**ILGA Asia submission to the report on colonialism and sexual orientation and gender identity**

*of*

**the UN Independent Expert on sexual orientation and gender identity**

*to*

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Introduction

Colonial laws and ideologies that have historically perpetuated difference, stigma, shame, and harm against sexual and gender minorities continue to affect contemporary discourse on sexuality and gender across Asia. Anti-LGBTIQ and anti-gender movements in formerly colonized Asian societies have adapted colonial discourse on sexuality and gender and weaponize such narratives to provide a discursive basis for discriminatory laws, public policies, and social practices in certain countries.

This dynamic has contributed to conventional understandings of Asian societies that are characterized by conservative worldviews and beliefs, and that the social inclusion of LGBTIQ and sexual and gender diverse persons is incongruous with “traditional Asian values.” With this submission, ILGA Asia will seek to demystify this notion and argue that such a general understanding of Asian societies is misconceived.[[1]](#footnote-1)

This submission will highlight the general impacts of colonialism in certain formerly colonized countries across Asia, and will feature perspectives from ILGA Asia’s membership in three of those countries.

# 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?

In several pre-colonial Asian societies, gender and sexual fluidity and diversity were ostensible, celebrated, and embraced.[[2]](#footnote-2)

In the **Philippines**, men assigned male at birth would often assume the role of *Babaylan*, a position traditionally held by women assigned female at birth. *Babaylans* are revered as they are thought to possess the power to communicate with ancestral and environmental spirits, and male *Babaylans* were highly respected advisors to community and village leaders.[[3]](#footnote-3) Accounts of the existence of *Babaylans* serves as historical evidence of crossdressing and gender fluidity in pre-colonial Filipino society.[[4]](#footnote-4)

In **India and Pakistan**, analysis of historical texts indicate that prior to colonization, there was a rich culture of gender fluidity with respect to cultural gender identities including the *hijra,* who held significant roles in pre-colonial South Asian societies.[[5]](#footnote-5) *Hijras*, typically assigned male at birth, expressed themselves as women and performed at weddings and births across religious and caste lines.[[6]](#footnote-6) They also held influential positions in tax collection.[[7]](#footnote-7)

In pre-colonial **Malaysia**, male-bodied and androgynous priests, called *sida-sida*, held positions in the royal courts of Malay sultans. They often resided in inner chambers as guards for female royalty, oversaw ritual protocols, and protected the palace's physical and spiritual boundaries.[[8]](#footnote-8)

In **Hong Kong**, during the imperial era in China, a number of Han dynasty rulers were noted to be bisexual or homosexual. Stories of homoerotic relationships were common throughout Chinese history.[[9]](#footnote-9)

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# 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 the prohibition of certain sexual acts, but also regulation of sexual or gender identities and expressions (such as bans on cross-dressing).

Colonial forces imposed their beliefs and worldviews of gender and sexuality through the enforcement of laws across colonized societies in Asia.

In **India**, Article 377 of the Indian Penal Code (IPC) criminalized homosexual behavior in colonial India, and later became a template for legal systems across British colonies in Asia. As a result, same-sex consensual conduct was also criminalized in other former British colonies including Hong Kong, Malaysia, Pakistan, and Sri Lanka.[[10]](#footnote-10)

In the **Philippines**, an appellate court in Spain referred to as the the Real Audiencia, ordered Spanish administrators in the Philippines to confiscate the possessions of and burn alive persons who were found guilty of homosexual relationships.[[11]](#footnote-11) Colonial forces also relied on narratives of religion to enforce the policing of sexuality in the societies they colonized: the Catholic Church in the Philippines implemented measures to suppress *Babaylans* and labeled them as witches to be burned at the stake.[[12]](#footnote-12) The Church also conditioned young children to enact discrimination and violence against *Babaylan* villages.[[13]](#footnote-13)

In **China**, the derogatory term “*jijian*”, used to refer to men who have sex with men, emerged in Chinese society concurrent with the arrival of Christian missionaries who perpetuated notions that same-sex love and homosexuality were immoral.

# 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?

Many former British colonies still retain “anti-sodomy” laws that date back to their colonial past. In **India**, Article 377 of the IPC remains in effect. In 2018, the Supreme Court ruled that the manner of its interpretation with respect to homosexuality violated fundamental rights to privacy. The law’s scope was subsequently limited to exclude consensual private sexual acts between consenting adults.[[14]](#footnote-14) Before then, a total of 4,690 cases of violations of Article 377 were prosecuted between 2014 and 2016.[[15]](#footnote-15)

In addition to ‘sodomy’ laws, several vague colonial-era laws were/are used to harass and arrest transgender and gender-non-conforming individuals or those who are perceived to be transgender. “The stigma around transgender identities and ‘vagrancy’ has existed since the Colonial era, when the British introduced discriminatory laws such as the Criminal Tribes Act, 1871 (CTA) which provided powers to the police to arrest without warrant nomadic tribes and transgender persons who were found dancing, playing music or taking part in any public exhibition, in a public street. The colonial moral panics around ‘vagrants’ are carried on in post-colonial India through laws that govern beggary, public nuisance and public obscenity.”[[16]](#footnote-16)

**Hong Kong's** legal history under British colonial rule included articles 49 to 53 of the Offences Against the Person Ordinance, which criminalized homosexuality until their repeal in 1991.[[17]](#footnote-17) **Malaysia**, **Pakistan**, and **Sri Lanka**, however, have continued to enforce the colonial sodomy laws and have amended or supplemented such laws to cover other acts or to aggravate the punishment imposed.

In **Malaysia**, Section 377 was amended and was subdivided into categories such as bestiality, consensual and non-consensual sodomy, and gross indecency in 1989. The revised amendment defined carnal intercourse as anal or oral sex and made gross indecency gender-neutral, extending its application to lesbian women.[[18]](#footnote-18)

Article 377 of the **Pakistan** Penal Code is similar, but states that the penalty “shall be not less than two years.[[19]](#footnote-19) This was later amended by the Hudood Ordinances in 1980 to increase the penalty to the minimum punishment of ten years and a fine. The Hudood Ordinances were created to align criminal law with the Shariat and are applicable to both Muslims and non-Muslims.

In **Sri Lanka**, Article 365 of the Sri Lankan Penal Code reproduced section 377 of the IPC and is being interpreted to target LGBTIQ individuals.[[20]](#footnote-20)

# 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?

In the **Philippines**, many existing laws have been informed by standards of morality inculcated by the Catholic Church. The Family Code of the Philippines specifically limits marriage “between a man and a woman”, and is undoubtedly informed by the worldviews and morals imposed by Catholic missionaries. The same Code also lists homosexuality and lesbianism as grounds for marriage annulment, along with alcoholism and drug addiction.[[21]](#footnote-21) The passage of certain laws that would codify rights protections on the basis of sexual orientation, gender identity, and expression have been continuously blocked by various conservative Christian denominations.[[22]](#footnote-22)

*“The legislation and policy making in the Philippines is heavily influenced by religious beliefs and ideologies that up to this day we do not have a National/ Federal anti discrimination law (SOGIE Equality Bill) , marriage or union equality law, gender recognition law and divorce law. LGBTQI people have for many years continually suffered from discrimination and day to day violence such as the case of Jennifer Laude among so many others. We need to decolonize our laws, our practices and our beliefs so as to be fully reminded of the pre-colonial realities that reflected inclusivity, diversity and love. LGBTQI people have always been part of herstory/ history and we helped build our nation and we need not to keep begging for human rights and justice.”*

**Brenda R. Alegre,** PhD. Lecturer, Gender Studies at the University of Hong Kong and Board Member, the Society of Trans Women of the Philippines (STRAP) - The Philippines

Discriminatory narratives and stigmatization of *hijras* brought about by British colonial rule and imposition of Victorian ideologies of gender and sexuality remain prevalent in contemporary **India** and **Pakistan**. *Hjras* continue to face social and economic exclusion, making it difficult for them to secure legal employment. In turn, many resort to begging or illegal sex work to survive. LGBTIQ persons in both countries often still experience stigma, shame, and harm, which contributes to the human rights violations they face and their diminished human capabilities.

*“Colonial legacies have a grip on our imaginations. In India, Victorian era beliefs around sexual ‘purity’ and ‘morality’ led to the criminalisation of identities, prohibition of sexualities and the disciplining of gender into strict boxes, aimed at serving capitalist interests. Today, the impact of this is felt in our legal systems, social behaviors and normalized structural hatred.”*

**Vandita M.,** Founder and CEO, One Future Collective - India

*“Colonial-era laws reinforced the notion that non-hetrosexual orientations and gender diversity were deviant and immoral, further entrenching societal prejudices. This has resulted in the marginalization, discrimination, and violence-faced by LGBT individuals in Pakistan. LGBT individuals often face social exclusion, harassment, and even physical harm due to deeply ingrained culture and religious biases influenced by colonial-era laws and attitudes. However, contemporary cultural, religious, and socio-political dynamics also play a role in shaping attitudes and perceptions about sexual orientation and gender diversity. ”*

**Anonymous Activist** - Pakistan

The existence of anti-LGBTIQ discriminatory laws and social attitudes is ostensible throughout **Malaysia**. Recently, there has been an upsurge in rhetoric advocating for the "rehabilitation" or "curing" of LGBTIQ individuals. Furthermore, the existence of Article 377 has been used by Members of Parliament as a springboard for discussions relating to the imposition of harsher laws and punishments against LGBTIQ individuals.[[23]](#footnote-23)

In **Sri Lanka**, sections 365 and 365A make it illegal to have same-sex relations between consenting adults, even in private. The retention of these laws allow for the mistreatment of LGBTIQ people by both the public and state officials. Due to repeated police harassment and mistreatment, some transgender women and men who have sex with men are hesitant to report crimes.[[24]](#footnote-24)

Recommendations for States

1. Immediately repeal all discriminatory laws and policies, as well as social practices that explicitly criminalize and/or target LGBTIQ persons’ identities and adult consensual same-sex sexual acts.
2. Implement sexual orientation, gender identity, expression, and sex characteristics focussed knowledge sharing, capacity building, and sensitization programs for federal, provincial, and municipal authorities, including law enforcement agencies.
3. Curtail the perpetuation of hate speech against LGBTIQ persons and hold perpetrators accountable through laws and public policies implemented towards the achievement of inclusive, just, and peaceful societies.

Annex

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# 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 the prohibition of certain sexual acts, but also regulation of sexual or gender identities and expressions (such as bans on cross-dressing).

### The Philippines

Through religious discourse, colonizers carried out programs of “reeducation” by which they would coerce native Filipinos to accept their values as universal truths. Spanish colonizers had a clear objective of evangelizing the inhabitants of the pre-colonial Philippines, which they achieved through a standard pattern of evangelization called *Reduccion*. Priests in charge of churches also took on the role of de facto administrators of the Spanish regime in the towns where they were assigned[[25]](#footnote-25) and became the wealthiest and most politically powerful elements in society.[[26]](#footnote-26)

With the institutionalization of Catholicism, Spanish colonization brought about the demonization and suppression of traditional Filipino practices, including those related to sexuality. Sexual conduct that Catholic authorities deemed improper were policed through confessions and were publicly labeled as sinful, and "gender-crossers" were ridiculed and humiliated. Same-sex sexual acts that were once viewed as acceptable norms in pre-colonial Filipino society were also demonized and labeled as sinful.

For example, before the arrival of Spanish colonizers, “concubinage among married men was normal”, and it has been documented that one Spanish friar taught native Filipinos that “same-sex sexual acts and intercourse with someone who was not their spouse was sinful.”[[27]](#footnote-27) The country essentially underwent a complete paradigm shift through forced conversions to Catholicism that put several men engaged in same sex acts to death through execution if caught.

# 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?

### Malaysia

Malaysia’s Article 377 has been rarely enforced to police consensual same-sex sexual conduct. From 1990 to 2010, the law mainly prosecuted men who engaged in non-consensual or underage anal or oral sex with children, rather than those in consensual same-sex relationships.[[28]](#footnote-28) As of 2015, Article 377 has only been invoked seven times since 1938.

However, in 2015 the law was weaponized against opposition leader and former Deputy Prime Minister, Anwar Ibrahim, who was repeatedly charged, tried, and convicted for violating the law in what has been construed as an attempt to sabotage his political viability. Despite the rare enforcement of the law, “the willingness of successive Malaysian governments to use the law repeatedly against one high-profile political opponent highlights the danger it poses so long as it remains on the books.”[[29]](#footnote-29)

In 2021, the existence of Article 377 in Malaysia became the basis to support Malaysia's Federal Court’s ruling that Selangor state's law prohibiting consensual same-sex conduct is unconstitutional in relation to the “preclusion” clause in Malaysia’s constitution.

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