

**CENTRE FOR HUMAN RIGHTS**

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Colonialism and sexual orientation and gender identity in Africa

Submission to the call for inputs by the Independent Expert on Sexual Orientation and Gender Identity

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## 1. Background

This submission responds to the call by the Independent Expert on Sexual Orientation and Gender Identity regarding his upcoming report on colonialism and sexual orientation and gender identity. In responding to the call, the Centre for Human Rights, Faculty of Law, University of Pretoria, focuses on Africa with regard to the 10 questions in the call.

## **2. 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 experiences of colonization?**

The imposition of colonial laws, particularly anti-sodomy laws significantly affected African pre-colonial treatment of sexual orientation and gender identity. Before colonialism Africa consisted of different independent kingdoms and societies that each had their own religious, legal, political, economic and social systems.<sup>1</sup> Sexuality and gender were an integral part of these systems. Historical and anthropological evidence shows that pre-colonial African societies treated sexual and gender minorities as part of their societies, with tolerance and acceptance.<sup>2</sup> For example, Murray and Roscoe reviewed the evidence of sexual diversity from all African regions; from the Hausa and Yoruba in West Africa; the Kikuyu, Mashoga, Mabasha and Magai in East Africa; and the Shona, Zulu, Khoisan, Herero Ndembu (of Zambia) in Southern Africa. They conclude that same-sex patterns in pre-colonial Africa were not only widespread but diverse and perhaps more diverse than in other parts of the world.<sup>3</sup>

The acceptance (or at the very least non-discrimination) of sexual and gender minorities in pre-colonial African societies was rooted in the one characteristic found in most of African societies: communalism or ubuntu.

## **3. 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).**

While pre-colonial African societies were sexually diverse, with their traditional legal systems and the cultures tolerant towards sexual and gender minorities, anti-sodomy laws and

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<sup>1</sup> G Ayittey *Indigenous African institutions* (1991) argued that broadly, pre-colonial Africa had two types of political formation. The state like (Kingdom) formation which centralised power in kings and had administrative and judicial institution and the 'stateless' societies which also had defined centres of power but were less structured.

<sup>2</sup> For detailed accounts of the historical and anthropological evidence see S Murray & W Roscoe (eds) *Boy wives and female husbands: Studies in African homosexualities* (2001), M Epprecht *Heterosexual Africa? The history of an age of exploration the age of AIDS* (2008).

<sup>3</sup> Murray & W Roscoe (n 2) 9.

religious forms of socialisation, introduced through colonialism, had a disruptive effect on African culture and traditional legal systems. African societies adopted colonial laws and systems of socialisation which disconnected them from their history, constructions of sexuality and gender in a way that heterosexuality increasing became a 'defining' feature of Africanness. In this sense the creation of colonial states marked the beginning of colonial citizenship. As citizens, in colonised states, Africans lost the power to regulate their own affairs as African culture and traditional legal systems were subordinated to colonial 'repugnancy' laws.

Anti-sodomy laws, introduced through the codification of colonial criminal laws, criminalised consensual same-sex relations, which together with colonial religious teachings labelled sexual and gender minorities as deviants in their societies – a label that did not exist before colonialism. Therefore, the disruptive effective of colonial laws and particularly anti-sodomy laws gave rise to the narrative that 'homosexuality is unAfrican'. Homophobia is therefore a product of colonially imposed laws and systems of socialisation and not a construction of pre-colonial African legal and cultural systems.

#### **4. 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?**

Anti-sodomy laws survived colonialism and continue to exist on the statute books of most African countries.<sup>4</sup> This is part of the experience of coloniality, which saw many African institutions in post-colonial Africa perpetuating colonial ways of doing, and many Africans taking on mindsets infused by colonial tenets. The uncritical continuation of anti-sodomy laws is part of a general continuity of colonial laws after independence. This influence is apparent from the broad division of experience in independent Africa, which can be categories along colonial lines. The various colonial encroachments into Africa brought with them a formalised system of regulation and control, also of sexual minorities.<sup>5</sup> The deepest imprint had been left by British colonialism.<sup>6</sup> The countries under Portuguese colonial control reflect the ambiguity of the colonial master. Portugal in 1852 decriminalised same-sex acts, re-criminalized them (as 'indecent acts' and 'habitually engaging in acts against nature'), and in 1982 abolished them.<sup>7</sup> Its former colonies have taken a longer time, but all reached this point. Guinea-Bissau decriminalised in 1993, Cape Verde in 2004, Sao Tome e Principe in 2012, Mozambique in 2015 and Angola in 2021. In Francophone Africa, a number of countries previously under French colonial rule never criminalised same-sex relations.

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<sup>4</sup> For details of African countries that criminalise consensual same-sex and the detailed provisions see <https://antigaylaws.org/regional/africa/>

<sup>5</sup> Ireland, Patrick R. "A macro-level analysis of the scope, causes, and consequences of homophobia in Africa." *African Studies Review* 56.2 (2013): 47-66.

<sup>6</sup> See Lennox, Corinne, and Matthew Waites. *Human rights, sexual orientation and gender identity in the Commonwealth*. University of London Press, 2013.

<sup>7</sup> R Garrido 'Patterns of discrimination based on sexual orientation in Africa: is there a Lusophone exception?' (2019) 3 *African Human Rights Yearbook* 93-118

In most cases these laws are interpreted and enforced as laws against homosexual orientation and diverse gender identities rather than the actual conduct provided in the laws. Sexual and gender minorities are therefore arrested or victimised in different aspects of their lives, in the name of these laws, even in the absence of actual same-sex sexual conduct. While in some countries anti-sodomy laws are drafted in neutral language, they are exclusively enforced against sexual and gender minorities because of the perception that they are anti-homosexuality laws. As such anti-sodomy laws, irrespective of the nature of their drafted language, are inherently discriminatory against sexual and gender minorities.

The justification given for maintaining these laws is that they protect and preserve traditional African values on sexuality<sup>8</sup> and also that religion (mainly Christianity and Islam)<sup>9</sup> does not permit same-sex relations.<sup>10</sup> The thought pattern that retains anti-sodomy laws in Africa started with the codification of colonial criminal laws and aided by religious forms of socialisation, both introduced through colonialism.

### **5. 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?**

Anti-sodomy are not generally framed as colonial laws in the general discourse of most African states. Rather, they are framed as laws that protect and preserve traditional African values. As such, the decolonisation discourse has not had a very positive impact on the protection from violence and discrimination on sexual and gender minorities in Africa. If anything, the decolonisation discourse in some respects attracts backlash.

However, in African countries that have repealed their anti-sodomy laws, not much evidence exists to conclude that the decolonisation discourse played a role towards the protection from violence of sexual and gender minorities. Even in these countries, the decolonisation discourse is fairly new, and only growing through academic articulation rather than political consciences of law makers.

Ngwena, in *What is Africanness?*, notes that anti-colonial nationalism in Africa, in search of an authentic national identity in the decolonization process, often invoked an essentialised 'ontological and mythological Africanness' that tended to homogenise and eschew diversity

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<sup>8</sup> M Epprecht *Heterosexual Africa? The history of an age of exploration the age of AIDS* (2008). See also S Long *More than a name: State-sponsored Homophobia and its consequences in Southern Africa* (2003) 34 <https://www.hrw.org/report/2003/05/13/more-name/state-sponsored-homophobia-and-its-consequences-southern-africa>, and Msidi T 'Lies we have been told: On (Homo) sexuality in Africa' (2015) 58 *Africa Today* 56.

<sup>9</sup> See for example G Grossman 'Renewalist christianity and the political saliency of LGBTs: Theory and evidence from Sub-Saharan Africa' (2015) 77 (2) *Journal of Politics* 337.

<sup>10</sup> Gloppen, Jjuuko, Msosa & Viljoen (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022) For a full discussion of why these laws are maintained and how they are contested in Africa see example G Grossman 'Renewalist christianity and the political saliency of LGBTs: Theory and evidence from Sub-Saharan Africa' (2015) 77 (2) *Journal of Politics* 337 and A Van Klinken 'Homosexuality, politics and Pentecostal nationalism in Zambia' (2014) 20 *Journal of Christian Studies* 254.

– including sexual and gender diversity. This monumentalised identity discourse has been used ‘opportunistically by ruling elites in the postcolonial era’ to facilitate pathologies of power.<sup>11</sup> This tendency has continued to the present day, and is exemplified in the rhetoric of leaders such as President Museveni.

**6. 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 rational/explanation for their abolishment?**

Colonial anti-sodomy laws continue to exist in most African countries with a British colonial history. In some countries, such as Nigerian and Uganda, new laws are being introduced with expanded offences and stiffer punishment and repression against sexual and gender minorities.<sup>12</sup> However, other African countries, most recently Botswana, have repealed their anti-sodomy laws. The repeal of these laws has been a result of strategic litigation where the laws were challenged as being unconstitutional and in breach of international human rights law. The colonial foundations of these laws were cited as well as the impact the laws have on the fight against HIV and AIDS in the respective countries.

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

The continued existence of anti-sodomy laws has in many respects continued colonial patterns of thinking in the criminal legal systems of African countries that have maintained them. In these countries, the perception introduced through colonialism, that sexual and gender minorities are social and religious deviants who constitute a criminal class persists. This perception presents a serious challenge to effective decolonialisation and decoloniality discourse and efforts. The general reliance of colonial criminal systems does not only entail the maintenance of colonial legal curriculums in legal education but also sustains a pattern that colonial powers have more advanced legal systems than African countries. In this regard, colonial power is maintained as former colonial states are seen as standard setters in law reform. However, this is not the case when it comes to repeal of anti-sodomy laws thereby highlighting how deeply entrenched the culture of tolerance of sexual and gender minorities was disrupted in African societies. This can be explained by association of anti-sodomy laws and religious teaching on sexuality which remains the basis of sexual socialisation in most African countries.

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<sup>11</sup> Ngwena, *What is Africanness? Contesting nativism in race, culture and sexualities* (Pretoria University Law Press, 2018), 270-275.

<sup>12</sup> <https://www.jurist.org/news/wp-content/uploads/sites/4/2023/03/Anti-Homosexuality-Bill-2023.pdf>

**8. 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?**

Anti-sodomy laws adversely impact on the rights of sexual and gender minorities protected in national constitutions and international law. Anti-sodomy laws give rise to the perception that sexual and gender minorities are not human rights holders. Their continued existence on the statute books of some African countries lends support to the perception that sexual and gender minorities are not human rights holders and therefore, human rights violations against them are characterised as legitimate enforcement of the laws.

Human rights violations against sexual and gender minorities range from murder, torture unlawful arrests and detention, extortion, denial of registration of organisation, denial of medical treatment including harmful medical procedures such as forced anal examinations and HIV tests, discrimination in employment, schools and other economic sectors and 'corrective' rape of lesbian women. While these violations occur, sexual and gender minorities lack avenues of redress, and often refrain from using available channels for fear of further violations from both state and non-state actors.

**9. 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.**

The disruptive effect of anti-sodomy laws on the culture of tolerance against sexual and gender minorities had and continues to have an intersectional effect. Sexual and gender minorities who already faced discrimination based on race, nationality, disability and other forms of exclusion became further marginalised and could not easily seek redress as their sexual orientation and gender identity became a barrier for access to justice.

**10. Have any laws, policies, or psycho-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 based on sexual orientation and gender identity?**

At domestic level most African countries that maintain anti-sodomy laws have not put in place legal, psycho-social or other mechanisms to redress the colonial legacy of anti-sodomy laws in relation to their impact on human rights or at all.

At regional level, the African Commission on Human and Peoples' Rights passed Resolution 275 on the Protection against violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation and Gender Identity (Resolution 275).<sup>13</sup> The Resolution expresses alarm that 'acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity' and 'strongly urges States to end all acts of violence and abuse committed by state and non-state actors'. If effectively implemented by African States, Resolution 275 can help mitigate the impact of the colonial legacy of anti-sodomy laws through repeal of the laws, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims and the provision of psycho-social support.<sup>14</sup> Resolution 275 is, therefore, an African tool that can be used as a starting point towards decolonisation and decoloniality on the continent.

### **11. 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?**

Currently, reparatory justice has its main focus on racial inequalities existing in formerly colonised countries as a lasting legacy of colonialism. The Durban Declaration and Programme of Action (DDPA) provides a framework for reparatory justice in the context of race. The injustices and inequalities in DDPA intersect with injustices faced by sexual and gender minorities. In this regard national and international programming and plans of actions such as the Sustainable Development Goals (SDGs) should holistically include sexual and gender minorities as equal citizens in the same way as framed in the DDPA. The current SDG framework frames sexual and gender minorities as key populations in the response to HIV/AIDS. While the key populations framing allows for an incremental and less politicised approach in African countries towards ending discrimination on sexual and gender minorities, the adaptive use of frameworks such as the DDPA, from an intersectional perspective, can play a significant role in addressing discrimination based on sexual orientation and gender identity.

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<sup>13</sup> <https://achpr.au.int/en/adopted-resolutions/275-resolution-protection-against-violence-and-other-human-rights-violations>

<sup>14</sup> See [https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution\\_275/Resolution\\_275\\_booklet\\_EN\\_GLISH\\_02\\_WEB.pdf](https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_EN_GLISH_02_WEB.pdf)