

REPORT ON COLONIALISM AND SEXUAL ORIENTATION AND GENDER

IDENTITIES – REPUBLIC OF KENYA

REPORT SUBMITTED TO THE OFFICE OF THE HIGH COMMISSIONER UNITED

NATIONS HUMAN RIGHTS

ARNOLD OCHIENG OGINGA'

arnold@ochiengogingaadvocates.africa

www.ochiengogingaadvocates.africa

APRIL; 2023

INTRODUCTION AND BACKGROUND

Colonial control of Sub-Saharan sexualities was justified by ideas of the primitive African race which needed to be controlled in order to elevate to a more 'civilized' status as measured against the colonizers' Victorian ideas of sex. The regulation of same-sex activities within the colonies in Sub-Saharan Africa was largely geared towards broader ideas about white superiority, Christianity, colonial capitalism, colonial nation building, and colonial citizenship.² According to Flint and Hewiltt,

¹ **Arnold Ochieng Oginga** is an Advocate of the High Court of Kenya; a Constitutional Law, Human Rights, Electoral justice, and Tech Law expert, and litigates and consults in this field. He is the CEO and Founder of **OCHIENG OGINGA & COMPANY ADVOCATES** the Managing Director and Co-founder of **IDEAT TECH POLICY AFRICA**. He is a Certified Sexual and Gender Minority Rights Practitioner; & Certified Disability Rights Practitioner certified by the University of Pretoria, Centre for Human Rights, South Africa. He is currently an LL.M candidate at the University of East London, United Kingdom.

² Jesse Brimmer, "Un-African" African Sexualities: Post-Colonial Nation Building and the Conditioning of Citizenship in Sub-Saharan Africa with Analysis of Uganda and Kenya' 2020, Central European University Collection.

colonialization developed racialized characterization of African sexualities. Africans were portrayed as racially prone to ‘uncontrolled’ sexual behavior as these habits developed without ‘true religious guidance’. Colonizers became fixated on African sexuality which they thought needed to be controlled. Additionally, the tropes of the African male as dangerous were especially important in settler colonies where they feared race mixing and rape by African men. The need for control of the ‘uninhibited’ and ‘immoral’ African sexual practices was furthered by the spread of sexually transmitted diseases on the continent. This justified the colonizers’ obsession with African sexualities as they were now also protecting Africans from themselves by controlling their sexuality.³ Tamale in her article notes that African sexuality was depicted as primitive, exotic, and bordering on Nymphomania. It was perceived as immoral, bestial, and lascivious. Their sexuality was read directly into their physical attributes, and the attributes were believed to reflect the culture of morality of Africans.⁴ The foregoing largely presents the rationale, in general, pertaining to the regulation through laws of African sexualities by the colonizers. In Kenya, the topic of sexual orientation and gender identities has only in recent times resurfaced and dominated the public discourse and debate. The general environment has been largely regulated by colonial laws in the form of the Penal criminal consequences as copied from the then Indian Penal Code which was shared by the British colonies. As a British colony, most of the laws were largely transplanted and copy pasted from British. There is no law however, that makes specific recognition or reference to sexual orientation and gender identities in Kenya save for the Children Act, 2022 which is the only law that recognizes intersex children as a distinct identity.

³ Adrian Flint and Vernon Hewitt, ‘Colonial Tropes and HIV/Aids in Africa: Sex, Disease, and Race’ 2015, *Commonwealth and Comparative Politics*, 53, No. 3.

⁴ Sylvia Tamale, ‘The Right to Culture of Rights: A Critical Perspective on Women’s Sexual Rights in Africa’ 2008, *Feminist Legal Studies*, Vol. 16, No. 1.

Did the imposition and/or enforcement of colonial laws or policies on sex, gender and sexuality change pre-colonial treatment of sexual orientation and gender identity? What historical or anecdotal evidence is there available about the treatment of gender and sexual diversity before past or present experience of colonization?

There is no detailed exposition in the existing literature pertaining to sexual orientation and gender identities, and practices during the pre-colonial times and the earlier years post-colonialization. Among the existing literature point to examples such as in the Nandi tribe from the historic region of the Nandi Hills in the Great Rift Valley where, same-sex marriage traditions were observed from the pre-colonial times to the 21st century. “A woman who had taken a wife was said to have become a man. It is said that she had been promoted to male status (kagotogosta komostab murenik)”.⁵ According to Leah, many African countries did not see gender as a binary in the way that their European colonisers did nor did they correlate anatomy to gender identity. Additionally, in no African country prior to colonization do we see any persecution of LGBT individuals because of their sexuality, nor any anti-LGBT laws.⁶ This paper did not come across any literature or writing depicting the treatment of gender and sexual diversity before past or present experience of colonization.

⁵ Bharat Mehra, Paul A. Lemieux III, and Keri Stophel, ‘An Exploratory Journey of Cultural Visual Literacy of “Non-Conforming” Gender Representations from Pre-Colonial Sub-Saharan Africa’ 2019, *Open Information Science*, Vol. 3, pp. 1-21.

⁶ Leah Buckle, ‘African Sexuality and the Legacy of Imported Homophobia’ 2020, available at <http://www.stonewall.org.uk/about-us/news/african-sexuality-and-legacy-imported-homophobia> accessed 23 April; 2023.

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, sexual or gender identities and expressions? Such as bans on cross-dressing)

The **Penal Code of Kenya, 1963, Chapter 63** of the Laws of Kenya largely influenced and shaped the socio-normative perception of sexual orientation and gender identity as it completely outlawed and imposed penal consequences in the form of penal sanctions on what it referred to as ‘unnatural offences’, which entail carnal knowledge by male persons against acts of nature. This law was largely borrowed from the British colony laws that were then being applied within the British colonies.

What colonial laws regulating sexual orientation and gender identity are still in place today? How are they enforced? How are they being interpreted by national jurisprudence and customary law? What legal, moral, or socio-cultural explanations have been provided, if any, for their continued existence?

The **Penal Code of Kenya, Chapter 63** of the Laws of Kenya remains the key statute making provisions close to the topic pertaining to sexual orientation and gender minorities. The Penal Code makes specific provisions pertaining to what was considered ‘unnatural offences’. **Sections 162, 163, and 165** made express penal prohibitions namely:

Section 162 provides for the offence of ‘unnatural offences’. It states that:

Any person who –

- (a) Has carnal knowledge of any person against the order of nature;**
- (b) or has carnal knowledge of an animal; or**
- (c) permits a male person to have carnal knowledge of him or her against the order of nature,**

is guilty of a felony and is liable to imprisonment for fourteen years, with or without corporal punishment.

Section 163 provides that:

Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years, with or without corporal punishment.

Section 165 provides that:

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years, with or without corporal punishment.

The above provisions are still being implemented and in fact, the situation has been exacerbated by the subsequent enactment of the **Constitution of Kenya, 2010**, which provides for marriage between persons of the opposite sex and does not recognize sexual orientation and gender identity. The **Constitution of Kenya, 2010** recognizes and prescribes marriages of the opposite sexes. It stipulates that “*Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties*”. This provision of **Article 45** of the **Constitution of Kenya, 2010** has been reaffirmed in the **Marriage Act, 2014, Laws of Kenya**, which provides that: “*Marriage is the voluntary union of a man and a woman whether monogamous or polygamous union and registered in accordance with this Act.*”

The above provisions have influenced the formulation of the current proposed **Family Protection Bill of Kenya, 2023**, which seeks to impose further penal consequences in the form of criminalization of same-sex-relations and sexual conduct and further criminalize sexual orientation and gender identities by only recognizing sex based on biological identification in the form of male and female anatomy. The proposed law defines ‘sex’ as:

“Biological state of being male or female as physically observed and assigned at birth, or as medically determined and assigned by the time the person reaches puberty; but excludes sexual orientation and gender identity.”

How, if at all, has the protection against violence and discrimination based on sexual orientation and gender identity been transformed and positively or negatively impacted by processes of decolonization?

The protection against violence and discrimination based on sexual orientation and gender identity has been transformed by the interventions of the Courts in Kenya for instance the pronouncement by the Supreme Court of Kenya in the case of **Non-governmental Organization Coordination Board vs Erick Gitari and Other, Supreme Court Petition No. 016 of 2019** on the protection and inclusion of sexual orientation as a ground for non-discrimination to be read into the Constitution of Kenya, 2010.

If no longer in place, when were colonial laws regulating sexual orientation and gender identity repealed? In what pretext were they abolished and what was the rationale/explanation for their abolishment?

The colonial laws as prescribed under **Sections 162, 163, and 165** of the **Penal Code of Kenya** are still in place and have in fact been held to be valid and unconstitutional by the Kenyan Court in the case of **EG & 7 others vs Attorney General; DKM & 9 others (Interested Parties); Katiba**

Institute & another (Amicus Curiae), Nairobi High Court Petition No. 150 of 2016, where the High Court of Kenya declined to declare the said provisions as unconstitutional and held that Kenya is founded on cultural values and principles on governance as the foundation of the nation and as the cumulative civilization of the Kenyan people and the nation; and that the provisions are not unconstitutional as **Constitution of Kenya** recognizes only marriages between persons of the opposite sex and as such the decriminalization of same-sex sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions, tenor and spirit of the Constitution. The above litigation is however still ongoing and is pending at the Court of Appeal of Kenya.

In regard to sexual orientation and gender identities, the Supreme Court of Kenya in the case **Non-governmental Organization Coordination Board vs Erick Gitari and Other, Supreme Court Petition No. 016 of 2019**, the apex court of Kenya affirmed that ‘sexual orientation’ is to be read into the equality provisions under **Article 27 of the Constitution of Kenya, 2010**, which provides that every person is entitled to equal protection of the law and shall not be discriminated on any grounds.

How has the legal social regulation of gender, sexual orientation and gender identity been relevant for imposing and maintaining colonial power?

The existing laws have continued to hamper the recognition of sexual minorities and gender identities despite the subsequent changes in British laws, where the Penal Code was largely borrowed from.

What is the ongoing impact of gender-and-sex-regulating colonial laws on 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?

The most prominent impact of gender-and-sex-regulating laws on enjoyment of human rights by LGBT persons in Kenya is evidenced through the stigma and continued discrimination and unequal application of the laws on these populations. For example, the Non-Governmental Organization Coordination Board decline to register an NGO which had one of its objectives and even name, to denote the promotion of the human rights of the LGBT persons.

Was there a relationship between colonial laws and policies that created unequal treatment and power relations affecting LGBT persons, paving the way to intersecting forms of discrimination, exclusion, racism, xenophobia and related intolerance, patriarchy, and other forms of discrimination and oppression? How did these laws and policies impact persons with multiple and intersecting identities such as LGBT persons with disabilities, older LGBT persons, LGBT children, LGBT persons of African descent, among others.

There is no documented law or policies that created unequal treatment and power relations affecting LGBT persons, paving the way to intersecting forms of discrimination, exclusion, racism, xenophobia and related intolerance, patriarchy, and other forms of discrimination and oppression on persons with multiple and intersecting identities such as LGBT persons with disabilities, older LGBT. LGBT children, and LGBT persons of African descent, among others.

Have any laws, policies, or psych-social support or legal remedies been put in place to recognize and provide reparations and redress for the legacy of colonialism in relation to the enjoyment of human rights? Do these take into account violence and discrimination and gender identity?

The Constitution of Kenya contains enactments in the Bill of Rights which grants every person the right to seek redress from the **High Court of Kenya**.⁷ This has offered an avenue for the redress of the legacy of colonialism and the courts have deployed the doctrine of transnational justice in addressing such grievances. A key example has been in the recognition of intersex persons in Kenya which emerged as a result of the courts intervention and which led to the amendment of the **Children Act, 2022**, Laws of Kenya, which now recognizes ‘intersex’ children and defines an intersex child under **Section 2** as:

“A child with a congenital condition in which the biological sex characteristics cannot be exclusively categorised in the common binary of female or male due to inherent and mixed anatomical, hormonal, gonadal or chromosomal patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood.”

⁷ Article 165 of the Constitution of Kenya provides that: there is established the High Court of Kenya shall have –

- a) Unlimited original jurisdiction in criminal and civil matters;
- b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- c) ...

In addition, the Constitution establishes the **Kenya National Human Rights and Equality Commission**⁸, whose key mandate is to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development; to promote the protection, and observance of human rights in public and private institutions; to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs; to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated; and to act as the principle organ of the state in ensuring compliance with obligations under treaties and conventions relating to human rights, among other functions.

In addition to the foregoing, the Constitution also establishes a **National Land Commission**⁹ and among the functions of the Commission include to investigate, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

Whereas the Constitution provides for such a wide array of avenues for redressing human rights violations, there is no such express provision pertaining to sexual and gender minorities. The same however offers an avenue for such sexual and gender minorities to utilize such avenues for seeking redress in regard to the violation of their various fundamental rights and freedoms.

⁸ Article 59 of the Constitution of Kenya, 2010.

⁹ Article 67 of the Constitution of Kenya, 2010.

How, if at all, should reparatory justice for the lasting consequences of colonialism include measures to address discrimination and violence based on gender, gender identity and sexual orientation?

Reparatory justice for lasting consequences of colonialism should take a broad approach to include measures to address discrimination and violence based on gender, gender identity, and sexual orientation. The first measure to be taken ought to be, a human-rights-based approach. This should entail, firstly, a firm recognition and implementation of equality provisions both under international and regional instruments, as captured in various countries' Constitutions.

REFERENCE

1. Jesse Brimmer, ‘ “Un-African” African Sexualities: Post-Colonial Nation Building and the Conditioning of Citizenship in Sub-Saharan Africa with Analysis of Uganda and Kenya’ 2020, Central European University Collection.
2. Leah Buckle, ‘African Sexuality and the Legacy of Imported Homophobia’ 2020, available at <http://www.stonewall.org.uk/about-us/news/african-sexuality-and-legacy-imported-homophobia> accessed 23 April; 2023.
3. Adrian Flint and Vernon Hewiltt, ‘Colonial Tropes and HIV/Aids in Africa: Sex, Disease, and Race’ 2015, *Commonwealth and Comparative Politics*, 53, No. 3.
4. Sylvia Tamale, ‘The Right to Culture of Rights: A Critical Perspective on Women’s Sexual Rights in Africa’ 2008, *Feminist Legal Studies*, Vol. 16, No. 1.
5. Bharat Mehra, Paul A. Lemieux III, and Keri Stophel, ‘An Exploratory Journey of Cultural Visual Literacy of “Non-Conforming” Gender Representations from Pre-Colonial Sub-Saharan Africa’ 2019, *Open Information Science*, Vol. 3, pp. 1-21.