and political language in an extremely ample way, to designate processes through which a State acquires or maintains full or partial political control over another sovereign nation, or the subjugation of groups or entities over others. This report examines one angle of that phenomena: projects of recent centuries, through which legislation and mores on sexual orientation and gender identity were utilized as means to consolidate the colonial enterprise.

The notion of gender has been constructed with strong points of reference in the male-female binary and the asymmetries of power associated with it, and persons often self-identify or suffer violence and dis-

crimination based on sexual orientation and gender identity (SOGI) in ways that cannot be placed within that axis. Some examples are seen in the lived experience of kathoey (Thailand), bakla (Philippines), travestis (Argentina and Brazil), fa'afafine (the Samoan islands) and leiti (Tonga). These identities are sometimes included in notions of sexual orientation and gender identity, but may operate under an understanding of sex and/or gender that does not neatly or necessarily coincide with either.



Colonialism has been a significant source of violence and discrimination based on SOGI, but it cannot be solely held responsible for these marginalizations. Evidence suggests that some settings were more accepting of diversity, but others were violent and cruel against individuals based on sexual orientation or gender. Understanding and addressing colonial processes and their impact is crucial for deconstructing violence and discrimination based on SOGI.





United Nations Member States have consistently declared their conviction on the need to eradicate colonialism, and have made this one of the principal objectives of the Organization.

The evidence strongly suggests that before colonization many peoples in the African continent did not have a binary approach to gender or correlate anatomy to gender identity. Feminist theorists have written about how sexual morality was less gendered and hierarchical within Sub-Saharan pre-colonial societies. Tribes situated in present-day Nigeria did not have a gender-binary and did not assign gender at birth. In the Yoruba culture, social hierarchies were based on seniority, while in Ethiopia, Oromo individuals switched between gender roles for a period of eight years. Senegalese communities showed fluid sexual behaviors, including same-sex practices, transgender identities, and cross-dressing. Dagaaba people in Ghana assigned gender based on energy, and same-sex marriages were observed in Kenyan tribes.

From the Babaylan spiritual protectors with both feminine and masculine spirits in one person in the Filipino indigenous community to the Ogbanje individuals in Nigeria, SOGI diversity has existed everywhere in the world throughout recorded history. Individuals embodying gender-variant roles and identities have been cherished and respected in many societies, both for ceremonial and advisory roles, such as Two-Spirits in North America, the Bonjus in Europe, the Muxes in Mexico, the Hijras in India and Bangladesh, the Takatāpui in Aotearoa/New Zealand, and the Sistergirls of the First Nation Cultures in Australia. 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.



Categorizations such as LGBTI cannot fully capture the diversity of sexualities and genders in life experiences of Indigenous Peoples: among them, diversity in sexual orientation and gender identity has historically been the norm, not the exception.



II. Mechanisms of colonial oppression

Most colonial projects regulated sexuality and gender as part of their broader enterprise to dominate peoples and territories, and colonization processes account for varied forms of violence and discrimination against individuals of diverse SOGI. Colonial oppression, inextricably tied to capitalism, imposed systems of differentiation, hierarchization and domination to exercise strict control over colonized peoples. This was done through conversion to the colonizer's religious institutions, the imposition of a rigid gender binary on colonized peoples, and the criminalization of gender and sexual non-conformity with models decided arbitrarily by the colonial authorities.

Colonial projects were particularly successful in concretizing political strategies such as political homophobia, which could be used in several ways for colonizers to further their own interests. It was often enacted through prohibitive laws targeting

implicitly or explicitly sexual conduct and expressions of gender identity. Sodomy laws prohibited sexual acts like buggery, carnal knowledge against nature, crime against nature, or nefarious crime; terms with a common root in Judeo-Christian tradition and Canonic law, which considered non-procreative acts abominable.

While law was a principal means of enforcement, it was also at the base of complex systems of socialization that included policing, medicine, literature and education, all placed at the service of controlling sexuality and gender in the colonies, construed in alleged opposition to European sexual mores.

Colonization implied imposing 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. 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.

III. Patterns of regulation of sexual and gender diversity through colonization

a) Religious: From the late fifteenth century through the 1850s, Portugal and Spain criminalized “pecado nefando” (nefarious sin). Policies were violently imposed through the Catholic Church, resulting in the isolation and destruction of local customs and beliefs that did not align with those parameters, and the discourse of “sin” and “guilt” were used against Indigenous persons, Afro-descendants, women and gender-diverse persons.

Both Portuguese and Spanish inquisitorial courts applied their “sodomy” laws inconsistently, sometimes to cover anal intercourse alone, and other times to include nonprocreative sexual acts, “bestiality,” and masturbation. For instance, the Inquisition Court of Cartagena at New Granada (present day Colombia, Ecuador, Panama and Venezuela) was

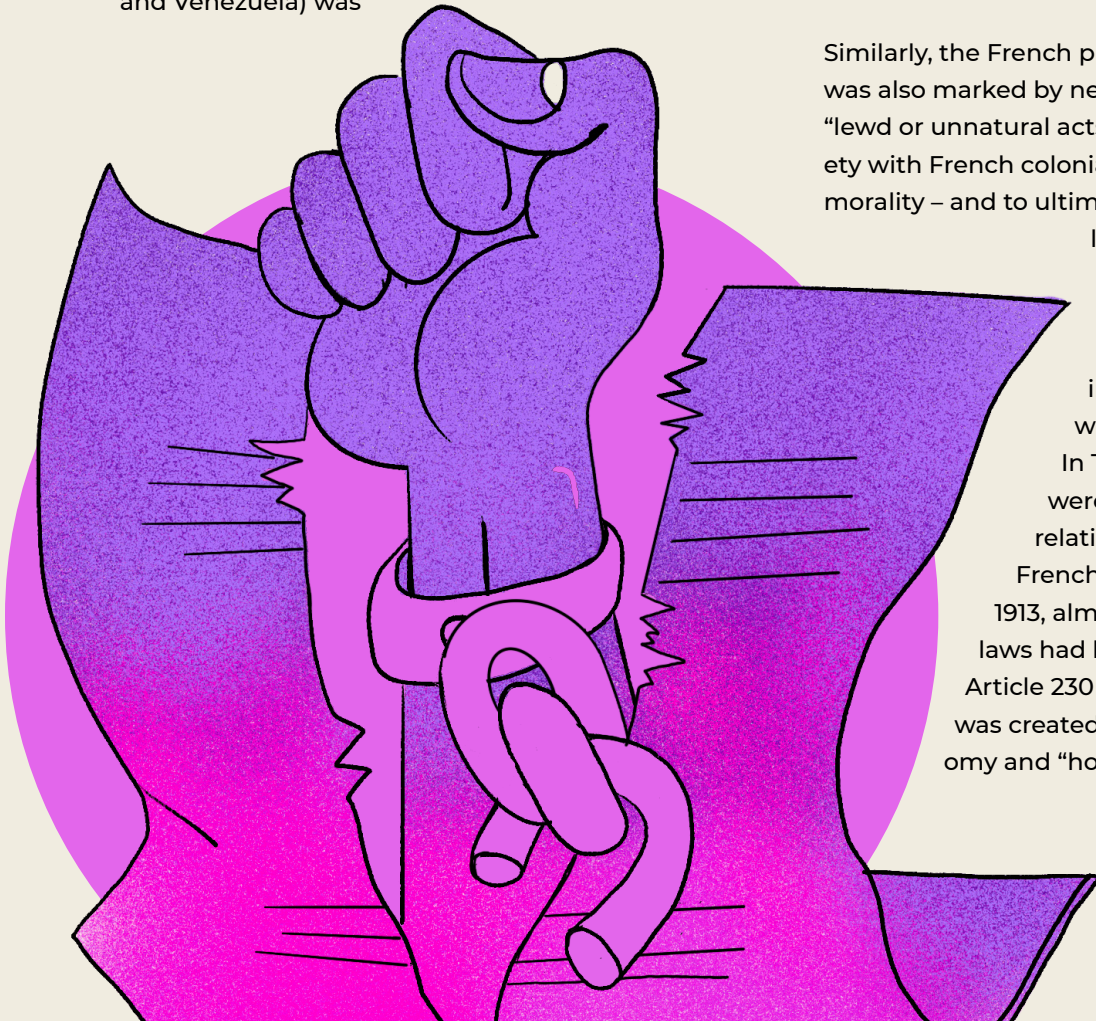
seen to prosecute “homosexual” acts occurring amongst predominantly African and indigenous slaves, labeling them as “sodomy” and “sin.” The punishments for sodomy in both empires were severe, including prison, confiscation, torture, and even death by burning.

b) Secular: The French Revolution was a watershed in European history of gender and sexuality, as the French Republic was founded on values of secularization, liberalism, and strict separation between the public and the private. A new rationale for the control of gender and sexuality emerged and traveled around Europe through Napoleonic conquests and then to colonized territories in the Americas, Africa, and Asia. In Senegal, for example, colonial French accounts characterize native persons as having lesser moral education and as being perverted individuals and criminals. These narratives were perpetuated intentionally, to generate support for the French administration of Senegalese persons and the spread of the *mission civilisatrice*.

Similarly, the French protectorate era in Morocco was also marked by newly introduced laws on “lewd or unnatural acts,” to align Moroccan society with French colonial ideals around Christian morality – and to ultimately be used to control

local persons by limiting personal autonomy in sexual matters. In other cases, outlawing same-sex intimacy did not correspond with metropolitan patterns.

In Tunisia, for example, there were no references to same-sex relations in laws in the pre-French protectorate era, but in 1913, almost a century after sodomy laws had been abolished in France, Article 230 of the Tunisian Penal Code was created to criminalize acts of sodomy and “homosexuality.”



c) Hybrid: The criminalization of same-sex relations throughout the British empire harks back to the 1534 buggery law in Britain, which criminalized “acts of sodomy” to target “supposed sexual immorality” in the Catholic church. In 1825, the British politician Thomas Macaulay was given the task to draft laws for the erstwhile British colony of the Indian subcontinent, motivated by reports that same-sex relations were pervasive across the colonized world. The Indian Penal Code (IPC) reflected the widespread adoption of “anti-homosexuality” laws across the British empire as a tool for control, particularly in Asia Pacific and Africa, but also outside of it. Around 1871, modern day Singapore, Brunei and Malaysia, replicated the IPC provisions, and later on the century, British Burma and Sudan also did.

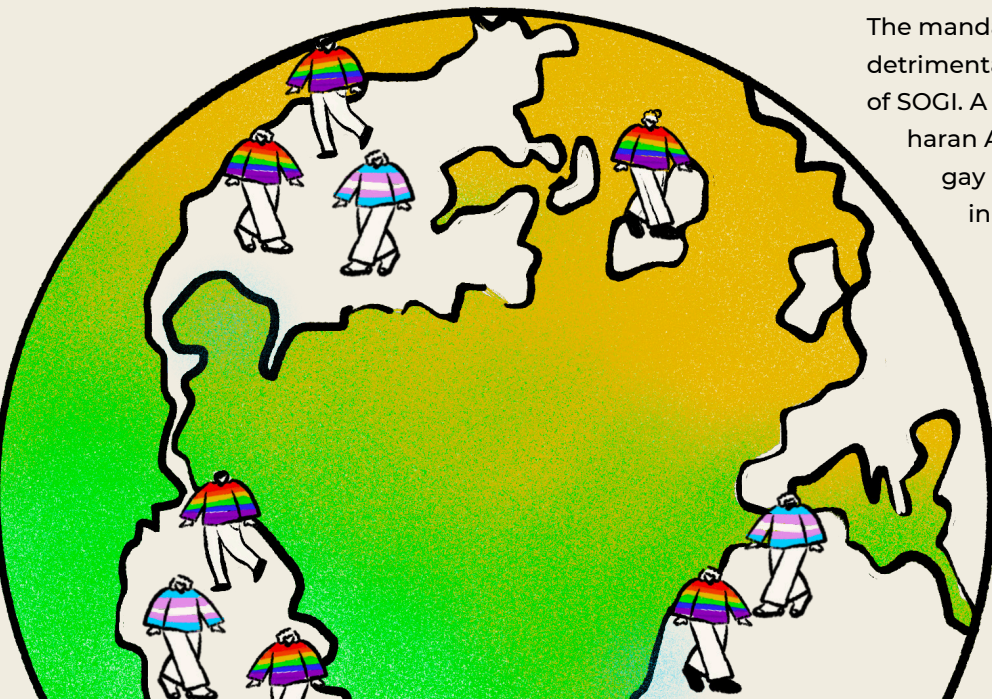
Aside from the IPC, the second most influential penal code was the Penal Code of the Australian colony of Queensland (QPC) that came into force in 1901 and was the basis for drafting criminalizing laws in Nigeria, Kenya, Uganda, Tanzania, Malawi, Zambia, Zanzibar, Gambia, New Guinea, Fiji, the Solomon Islands, Seychelles and Cyprus. All such laws have been termed as a “tool of social control” which preserve prevailing gender norms and reinforce discriminatory hierarchies using legally sanctioned harassment and arrest of persons characterized as “deviant” by law enforcement.

IV. Reconciling past, present and future

In some cases, even after independence, colonial dynamics appear to have had significant influence over the processes of law and policy reform. Brazil, for example, introduced crimes against “morality and good customs,” “vagrancy,” and “indecent exposure”, similarly to Portugal’s Imperial Criminal Code of 1830, allowing Police forces to harness these legal provisions to “clean cities from feminized or scandalous men and too visible women-men.” Cameroon and Senegal, both former French colonies, criminalized same-sex relations after they gained independence in 1960, in an effort to incorporate norms adopted by colonial overlords. Colonial trends of criminalization also impacted policies in countries that were not colonized. For instance, Japan and Thailand adjusted their laws during the nineteenth century to mirror Western systems as a signal of modernization.

The effects of sumptuary laws banning cross-dressing with the intent to regulate diverse gender identities and expressions were also seen in British colonies across the world, in conjunction with other laws oppressing LGBTI persons. 20 countries explicitly criminalize and/or persecute transgender people through laws targeting “cross-dressing,” “impersonation” or “disguise laws.”

The mandate has also provided evidence of the detrimental impacts of continued criminalization of SOGI. A recent study in ten countries of Sub-Saharan Africa shows that HIV prevalence among gay men and men who have sex with men in countries that legally criminalize same-sex intimacy is five times higher than in countries that do not have such laws. In countries with recent prosecutions, HIV prevalence is almost 12 times as high. The continuation of these laws therefore fosters an ongoing hidden and dire environment for LGBTI+ people, significantly impacting their access to goods and services, employment and education and health.



The global trend of decriminalization of same-sex intimacy occupies the span of the twentieth century and remains a work in progress. In 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.

Several African countries, including Madagascar, Mali, Niger, Ivory Coast, Central African Republic and Burkina Faso attained independence from France and adopted Penal Codes that did not criminalize same-sex relations. Former British colonies, on average, decriminalized same-sex relations much after uncolonized countries. Hong Kong repealed its sodomy laws in 1991 and India read down its sodomy provision in 2018. Starting in the 2010s, former colonies including Fiji, Lesotho, Belize, Seychelles, Botswana and Singapore successfully decriminalized same-sex relations,

and in the Caribbean, Belize, Trinidad and Tobago, Saint Kitts and Nevis, Barbados, and Antigua and Barbuda have all decriminalized same-sex intimacy between 2016 and 2022.

Colonial legislation and mores lie at the origin of current legal frameworks that discriminate and persecute LGBTI+ persons. They are a determinant aspect in how the social frameworks we live in today were forged. However, continued criminalization results from deliberate or negligent law reform (or worse, some reforms have lowered even further the applicable standards), which places the responsibility with the State once it acquires self-government. If all our are societies are irremediably influenced by cultural syncretism, it falls within each State's mandate to distinguish which elements within a legal system are in conformity with International Human Rights Law and which need to be reevaluated and discarded.

