The UN Independent Expert on SOGI
Mr Víctor Madrigal-Borloz

24 May 2023

Dear Independent Expert on SOGI,

1. This is an input (the "**Submission**") made on behalf of Colours Caribbean ("**CC**") in the call by the UN Independent Expert on SOGI for inputs regarding the report on colonialism and SOGI (the "**Call**").
2. CC is an organisation incorporated as a non-profit limited liability company under the laws of the Cayman Islands. CC's aim is to foster a safe and comfortable social and professional environment for the lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) community of the British Overseas Territories of the Caribbean region[1] and the British Overseas Territory of Bermuda (together referred to as the "**Caribbean Territories**") by advocating for LGBTQI rights as human rights and promoting the inclusion and equality of LGBTQI persons in the region.
3. CC has instructed Dr Leonardo J Raznovich[2] and Professor Raúl Zaffaroni[3] (the "**Reporters**") to prepare the Submission regarding the Caribbean and Latin America with a focus on the former region.[4]
4. The Submission, attached as Annex 1, draws from the published findings of IIHR Report, some of the background material used to assist with the analysis of the data collected during their research project and new developments since the publication of the IIHR Report.
5. In summary, the IIHR Report's findings show that various forms of discrimination, mistreatment, torture, and other denial of rights to the LGBTQI community are deeply intertwined with the administrative and legal inheritances of colonialism.[5]
6. The Reporters follow the questions as suggested in the Call to guide the formulation of the Submission. However, given the evidence available to the Reporters, it is purported to address only questions 1, 2, 3, 4, 5, 7 and 10 of the Call.
7. The material relied upon in the Submission is the IIHR Report for which a hyperlink is provided in footnote 4 and PDF copies of the Spanish and English versions are attached.[6] Other material referred to in the Submission is listed in Appendix 2.[7]
8. For any clarification or question please reach out directly to the Reporters by email to Leonardo.raznovich@gmail.com and eraulzaffaroni@gmail.com.

Dr Leonardo J Raznovich, Barrister
Bedlington Chambers – UK.
E Raúl Zaffaroni, Professor Emeritus
Universidad of Buenos Aires

[1] This includes the Cayman Islands, British Virgin Islands, Turks and Caicos, Monserrat and Anguilla.
[2] Leonardo Raznovich is barrister at Bedlington Chambers, Visiting Senior Research Fellow at the Intersectional Centre for Inclusion and Social Justice and Officer of the Diversity and Inclusion Council and the Rule of Law Forum of the International Bar Association.
[3] Raúl Zaffaroni is Professor Emeritus of the University of Buenos Aires, former judge of the Inter-American Court of Human Rights (2015-2021) and of the Supreme Court of Argentina (2003-2015).
[4] The Reporters have recently coordinated a research project that studied the different sources of discrimination and violence towards LGBTI persons, or individuals perceived as such, in these regions and published in March 2021 the finding of their research entitled "*The human right to respect sexual orientation and gender identity in the Caribbean and Latin America - Current situation and perspectives*" (San Jose: IIHR, 2021) (the "**IIHR Report**"). A copy is available at: < http://www.ilanud.or.cr/lanzamiento-del-libro-el-derecho-humano-al-respeto-a-la-os-y-la-ig-en-el-caribe-y-en-america-latina/> [accessed 24 May 2023].
[5] IIHR Report (fn.4 above) at p.27.
[6] Note of the Reporters: the IIHR Report was drafted in Spanish, the English version being a translation. Therefore, in case of divergences, the Spanish text is the authoritative version and prevails.
[7] Note bis of the Reporters: it is certified that the Submission contains 2666 words (excluding this covering letter, documents attached, list of other material in Annex 2, footnotes and guiding questions repeated for convenience).

Call by the UN Independent Expert on SOGI for inputs:
Report on colonialism and sexual orientation and gender identity

Annex 1: The Submission

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 experiences of colonization?**

Answer

The IIHR Report explored how pre-colonial historical studies indicate that people in the Caribbean region, today identifying as LGTBQI+, were neither repressed nor stigmatised by some pre-colonial cultures, but positively valued by them.[8] The pre-colonial historical studies cited in that Report include the 1556 work, by Bartolomé de las Casas, entitled *Apologetic Summary History of the People of These Indies*, (since republished, Nigel Griffin tr, Penguin, 1992)).

This accepting attitude collided head-on with the culture and legislation of the European colonising countries which, throughout European history, had been brutal and sadistic towards LGBTQI+ people.[9] The phenomena of segregation and criminalisation of LGBTQI+ people in the Anglophone Caribbean are a consequence of colonial laws exported to the region by the British Empire: see the IIHR Report at 48.[10] Those colonial laws are precisely the ones that former British Prime Minister Theresa May acknowledged and apologised for in 2018 (as reported in *The Guardian* for 17 April 2018) stating:

> *[T]hese laws were often put in place by my own country. They were wrong then, and they are wrong now. As the UK's Prime Minister, I deeply regret both the fact that such laws were introduced, and the legacy of discrimination, violence and even death that persists today.*

2. **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).**

Answer

Scholars boasted of the influence of English criminal law throughout the world,[11] which included anti-sodomy laws. Since the first English legislation that established the sodomy offence in 1533,[12] the actus reus has been left abstract; the prohibited conduct described as *"the detestable and abominable vice of buggery committed with mankind or beast"*[13] and survived hardly unaltered until its repeal in 1967.[14] English courts construed the offence to include only

[8] IIHR Report (fn.4 above) at p.45.
[9] *ibid*.
[10] *id* at p.48.
[11] JF Stephen 3 *A History of the Criminal Law of England* (Macmillan London 1883) 283 (stating that English criminal law was reproduced almost in every state of the United States and almost in all the 45 colonies of the British Empire).
[12] An Act for the Punishment of the Vice of Buggerie, 25 Hen. 8 c. 6.
[13] 25 Hen. 8 c. 6
[14] Even by 1956 the actus reus remains as abstract as it was in 1533. *See* Sexual Offences Act 1956, 4 -5 Eliz. 2 c. 69 s.12(1): *"It is considered a crime when a person commits sodomy with another person or animal."*

anal penetration.[15] In 1885, the British Parliament expanded the control of male sexuality by creating the offence of "gross indecency", according to which any act or expression in public or private (other than anal penetration) whose purpose was to express the sexual desire of a man for another man (and thus contrary to the dominant binary gender norm) was a crime punishable with up to two years in prison and forced labor.[16]

This regulation of human sexuality, in particular male sexuality,[17] was exported and imposed upon the natives of the colonies of the British Empire under the argument that the native inhabitants of the colonies had to be 'Christianised' to protect the British from their customs.[18] Some colonies adopted the English laws of the time – e.g., Jamaica adopted the Offences against the Person Act 1861, 24-5 Vict. c. 100, which included the sodomy offence. Other colonies were imposed the model code written by Thomas Macaulay, e.g., India in 1860, or by R S Wright, originally written for Jamaica, never implemented therein, but imposed in British Honduras (today Belize), Tobago, and St. Lucia.[19] The history on how the offence of sodomy was introduced in the Caribbean by the British colonial power is revealing. RS Wright's model penal code, influenced by the German penal code,[20] codified the sodomy offence as a crime against public order punishable by two years in prison.[21] This proposal differed from Macaulay's proposal, which the British Colonial Office adopted; it suggested codifying the offence as a crime against the person, thus attracting a more severe punishment. RS Wright's approach to reference to public rather than private acts is likely to have been influenced by the work of John Stuart Mill, who in turn had been a pupil of Jeremy Bentham,[22] the latter a secret advocate against criminalisation.[23] The rejection of the British government of RS Wright's proposal confirms a certain intentionality of the British imperial power to impose a binary patriarchal vision of the sexuality of the human body on its Caribbean colonies. This is particularly contrasting with the attitudes of most Latin American independent nations whose young parliaments, save for few exceptions, adopted contemporaneously penal codes following the French model, which had inaugurated the decriminalisation of sodomy in continental Europe with the French revolutionary Penal Code of 1791.[24]

The significance and success of this colonial legal transfer make the colonial British Empire in part co-responsible for the origin of criminal persecution of the LGBTQI+ community in most of the continent where this offence had existed.[25]

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[15] In 1817, the defendant was charged with sodomy and found guilty on first instance on proof that he had forced his member into a male's mouth and ejaculated. On appeal, the court found the defendant wrongly accused of sodomy because the proven facts did not constitute the offence of sodomy. *Rex v Jacobs* Russ. & Ry. 331, 168 Eng Rep 830 (KB 1830).

[16] The Criminal Law Amendment Act 1885, 48-9 Vict. c.69, s.11 *"Any male person, who in public or private, commits or is party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of …".* Oscar Wilde was charged and found guilty of gross indecency in 1895 for writing a love sonnet to his lover. *See* H. Montgomery Hyde *The Trials of Oscar Wilde* (Dover New York 1962).

[17] Sexual acts between women were not deemed a crime in English law. An attempt to criminalise them was rejected by the House of Lords in 1921. House of Lords, Hansard - 15 August 1921, Vol. 43 cc567-77. <http://hansard.millbanksystems.com/lords/1921/aug/15/commons-amendment-2>

[18] *See* R Hyam *Empire and Sexuality: The British Experience* (Manchester University press London 1990).

[19] The drafting and imposition of a criminal code was an unprecedented socio-legal experiment that allowed politicians in London to try codification with the inhabitants of the colonies something for which there was no social support in England. Stephen (fn.11 above) at p.304. *See also* ML Friedland 'R. S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law' (1981) 1 Oxford J. Legal Stud. 307, 311 (publishing a letter by RS Wright to the government when offering his services to draft a criminal code for Jamaica: "*I have some ideas regarding how a criminal code must be structured, and I would love to prove them through a field experiment*").

[20] RS Wright had translated into English the Prussian Penal Code. Friendland (fn.19 above) at p.313.

[21] *id* at p 328.

[22] *id* at p 327.

[23] Bentham's written work on this topic has hardly been studied in England and thus seldomly published. L Campos Boralevi "Jeremy Bentham's Writings on Sexual Non-Conformity: Utilitarianism, neo-Malthusianism, and Sexual Liberty" (1983) 2 TOPOI 123, 124

[24] IIHR Report (fn.4 above) at p.46-7.

[25] *See* E Han and J O'Mahoney 'British Colonialism and the Criminalisation of Homosexuality" (2014) 27 (2) Cambridge Review of International Affairs 268 (showing that data from 185 countries supporting the conclusion that former British colonies are more likely to include offences that criminalise sex between two consenting adults of the same sex, than former colonies of other power).

3. 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?

Answer

There are 35 state members of the OAS, of which 21 are bound by the Inter-American Convention on Human Rights ("Convention") by having accepted jurisdiction of the Inter-American Court of Human Rights ("IACtHR"). None of them criminalises sex between consenting adults of the same sex.[26] Canada, the USA and Cuba are not party to the Convention, but none of them criminalises and, in fact, all three have legislated for same-sex marriage.[27]

This leaves 11 anglophone countries in the Caribbean, which gained independence by consent of the British Parliament from the 1960s onwards. As of 2016 (save for the Bahamas[28]) all of them still had anti-sodomy laws. Belize started with decriminalisation in 2016 when its Supreme Court stroke down the anti-sodomy laws for unconstitutional on grounds that they breach liberty, privacy and non-discrimination.[29] In 2018, the High Court of Trinidad and Tobago arrived at the same conclusion.[30] More recently, the High Courts of Antigua and Barbuda,[31] of Saint Kitts and Nevis[32] and of Barbados[33] followed for similar reasons.

There are two distinctive groups amongst these anglophone countries according to their apex court (12 in total when Barbados is included): 7 countries retained the British Judicial Committee of the Privy Council ("**JCPC**") as their final court of appeal (Antigua and Barbuda, Bahamas, Grenada, Jamaica, St Kitts and Nevis, St Vincent and Grenadines, and Trinidad and Tobago)[34] and 5 countries (Barbados, Belize, Guyana, Dominica, St Lucia) renounced the JCPC and adopted the Caribbean Court of Justice ("**CCJ**") as their apex court.

The caselaw reviewed allows us to confirm that the JCPC has never delivered a decision to further LGBTQI rights in the Caribbean. This comes not out of a hesitancy to intervene, but rather because it acted to intervene and stop progress on LGBTQI rights. The JCPC did so by using unorthodox tools of construction, thwarting judicial progress regarding LGBTQI rights delivered by Caribbean home-grown judges over the last 20 years. For instance:

a. Discrimination and segregation on grounds of sexual orientation: in 2022, the JCPC enabled it in Trinidad and Tobago,[35] Bermuda[36] and the Cayman Islands[37] holding that

[26] The IACtHR has not been asked to address the conventionality of anti-sodomy laws but has determined that the Convention requires same-sex marriage. *See* Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (24 November 2017).
[27] In Canada, the Civil Marriage Act – 20 July 2005 and in Cuba the Civil Code reform – *see Gaceta Oficial de la República de Cuba*, Minsiterio de Justicia, No 4 (Extraordinaria) 12 January 2022) – approved by referendum came into effect in September 2022. The Supreme Court in the USA held that the constitution requires marriage to be open to same-sex couples in *Obergefell et al v Hodges* 576 US 644 (2015).
[28] Bahamas is the only anglophone country in the Caribbean that decriminalised through legislation. *See* Sexual Offences Act 1991 (Bahamas).
[29] See *Caleb Orozco v AG of Belize* – Claim No.668 of 2010 of 10 August 2016, upheld by its court of appeal in a unanimous decision on 30 December 2019 - *AG of Belize v Caleb Orozco* – Civil Appeal No 32 of 2016).
[30] *See Jason Jones v AG of Trinidad and Tobago*—Claim No.CV2017-00720), but an appeal filed by the government is still pending.
[31] *See Orden David v AG* – Claim No.ANUHCV2021/0042 (5 July 2022) (unreported)
[32] *See Jamal Jeffers et al v The Attorney General Of St. Christopher And Nevis* – Claim No.SKBHCV2021/0013, (29 August 2022) (unreported)
[33] The High Court of Barbados delivered oral judgment on 13 December 2022 – written decision pending still unreported.
[34] None of these nations currently accept the jurisdiction of the IACtHR, thus JCPC's decisions for them are final. The JCPC remains the apex court for the UK Caribbean Territories (see fn.1 above) to which the UK has extended the European Convention on Human Rights ("**ECHR**"), hence there is a final recourse to the European Court of Human Rights from the JCPC's decisions for them.
[35] *Surratt v Trinidad and Tobago* [2007] UKPC 55.
[36] *AG of Bermuda v Roderick Ferguson* [2022] UKPC 5.
[37] *Chantelle Day at al v The Governor of the Cayman Islands et al* [2022] UKPC 6.

LGBTQI people are not constitutionally entitled to equality of treatment (overruling the court of appeal of the first two jurisdictions and rejecting the reasoning of the Chief Justice of the last jurisdiction)

b. Facilitating criminalisation of LGBTQI people: the lasting permanency of anti-sodomy and discriminatory laws in countries such as Jamaica and Trinidad and Tobago may be linked to a recent decision of the JCPC,[38] in which it confirmed its constitutional construction of the so called "*general savings clause.*"[39] This clause, found in the first constitutions of Bahamas, Barbados, Guyana, Jamaica, and Trinidad and Tobago, was held in 2004 by the JCPC to provide absolute immunity to colonial laws in force, at the time of independence, from any constitutional challenge for breach of fundamental rights and freedoms provisions of the constitutions regardless of how "*inhuman or degrading*" those colonial laws are.[40] This interpretation, which in stark contrast the IACtHR found to be in breach of the Convention,[41] has the effect of hindering progress of human rights in the Caribbean Region, in particular those of disfranchised minorities such as LGBTQI people, in that many laws, from criminalisation to discrimination, are pre-existing colonial laws.[42]

The CCJ reversed this interpretation of the "*general savings clause*" for Barbados and Guyana in 2018 holding that it is *incongruous, frustrates in perpetuity the constitutional supremacy and the independence of the judiciary, and is an unacceptable diminution of freedoms*.[43] This allowed the CCJ to strike down, for unconstitutionality, a colonial law that criminalised transgender people in Guyana;[44] similar colonial legislation would remain still protected from judicial scrutiny due to the JCPC's recent decision in Trinidad and Tobago.[45]

The JCPC, comprising judges of the UK Supreme Court, is the last remnant of British colonialism holding effective imperial power. No apex court in the Americas has so consistently denied LGBTQI people the ability to assert and advance their rights under their constitutions in modern times. The JCPC has shown an inability to understand the very basic aspect of the written constitutional system that the British Empire bequeathed to its Caribbean colonies, in particular, a lack of comprehension, as Lord Bingham explained back in 2006, of the legal implication of incorporating a declaration of rights and freedoms into a written constitution.[46] Furthermore, Lord Bingham in a dissenting judgement in 2007, cried out loud that the JCPC's reliance on what could or could not be done in the UK is of "**no assistance**" (emphasis added) when adjudicating primary legislation under a written constitution.[47] It is difficult to ascertain whether it is simply a lack of understanding or perhaps even worse

[38] *Chandler v The State No 2 (Trinidad and Tobago)* [2022] UKPC 19.
[39] IIHR Report (fn.4 above) at p.50-1.
[40] *Boyce v the Queen* [2004] UKPC 32, at [1]. *See also Matthew v State of Trinidad and Tobago* [2004] UKPC 33, and *Watson v the Queen* [2004] UKPC 34. *See also* "*special savings clause"* in relation to punishments, *Pinder v R* [2002] UKPC 46 (holding that colonial laws never die in that they may be repealed but reinstated at any time by the parliaments of these nations. More disturbingly, upon being reinstated, the reinstated law regains colonial status, thus becoming again immune from judicial scrutiny).
[41] *Boyce v Barbados*, ACHR Series C no 169 of 20 Nov 2007.
[42] *See* "*Attorney General* [Trinidad and Tobago - Mr Faris Al-Rawi] *Talks – Episode 3 – What does the Attorney General do?"* (11 July 2021) available at<https://www.youtube.com/watch?v=ABBzVPmRRDI> (between 16:10 and 19:35) [accessed 24 May 2023] (stating that there are 27 colonial laws in the country that discriminate against LGBTI people shielded from challenge by the *general savings clause*).
[43] See *Nervais v Regina* [2018] CCJ 19 (AJ), *McEwan v Guyana* [2018] CCJ 30 (AJ), confirmed in *Bisram v DPP* (Guyana) [2022] CCJ 7 AJ (GY) (President Saunders citing with approval at [62] an article L Raznovich 'Privy Council's Errors of Law Hinder Progress of LGBTI Rights in the Caribbean' (2022) (1) 33 European Human Rights Law Review 65 in which ambiguity in the relevant constitutional text and a serious error of law in *Matthew v State of Trinidad and Tobago* [2004] UKPC 33 are identified, which would constitute in common law legal reasons to reverse the 2004's decision)
[44] Summary Jurisdiction (Offences) Act 1893 (Guyana), s.153 (1) (xlvii) made a criminal offence for a person being a "man', and in 'any public way or public place' and for 'any improper purpose', appearing in 'female attire'.
[45] *Chandler v The State No 2 (Trinidad and Tobago)* [2022] UKPC 19 at [97].
[46] See *Bowe v R* [2006] UKPC 10 at [42].
[47] *Surratt v Trinidad and Tobago* [2007] UKPC 55 at [29].

dastardly justice, (Lord Bingham described it as "resistance" in some courts),[48] that might explain why some British judges (although there were also very vocal and poignant dissenting judgments in most of the cases studied)[49] have become, in practice, the last defenders of the worst of European colonialism.[50]

4. **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?**

Answer
This is addressed with the answer to question 3.

In summary, decolonialisation, on the one hand, incorporated a declaration of human rights into all the independence constitutions of the new states. This declaration, mainly taken from the ECHR,[51] which had been extended to the colonial territories prior to their independence, has assisted the courts to decriminalise on grounds that the anti-sodomy laws breach the rights to liberty, privacy and non-discrimination of those constitutions (e.g. Belize, Trinidad and Tobago, Antigua and Barbuda, Saint Kitts and Nevis and Barbados). However, in countries under the jurisdiction of the JCPC (Bahamas, Jamaica and Trinidad and Tobago) where their constitution features a "*general savings clause*" or "*special savings clause*", the process of decolonialisation has frustrated the protection of LGBTQI people by the combined effect of these clauses and the obtuse persistence of the British judiciary in construing them against international law and in defiance of the alternative interpretations of the same clause adopted by the regional apex court of the Caribbean (i.e. CCJ).[52]

5. **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?**

Answer
This is addressed with the answer to question 3.

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?**

Answer
The evidence collected and analysed for the IIHR Report shows that discrimination suffered by LGBTQI persons, due to the existence of anti-sodomy laws, is highly damaging to the physical and mental integrity of these people and society at large. Each of these aspects is briefly developed in turn below.

[48] See Bowe v R [2006] UKPC 10 at [42].
[49] e.g., *see* the strong dissenting judgments by *Lord Nicholls of Birkenhead and Lord Hope of Craighead* in *Pinder v R* [2002] UKPC 46, by Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Steyn and Lord Walker of Gestingthorpe in *Boyce v the Queen* [2004] UKPC 32 and by Lord Sales in *AG of Bermuda v Roderick Ferguson* [2022] UKPC 5.
[50] It is not just substantive but procedural due process affected in *Boyce v the Queen* [2004] UKPC 32, *Matthew v State of Trinidad and Tobago* [2004] UKPC 33, and *Watson v the Queen* [2004] UKPC 34 in that it has been revealed that their fate had been sealed before the hearing had even started by a manipulation of the composition of the panel with the purpose of securing that colonial laws are immune from constitutional challenge. This made a mockery of the right to a fair and public hearing by an independent and impartial tribunal. *See* Lord Millet *As in Memory Long* (Wildy London 2015) at p.189.
[51] Trinidad and Tobago adopted the declaration of rights from the Canadian Charter rather than the ECHR.
[52] IIHR Report (fn.4 above) at p.49-52.

a. Physical integrity

The research has unveiled information that evidences governments using anti-sodomy laws to justify lack of implementation of more effective policies to reduce HIV (the Caribbean is the second most severely affected region in the world with regards to the prevalence of HIV after Africa).[53] There is also evidence that governments use these laws to justify the lack of implementation of policies to tackle social violence against LGBTQI individuals on grounds that LGBTQI individuals are defined as criminals (and in some cases are even considered mentally ill, e.g., Dominica). Moreover, the stigma attached to these labels is used to justify not only segregation and discrimination of LGBTQI people, but, in some cases, different degrees of violence, from harassment to murder, e.g., Jamaica.[54]

The research has also evidenced support and exacerbation of social violence via institutional mechanisms through blessing of approval, not just by senior clergy in the church, but also by the criminal justice system itself. For instance, local church violence is not uncommon in that Christian churches of all denominations try to link homosexuality to the root causes of sexual abuse of minors in the clergy.[55] There is in addition evidence of hate speech coming from senior local clergies, which provide violence with an alleged moral justification, e.g. the local Roman Catholic Church supported in court anti-sodomy laws in Belize and openly opposed the repeal of these laws in Barbados, Jamaica and St Lucia. This fuels social hatred in addition to the social violence triggered by criminal laws, as evidenced in Jamaica. In addition to social violence, institutional violence is also promoted, for instance in Jamaica, where the criminal law permits in murder cases the use of the so called "*gay panic*" defence, as a variation of self-defence, which means that murdering a LGBTQI individual finds justification in law based on the perceived sexual orientation or gender identity of the victim.[56]

b. Mental health

The lack of proper statistics makes it rather difficult to quantify properly the impact of these laws on the mental health of individuals and the society at large. The lack of statistics however helps with the invisibility of LGB persons: they may live all their life in the closet unlike a transgender, coloured person, or someone of a particular ethnic background, who are unable to hide from social, church or institutional violence. But this invisibility leads critically to unaccountability: LGB violence and death remain unaccounted, e.g., Guyana presents one of the highest rates of suicide in the world (4th in the world and 1st in America) with 29/100,000. LGBTQI grass roots groups link this to sexual orientation and gender identity; yet the invisibility of the group makes it impossible to conduct a proper quantification.[57]

Professor Zaffaroni agrees with the analysis of LGBTQI grass roots groups and suggests that this self-harming attitude may be a natural consequence of the deterioration of the psychiatric integrity of such a suffering individual because of discrimination based on sexual orientation and gender identity.[58] Zaffaroni highlights that sexuality is fully revealed to the person in puberty at a point when the homosexual/transgender individual has internalised the societal prejudice even within the family circle.[59] This does not occur in other forms of discrimination, for which the person knows the discriminating motive - colour, ethnic origins,

[53] IIHR Report (fn.4 above) at p.82.
[54] IIHR Report (fn.4 above) at p.56.
[55] IIHR Report (fn.4 above) at p.84-7.
[56] IIHR Report (fn.4 above) at p.70.
[57] IIHR Report (fn.4 above) at p.126.
[58] R Zaffaroni "La Penalización de las Relaciones Homosexuales y Su Efecto sobre la Salud Mental de la Sociedad" in B Scherer (ed) *Queering Paradigms VII – Contested Bodies and Spaces* (Peter Lang Oxford 2018) epílogo.
[59] IIHR Report (fn.4 above) at p.74-7.

etc. from childhood and is supported and protected by the family circle. The tension between the natural sexual evolution and a lonely unsupported environment and self-inflicted prejudice ought to be particularly damaging to the integrity of the psyche. This tension may not only explain self-harmful behaviours, but the cause of many suicides also as evidenced in Guyana. Zaffaroni highlights that those who suffer also interact in the society. This interaction, Zaffaroni concludes, would also contribute to impact negatively the people with whom they interact and, in this way, tend to neurotise (to unbalance) social relationships in general.[60]

c. Collective economic harm

The damage described to the physical and mental integrity of LGBTQI individuals and society at large is not intangible, but quantifiable in terms of economic ramifications. The collective economic harm to LGBTQI individuals has been quantified to fall between US$1.5 and US$4.2 billion per year, equating to 2.1% to 5.7% of Caribbean states' collective GDP.[61]

10. 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?

Answer

This is addressed with the answer to question 3 and 7.

In summary, the IIHR Report concluded that it would be advisable to carry out an in-depth study of the international responsibility resulting from these laws and current constitutional frameworks that prevent judicial scrutiny.[62] A proper study should not just focus on the decolonialised countries, but it should also extend the study to unveil the responsibility in international law under article 73 of the UN Charter of the decolonialising state as well. It is a fact, publicly acknowledged by British PM Theresa May, that the British Crown was the legislator of many of these colonial laws. It is undisputed that these nations obtained independence by concession of the UK Parliament, thus as a matter of law, the British Crown was the constitutional maker of the first independence constitutions and, therefore, in law responsible for their content. It is a fact that these colonial laws appear currently to be inexpungable by effect of the "*general savings clause*" and "*special savings clause*" included in those first constitutions, but only in countries such as Jamaica, Trinidad and Tobago and Bahamas by effect of the JCPC's construction of those closes. Incidentally, it must not be overlooked that the British monarch remains, in law, the final judge of all appeals in accordance with the advice of the JCPC by effecting an *Order in Council* pursuant to English legislation.[63]

[60] IIHR Report (fn.4 above) at p.77-8.
[61] See P Crehan *The Economic Case for LGBT+ Inclusion in the Caribbean* (Open for Business 2021) A copy is available at: <https://open-for-business.org/reports> [accessed 24 May 2023].
[62] IIHR Report (fn.4 above) at p.129.
[63] Judicial Committee Act 3-4 Will. 4 c. 41. *Contrast* Trinidad and Tobago became a republic in 1976 but retained the JCPC as the final Court of Appeal. In matters appealed to the JCPC, the board no longer advises to the monarch, as this is no longer the head of state, and therefore the board makes decisions directly without the need of an Order in Council. See Lord Mance and J. Turner, *Privy Council Practice* (Oxford: OUP, 2017) at [2.40]–[2.41].