Call for input on: Report on colonialism and sexual orientation and gender identity

Addressed to: Independent Expert on sexual orientation and gender identity

Authors:

Relevant Questions:
1. What laws, policies, and practices regulated or influenced the shaping of or the socio-normative perception of sexual orientation and gender identity in colonial times? How were they introduced, promoted, administered or enforced? Examples could include prohibition of certain sexual acts, but also regulation of sexual or gender identities and expressions (such as bans on cross-dressing).
6. How has the legal and social regulation of gender, sexual orientation and gender identity been relevant for imposing and maintaining colonial power?
7. What is the ongoing impact of gender- and sex-regulating colonial laws on the enjoyment of human rights by LGBT persons? How did the imposition of colonial laws on sex and gender shape social and moral ideas about sexual orientation and gender diversity?

Comments:

The objective of these brief comments is to bring to the attention of the Independent Expert on SOGI **the impact of Portuguese colonialism on the legal regulation of sexual orientation in former Portuguese colonies.**

To begin with, Portuguese colonial agents and local populations from Portuguese imperial territories managed legal plurality from the early modern age. From the 15th and 18th century there was a "pluralistic matrix" of law and power. European and local/indigenous normative spheres in the American, Asian, and African territories of Portuguese colonial societies coexisted. However, the object of converting colonized subjects to Christianity restricted their sphere of self-regulation, submitting local "practices and customs" to Christian morality.[1] This regulatory practice can have reasonably affected Court decisions on indigenous people whose practices were considered against Christian morals, such as "sodomia." Some Inquisition lawsuits suggest that these cases existed in non-European territories of the Iberian Monarchies and were dealt with in courts.[2]

After the liberal Revolution in 1820, a new political model was established according to which State administration and State law should be applied uniformly throughout national territory, including overseas territories. These new principles led to a policy that generally implemented Portuguese metropolitan legislation in the colonies, namely the modern Codes passed by Portugal's

[1]António Manuel Hespanha, *Modalidades e limites do imperialismo jurídico na colonização portuguesa*, « Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno », 41, 2012, pp. 101-135.
[2] Sophia Blea Nuñez, "Work and Identity in the Case of Elena/o de Céspedes (16th century)", in Ângela Barreto Xavier, Cristina Nogueira da Silva, Michel Cahen, *Slave Subjectivities in the Iberian worlds* (16th-19th centuries), Brill, *forthcoming*.

Liberal Parliament in which members elected from the colonies also held seats.[3] This suggest that practices identified in the Codes as "against nature" – namely in the Penal Codes (1852; 1880) - were also illegal in colonies. The Penal Code of 1852 only punished conducts against modesty when they involved coercion (thereby failing to cover consensual homosexual activities). In 1912, the Portuguese Parliament passed a new law criminalizing any "vices against nature" (*vício contra a naturaleza*) as part of a broader reform criminalizing begging and vagrancy. The newly introduced law was based on a modern understanding of homosexuality as an individual identity rather than mere conduct.

Notwithstanding this new approach, plurality remained a driving force in the administration of justice or the status of Indigenous people in colonies. Colonial specific circumstances, namely existent Indigenous customary law, were recognised in the introductory texts of the decrees that enacted modern Codes in the colonies. The Codes, it was argued, should be adapted to the circumstances of colonial contexts.[4]

This was the case when, in 1869, a decree issued on November 18 extended the general application of the Portugal's first Civil Code (1867) to its overseas colonies.[5] The introduction to the decree determined that all inhabitants of non-European Portuguese territories were equally subject to the Civil Code. However, it also recognised that this was not immediately possible due to the existent legal plurality inherited from previous arrangements. The Civil Code would be the general rule, but some local/Indigenous groups' "practices and customs" (*usos e costumes*) could be applied if they did not threaten colonial public order or run against European morals. Therefore, at least in theory, while this decree was in effect, non-Catholic local/Indigenous groups could opt for to follow the Civil Code or their own practices and customs. It would be interesting to know how indigenous authorities judged cases involving same-sex relationships. However, at present, we do not know, due to a lack of historiographic studies.

Later, at the beginning of the twentieth century, the approach of Portugal as a colonial power changed again. Largely due to the military conquest and occupation of new territories in Africa within the international context created by the Berlin Conference and European competition for territory in Africa, the Portuguese government enforced an Indigenato system in Angola, Mozambique, and, later, in Guinea.[6] Devised in response to new demands stemming from the need to administer larger local populations, as well as new requirements regarding labour extraction and land dispossession, this new system divided colonial African subjects into two distinct groups: those who could become Portuguese citizens, and those who could not – the latter being the vast majority of the Indigenous African population. The latter groups were to become non-citizens, or *indígenas*, which was now a legal status.

---

[3] António Manuel Hespanha, *Panorama da história institucional e jurídica de Macau*, Macau, Fundação Macau, 1995. On the political representation of the Overseas in Portugal and Spain see *Imperios Ibéricos y representación política (siglos XIX-XX)*, Inés Montaud and Cristina Nogueira da Silva eds., Madrid, CSIC (Consejo Superior de Investigaciones Científicas), Colección Estudios Americanos, 2021, pp. 9-55.

[4] Cristina Nogueira da Silva, *A Construção jurídica dos territórios ultramarinos portugueses no século XIX, Modelos, Doutrinas e Leis*, Lisboa, Imprensa de Ciências Sociais, 2017.

[5] *Colecção de Decretos promulgados pelo Ministério dos Negócios da Marinha e Ultramar em virtude da Faculdade concedida pelo § 1 do art. 15º do Acto Adicional à Carta Constitucional da Monarquia*, Imprensa Nacional, 1870, p. 35.

[6] Cristina Nogueira da Silva, *A dimensão imperial do espaço jurídico português. Formas de imaginar a pluralidade nos espaços ultramarinos, séculos XIX e XX*, « Rechtsgeschichte - Legal History, Journal of the Max Planck Institute for European Legal History», 23 (2015), pp. 187-207. Id., *Natives who were citizens and natives who were indigenas in Portuguese Empire (1900-1926)*, in *Endless Empire. Spain's Retreat, Europe's Eclipse, America's Decline*, University of Wisconsin Press, 2012, pp. 295-306.

This system was enacted during the First Portuguese Republic (1910-1926). However, it was only enforced in 1917 (in Mozambique), and then in 1926 and 1929, during the Salazar dictatorship. Indígenas were individuals "of Black race and their descendants" who had not abandoned the "practices and customs" who were, according to the legal definition, "proper to their race." They had no political rights, and were subjected to exceptional criminal, tax, and labour laws.[7] They were also to be governed by special courts (private indigenous courts, *Tribunais privativos dos indígenas*) where the codified Indigenous customary law was to be applied by European judges or administrators, with the assistance of Indigenous counsellors.

Despite insisting on respecting Indigenous customary law, colonial authorities still maintained that "barbaric" legal practices or customary norms that violated public order or morals should be repressed. Therefore, the adoption of Indigenous customary law should be selective, allowing the abolition of customary legal practices that were considered immoral, uncivilized, or a violation of colonial public order.[8] This new legal framework meant that the option between the Civil Code and "practices and customs" was no longer free and voluntary. On the contrary, those who were legally *indígenas* could not be tried in ordinary Portuguese courts. Furthermore, metropolitan civil law would never apply to them.

The penalty for engaging in the crime of vice against nature (as happened with other crimes) differed for colonial subjects, as it consisted of forced labor in any of the Portuguese colonial territories – thereby illustrating the usage of similar laws as tools to recruit workforce in colonial space. Archival research conducted in Lisbon's archives indicates that the law was not enforced and that there were no convictions for *vícios contra a naturaleza* in the former colonies. However, this research is only partially reliable since colonial subjects could also be judged in colonial courts. The mentioned study explains the lack of enforcement in light of the relative tolerance towards local traditions and mores, as also illustrated by the lack of enforcement of laws against polygamy, which was part of a larger management plan seeking to avoid the uprising of local populations against the – rather fragile – colonial power.

As during this period, several cases were judged in these special courts, it is important to know more about the activity of these courts to get to some conclusion about hypothetical cases involving same-sex relationships. According to Gomes da Costa, there are no specific colonial rules in this area. Also, according to him, colonial agents during the first half of the twentieth century believed that the "problem" didn't exist among "primitive" population, because, like animals, they lived in harmony with "nature."[9] In greater detail, on the one hand, local populations in the former colonies were depicted by Portuguese social scientists as driven by impulses and animal-like behavior, and, as such, as naturally inclined towards heterosexual behavior ("a sexualidade africana estaria próxima da dos animais, impulsionada principalmente por instintos sexuais não refinados").[10] On the other hand, homosexuality was deemed to require an urban humus of bars, locker rooms, private spaces that was more common in larger urban areas in Europe. We believe that this conclusion makes sense, but it fails to consider the case law of *tribunais privativos dos indígenas*.

---

[7] Cristina Nogueira da Silva, *Constitucionalismo e Império*, Coimbra, Almedina, 2009, pp. 13-66; Lorenzo Macagno, *A invenção do assimilado. Paradoxos do Colonialismo em Moçambique*, LEdições Colibri, 2019, pp. 43-63.

[8] The same aim also justified the introduction of 'civilised' legal principles into Indigenous social life, a task to be undertaken through civilising work of European judges and administrators presiding over private Indigenous courts.

[9] Gustavo Gomes da Costa, *Reflexões sobre o legado colonial português na regulação das práticas sexuais entre pessoas do mesmo sexo em Moçambique*, « Anuário Antropológico », 46(3), 2021, pp. 158.

[10] Ibid., 161.

In addition, we have the status of "assimilados," who were judged in ordinary courts. The Indigenato system also allowed that some individuals of "Black race" who had *abandoned* their "practices and customs" could apply for Portuguese citizenship by proving before the administration or in private Indigenous courts, not only that they had abandoned those customs (namely polygamy) – the most important requirement for Portuguese citizenship – but that they could also speak and write the Portuguese language.[11] After providing such proof, they were considered Portuguese citizens (or *assimilados*) and, as such, (at least, in theory) enjoyed full civil and political rights. They would also be mandatorily tried in ordinary Portuguese Courts under metropolitan Portuguese law.[12]

According to this framework, it is possible that for "assimilados" the European rules on "vices against nature" had been applied. We are not aware of historical research on this point. But it is quite possible, because another idea held by colonial agents from the twentieth century was that when indigenous who got civilized emulate with special vigour the vicious behaviours of civilized people of European (urban) origin.

We are available to provide additional information and material.

Best wishes,

Cristina Nogueira da Silva
Associate Professor (com Agregação)
NOVA School of Law

Nausica Palazzo
Assistant Professor
NOVA School of Law

22 May 2023

[11] This primacy of abandoning what was considered indigenous customary law (the « practices and customs ») as a requirement to access citizenship was strongly asserted in a report by Gonçalves Cotta, the colonial administrator that Gomes da Costa identifies as the only one who proposed a norm criminalising native people who were involved in same sex relationships.

[12] Cristina Nogueira da Silva, *Assimilacionismo e Assimilados no Império português do século XX, uma relação equivocada* in *O Governo dos Outros. Poder e Diferença no Império Português*, Ângela Barreto Xavier e Cristina Nogueira da Silva orgs., Lisboa, Imprensa de Ciências Sociais, 2016, pp. 323-365. On these issues in Angola see Maria da Conceição Neto, *A República no seu estado colonial: combater a escravatura, estabelecer o 'indigenato'*, « Ler história », 59, 2010, pp. 205-225.