Contesting Colonial Criminalization:

Customary Law's Significance for Decolonizing Queer Analysis

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Introduction

The criminalization of same-sex sexual acts between consenting adults is an extensive form of oppression globally and a major critical concern for our times. Such criminalization applying to sexual acts between males, and less frequently also between females, continues in laws of 67 among the United Nations' 193 Member States (ILGA World: Mendos et al 2020). These criminalizing states include 35 of the 54 states in the Commonwealth that emerged from the British Empire, suggesting that the British imperial legacy remains a significant factor in more than half of the countries where state criminalization persists (The Commonwealth Equality Network 2021; Lennox, Tabengwa and Waites 2021, 34-35). This chapter provides a discussion of how queer legal studies is contributing to, and might better contribute to, analysis of such criminalization and its contestation in light of decolonizing analyses. The original contribution is to address analysis of queer criminalization through attention to the neglected issue of customary law.[1]

In international legal literatures customary law is a widely used and discussed concept. European colonialisms, imposing their own legal systems, formed a relationship to the legal systems of colonized peoples; and where such systems were recognized, customary law became a general concept in the English language used for description across many contexts.

The concept customary law has been widely adopted by colonized peoples (such as in Africa) seeking to re-assert their legal traditions in relation to states where colonial legal systems remain. Law literatures discuss customary law as a specific issue in the context of the wider discipline. Often legal scholars from the Global North who provide general accounts of customary law approach it with a tone of scepticism (Schauer 2007). Yet this approach differs markedly from that of recent law scholars in the Global South who integrate consideration of colonial power relations; for example, Sylvia Tamale who discusses customary law in relation to legal pluralism and decolonial feminism (Tamale 2020, 83-117).

The form of law known as customary law was generally recognized under British colonial governance, with an increasingly defined form from the early twentieth century, though with variation across time and territories. Most of the literature on customary law defines it as the law of particular peoples: for example, 'a normative order observed by a population, having been formed by regular social behavior and the development of an accompanying sense of obligation' (Woodman 2012, 10). However, for critical analysis customary law is better conceived as discourse produced in the colonial encounter, through unequal and hierarchical exchanges between colonizers and colonized. Hence customary law is best thought of as a concept subtly different from indigenous law, where the latter is understood as the legal discourse of indigenous peoples. As will be demonstrated, customary law's place within colonial law and governance has been overlooked in international research literature on the criminalization of same-sex sexual acts, an omission which this chapter begins to investigate and address.

For queer legal studies the starting point has to be an honest acknowledgement of how its configuration of academic research took form initially in Anglo-American contexts and that

legal scholarship on sexualities and genders was slow to address Global South concerns including colonial criminalization. With hindsight informed by postcolonial and decolonizing studies (e.g. Lugones 2008), it is explicable yet remarkable that gay liberation's foundational social histories of the regulation of homosexuality did not mention the British Empire's global criminalization of same-sex sexual acts prior to 2000 (Altman 1971; Weeks 1989). Yet it is also notable that the specifically queer legal studies initiated by scholars like Stychin focused on Western contexts (Stychin 1995), although he subsequently considered a wider global context problematizing Eurocentrism (Stychin 1998). A queer legal studies actively engaged with postcolonial studies began to emerge from the late 1990s (e.g. Spruill, 2000), with scholars from formerly colonized contexts contesting the field (e.g. Kapur 2005); but sustained engagement with the criminalization of same-sex sexual acts in previously colonized states took longer. While there has been a rapid growth of research on criminalization in mainstream legal studies of homosexuality or sexual orientation (discussed below), there is much for queer legal studies to investigate in dialogue with postcolonial and decolonial studies. This chapter seeks to make an innovative contribution through focusing on customary law.

Queer in the present context can be understood as a concept originating in the Anglophone West but actively taken up in preference against acronyms like 'LGBT' (lesbian, gay, bisexual and trans) by some Global South activists and scholars. Such usage of *queer* was notable, for example, in foundational documents of India's Voices Against 377 coalition that challenged criminalisation of 'Unnatural Offences' by Section 377 of the Indian Penal Code (Waites 2010). Such deployments have affirmed the flexibility and breadth of *queer* to encompass a variety of contextually specific identifications, such as kothi or hijra in Indian society. However, as the Queer Asia collective has argued, the concept may carry associations of privilege within activist or scholarly networks outside the West—for example in relation to

class, caste or racialisation (Luther 2017; Luther and Ung Loh 2019). Hence the conception of a queer legal studies in this chapter is attentive to the potentially unfair privileging of queer studies within circuits of global knowledge-production. It is also important to note that the use of 'same-sex sexual acts' rather than 'same-gender sexual acts' as a conceptual framing is a methodological decision for exposition, corresponding to the focus of colonial legal statutes on bodily acts with an assumed sex dichotomy (such as 'Indecent practices between males', discussed below); it certainly does not imply a normative, political or analytical preference for sex over gender. The complex social negotiation of sex and gender remains.

From these starting points, the chapter will proceed in three main sections. The first section will provide an overview of the emergence of international literature addressing the criminalization of same-sex sexual activity, especially in relation to colonialisms. The next section turns to customary law, showing that this has been neglected in legal studies concerning criminalization of same-sex sexualities and gender-transgressive behaviours. The final main section then offers an original analysis of customary law in Kenya. A comparative analysis is undertaken, drawing on colonial surveys regarding customary law among different ethnic groups. It is argued that queer legal studies, suitably combined with insights from postcolonial and decolonizing studies, can contribute to better analysis of customary law and to revising global analyses of criminalization and decriminalization struggles. Thinking about customary law requires us to recognise when and where colonized peoples were *not* subject to colonial criminalizations, which in turn implies rethinking the meaning of decriminalization. Who is the subject of decriminalization?

Analyses of Colonial Criminalization in Queer Lives and Decriminalization Struggles

It was Indian queer activists and associated scholars such as Alok Gupta and Arvind Narrain who put the British Empire's criminal legacies on the global agenda for sexuality and gender politics, and for legal studies (Narrain and Bhan 2005; Narrain and Gupta 2011). A ground-breaking legal case was initiated by the Naz Foundation in 2001, seeking a 'reading down' of the Indian Penal Code's Section 377 with respect to adult consensual sexual acts. *Naz Foundation* commenced a new era of international contestations. The case came to be supported in court and externally by the Voices Against 377 coalition, a broad-based coalition of groups including sexual and gender minorities, and women's rights organisations (Waites 2010).

Gupta's report, *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism*, was published by Human Rights Watch with contributions from Scott Long and definitively put British colonial criminalization of same-sex sexual acts on the global agenda for critical analysis (Human Rights Watch 2008). The substantial and rigorous research producing *This Alien Legacy* originated from an NGO rather than an academic source, and the innovative work reflected the insight of Gupta and Long that an anti-colonial framing could be valuable in supporting human rights claims and LGBT or queer movements. As various actors internationally began to make interventions from 2001, it was *This Alien Legacy* that emerged as the key synthetic text combining legal detail on criminalization with anti-colonial analysis. *This Alien Legacy* differed from mainstream approaches to colonial sodomy laws, notably that of Justice Michael Kirby from Australia, who lobbied the Commonwealth on LGBT human rights (for example, in the Commonwealth Eminent Persons Group, 2009-2011). Kirby's early publications advocated interventions in Commonwealth states using the same conceptual basis as the UK Wolfenden Report of 1957 (Committee on Homosexual Offences and Prostitution

1957; Kirby 2008). Kirby suggested that formerly colonized states learn from the British model of decriminalization; a model that focused on the public/private distinction without engaging postcolonial analysis (cf. Waites 2013).

The volume *Human Rights Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change*, co-edited by Lennox and Waites (2013a) represented the different approaches of Kirby and Gupta in distinct chapters, but drew especially on *This Alien Legacy*'s emphasis on strategies that addressed colonial contexts. In addition to data-analysis of laws across all Commonwealth states, the volume detailed regulation and resistance struggles in 16 states, while offering a comparative analysis of strategies adopted by movements (Lennox and Waites 2013b). This work has been updated in subsequent publications to document recent decriminalizations and contestations in Commonwealth states; for example, decriminalizations in India during 2018 and Botswana during 2019 (Waites 2019a; Lennox, Tabengwa and Waites 2021). While the British Empire criminalized same-sex acts most extensively, other European empires such as the Portuguese also criminalized such acts. Further analyses intriguingly suggest a tendency to decriminalization in states such as Mozambique (2015) and Angola (2019)(Gomes da Costa Santos and Waites 2019; Tabengwa and Waites 2019). Growing literatures center the transnational politics of LGBT rights and homophobia (e.g. Bosia and Weiss 2013; Farmer 2020), many with a particular focus on decriminalization contestations (Han and O'Mahoney 2018; Waites 2019b; Novak 2020; Castéra and Tognon 2020; Gerber and Lindner 2021).

While many analyses of colonial criminalization have focused on same-sex sexual acts, criminalization also occurred in relation to genders outside the colonial gender binary. Guyana criminalized certain gendered acts as 'cross-dressing' until 2018, as Deroy and Baynes Henry

(2018) discussed in an important contribution. Hijra people in India were subject to forms of colonial legal regulation that may be interpreted as criminalization in a broad sense. The main focus of the present chapter is on the criminalization of same-sex sexual acts, given the extensive existence of such laws and in order to challenge current analyses. However, implications for gendered regulations should also be kept in mind, especially with reference to Lugones' argument concerning 'the coloniality of gender'—whereby European colonialisms exported a gender system of biological sex dimorphism associated with heterosexuality (Lugones 2008).

To frame an issue of legal regulation in terms of criminalization and decriminalization potentially raises some analytical challenges. From the perspective of critical legal studies, law may be considered only one of the social practices defining crime in societies. For example, advocates of replacing a focus on 'crime' in criminology with a focus on 'social harm' argue that social harm may be defined by criteria other than law, such as normative conceptions of human rights (Hillyard and Tombs 2007). Hence to limit the definition of crime to within the scope of law would restrict parameters of enquiry. However, this chapter's purpose is to further investigate the forms of different types of law. Therefore, while the definition of crime and its relation to law are contested, for the specific purpose of this chapter criminalization refers to processes of law that prohibit, restrict or impede actions that are understood as crimes because they are believed to involve a particular kind of public wrong that requires punishment (cf. Lacey 2019, 307-309). This conception of criminalization facilitates a focus on an under-researched critical issue in the criminalization and decriminalization literatures, highly relevant for decolonizing analyses: the issue of customary law.

The Absence of Customary Law in Analyses of Queer Criminalization

Customary law is a remarkable absence in almost all of the academic literature and political debates on colonial criminalization of same-sex sexual acts. Once noticed, this absence is so glaring that it seems to need explanation not only by the general neglect of customary law in legal studies but also by the discursive formations and ideological investments of actors producing research and knowledge-claims—whether invested in decriminalizing by extending international human rights into states or by decolonizing—as surveyed in the following review. It is therefore necessary to document where and how attention to customary law has been omitted in existing literatures, before examining examples of primary sources on customary law. This process may enable methodological and theoretical adjustments for future queer legal studies to address criminalization through engagement with decolonizing perspectives.

Following the scramble for Africa, including the Berlin conference of 1884-1885 that assigned territories among European powers, customary law emerged as a central feature of British governance and criminal justice. Customary law was conceived in the British empire as representing the traditional forms of collective legal practice among colonized peoples. The emergence of distinct legal practices was closely related to the conception of 'indirect rule', the theory of which was promulgated by Frederick Lugard, High Commissioner of the Protectorate of Northern Nigeria at the beginning of the twentieth century (although some practices of indirect rule predate such conceptualisation; Ikime 1968). The colonial legal system imposed divisions between higher level courts and so-called 'native tribunals' where customary law was the central framework, although 'native tribunals' were typically administered with imperial officials, and were thus characterised in a broad sense by 'hybridity' (Bhabha 1994). Foucault's conception of 'governmentality' is useful to describe various

colonial practices used to influence the conduct of subjects, including law (as previously advocated; Waites 2013, 170-175). British colonialism developed a mode of governmentality that institutionalised different practices of regulation for those colonizing and for the colonized.

One rare example of literature on decriminalization where the customary law issue has been broached is Scott Long's appendix in the Human Rights Watch (2003) report *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, discussing South Africa, Namibia, Zimbabwe, Botswana and Zambia. Following substantial discussion of the criminalizing effects of colonial laws, Long turns to customary law only in the final section 'The Realm of the Customary'. Long rightly identifies that customary law under colonialism 'was contingent on white supervision, revision and veto', yet is rather dismissive, characterizing it as 'less a system of law than a playbook for a spectator sport' (Human Rights Watch 2003, 291). Such characterization tends to downplay the real practice and implications of customary law. For Long, 'The fact that custom in all African societies was complex, sometimes contradictory and almost always unwritten gave whites the privilege of writing it' (Human Rights Watch 2003, 291). Such overstatement loses sight of the ways some indigenous practices found representation in customary law for areas of communal affairs relatively ungoverned by the British. Long argued that customary law was concerned with assigning property in relation to marriage and kinship; yet colonial influences reshaped conceptions of marriage so 'any residual place for sexual or gender nonconformity which customary practice might once have accorded was inevitably, in the new enactments, expunged' (Human Rights Watch 2003, 292). Long cites only one example of contemporary customary law addressing same-sex acts, via a newspaper report from Botswana. The report is of punishments of same-sex offences with 'lashes' and jail terms, yet without historical evidence Long implies that such

attitudes from customary courts reflect homophobia. This provisional discussion suggests a need for further investigation.

Turning to consider more recent literature that has opened international debate over colonial criminalization of same-sex sexual acts, it can be seen that attention to customary law is almost entirely lacking. The agenda-setting report *This Alien Legacy* from Human Rights Watch (2008), is a problematic text in this respect (Gomes da Costa Santos and Waites 2019, 312-313); and it seems to forget rather than pursue Long's earlier discussion. The report initiated a discourse that has since become internationally popularized, emphasising a critical perspective on British colonial criminalization together with a strong argument that the colonial law was directed at all colonized peoples.

> Colonial legislators and jurists introduced such laws [Section 377 of the Indian Penal Code and similar], with no debates or 'cultural consultations', to support colonial control. They believed laws could inculcate European morality into resistant masses. They brought in the legislation, in fact, because they thought 'native' cultures did not punish 'perverse' sex enough. The colonized needed compulsory re-education in sexual mores. Imperial rulers held that, as long as they sweltered through the promiscuous proximities of settler societies, 'native' viciousness and 'white' virtue had to be segregated: the latter praised and protected, the former policed and kept subjected (Human Rights Watch 2008, 5).

The report is explicit in claiming that Section 377 and similar laws were devised to encompass both colonizers and colonized: 'It was a colonial attempt to set standards of behavior, both to

reform the colonized and to protect the colonizers against moral lapses' (Human Rights Watch 2008, 5).

Customary law is missing from this narrative; indirect rule is not considered. The text notably invokes 'fact', and its publication by a human rights organisation would lead many audiences to assume its veracity. A more realistic interpretation, however, is that the authors' anti-colonial orientation seems to have led them to infer assumptions about the intentions of colonial governance based on data from penal codes. Instead, there is a need to hold open questions about the intentions of colonial authorities and the scope of application of penal codes in relation to customary law. Yet *This Alien Legacy* does not discuss customary law at all—it is mentioned only once (Human Rights Watch 2008, 25)—and does not consider that its scope might delimit the relevance of colonial laws.

Undoubtedly, colonial authorities sought to regulate some sexuality and gender practices; yet historical literatures show resistances, such as fierce opposition to cliterodectomy prohibitions in Kenya frustrating intervention (Hyam 1990). Regarding same-sex sexual acts, a key dynamic was the replication of English law on buggery in the colonies, as when Macauley drafted the Indian Penal Code of 1860 to include Section 377. Yet it is important to inquire if laws on same-sex sexual acts were intended to regulate colonizing populations, or the colonized, or both. These complexities were not explored in *This Alien Legacy*.

The mainstream legal literature on decriminalization of homosexuality and LGBT human rights also fails to address customary law. Hence the publications of Justice Michael Kirby proceed with a straightforward narrative describing colonial criminalization across colonized territories, taking this as requiring to be mirrored by decriminalization also applying to all

populations, without attention to the relatively obvious legal fact of customary law that challenges the premise (e.g. Kirby 2008). Novak's survey of recent legal rulings on decriminalization acknowledges that 'most African subjects fell under the jurisdiction of a separate customary law system', yet he offers no further comment on the implications for conceptualising the scope of criminalization, or his support of transnational human rights litigation and a 'Commonwealth human rights strategy' (Novak 2020, 119). As such Novak's work embodies the problematic mainstream legal studies in which positive emphasis on global legal connections emerges partly through analytical neglect of customary law. Similarly, customary law is absent from indexes of the three-volume collection *Worldwide Perspectives on Lesbians, Gays and Bisexuals*, edited by a specialist on legal regulation in the Commonwealth (Gerber 2021a, 2021b, 2021c; Gerber and Lindner 2021). In sum, mainstream Western legal scholarship has omitted discussion of customary law due to some combination of unconscious or conscious bias and ignorance.

The absence of customary law is also clear in the global survey *State-Sponsored Homophobia*, published annually by the International Lesbian, Gay, Bisexual, Trans and Intersex Association—a foundational source for much research on criminalization (ILGA World 2020; Human Rights Watch 2008; Lennox and Waites 2013a). The report's methodology takes states as the focus for defining law, with the effect of privileging law at country level while implicitly lacking appreciation of legal pluralist perspectives that can acknowledge sub-national systems. The report comments:

> When it concerns criminalisation, the main sources that we look at to ascertain whether the country indeed decriminalised are the criminal codes. For that reason we do not

> systematically cover other types of regulations that might be used to criminalise same-sex sexual activity (ILGA World 2020, 15).

However the report does mention a few specific incidents related to customary law such as in Peru and El Salvador ‘when it has come to our attention’ (ILGA World 2020, 15). A section ‘Gaps and transitions from colonial laws’ acknowledges that in locations like the French colonies ‘a dual regime was identified, with an asymmetry between the law applied to natives and to those considered French citizens’ (ILGA World 2020, 16). However: ‘In view of this and considering the difficulty of ascertaining when and how the law applied to natives because of the legal uncertainty associated with it, we decided to indicate as the date of decriminalisation the year in which French laws became valid, although noting reservations’ (ILGA World 2020, 16). Hence the most globally influential survey of legal discrimination in relation to sexual orientation has been ignoring customary law over many years; even in the most recent version, its methodology systematically privileges European forms of criminal law. Rare references to specific cases do not shift the overall conceptual framework defining criminalization.

Meanwhile recent postcolonial and decolonial queer research is focused on past and present contexts and struggles, examining colonial histories and enduring colonialities. However decolonizing sexualities research (Bakshi et al 2016) has not yet yielded legal history studies of the regulation of same-sex sexual acts or gender beyond the binary with due attention to customary law. The focus of many decolonial sexualities researchers tends to be on critiquing colonial regulation or highlighting positive aspects of pre-colonial societies, with perhaps insufficient investigation of possible forms of pre-colonial regulation.

A queer legal theoretic approach to customary law could be especially generative, given queer theory's exploratory methodologies, its attention to sexuality and gender experiences outside social norms, and its willingness to break with rigid orthodoxies of both Eurocentric and decolonial approaches. The way forward surely includes attending to examples of how customary laws regulated sexuality and gender in particular contexts. The next section turns to analyze examples from Kenya. Recent Kenyan legal scholarship on non-heterosexual sexuality, in accordance with decolonizing sexualities scholarship, has emphasised that 'there were no laws criminalizing homosexual conduct between consenting adults in private before colonialism' because 'such conduct was not […] deemed worthy of formal legal sanction' (Wekesa 2017, 80); yet the following historical research offers evidence to the contrary.

Customary Law and the Regulation of Sexuality and Gender in Kenya

For a methodology to investigate customary law, analysis of colonial reports documenting such law in a particular colonial territory was selected. Kenya was chosen as an important territory in Africa, of regional significance and influence politically; this selection was made initially in the context of a comparative study in relation to Mozambique, since published (Gomes da Costa Santos and Waites 2019). The Kenya case has some obvious advantages for a study of customary law: Kenya includes a large number of different ethnic groups, suggesting the potential to compare interesting differences among populations. Kenya is a relatively large African state in terms of population.

Colonial reports on customary law for specific ethnic groups were selected as a form of primary source for data-collection and analysis, especially in light of the lack of attention to these

reports in existing legal research on colonial regulation of same-sex sexualities and genders. Such reports typically were produced by an individual with legal expertise appointed by British colonial authorities, who engaged in dialogue with leaders of a specific ethnic group to ascertain practices—typically via one or more translators. The reports thus present systematic, structured accounts of customary law, produced with the objective of accurately documenting the understandings of societal leaders.

A substantial search of London libraries was used to identify relevant reports. The search began in the British Library, using guides to official publications for Kenya to identify relevant texts on customary law (Howell 1978; Thurston 1991). Searches then extended to identify reports in the Institute of Advanced Legal Studies library and the British Library of Political and Economic Science, also through checking the library catalogue of SOAS (formerly School of Oriental and African Studies). Several relevant reports for specific peoples were found in print form, all reported here. Using a thematic analysis, each was systematically searched for relevant sections specifying any customary law that related to same-sex sexual acts or gender beyond the colonial gender binary.

Colonial reports on customary law have some obvious methodological disadvantages when considered in relation to decolonial politics and decolonizing methodologies (Smith 2012). Most obviously, such reports are colonial texts, written by the colonizers. Where reporting voices of the colonized they did so largely through translation with the assistance of interpreters, with consequent scope for inaccuracies or mistakes. Reporting practices usually did not involve precise use of quotation within quotation marks; what is reportedly said was typically expressed within the narrative of the report author. Yet on closer consideration, and in light of the difficulties with other conceivable methods, the customary law reports also have

some key advantages. In African contexts where oral traditions were important and written texts scarce, they provide a written record of law from the past that attempts to be synthetic. Most importantly, the overall objective of those producing the reports was to document as accurately as possible the beliefs and practices defining law and crime among colonized peoples, though this aim might have varied in relation to specific sensitive topics. From reading these documents, it seems clear that they were produced through systematic processes, with the intention to detail with precision. In contrast to many other kinds of text, there was an aspiration to objectivity which—although objectivity could not be achieved—makes the findings documented a unique and significant record, even while the uses of the information through colonial governance were highly problematic. Thus, the reports merit attention from postcolonial or decolonial scholars wishing to find out about pre-colonial practices defining criminality, even while other research methodologies such as oral history could clearly also contribute. As will be shown, it would be too simple to think that no colonial legal texts could provide valuable sources evidencing discourses of the colonized.

A useful introduction to Kenya's customary law is provided in works by Eugene Cotran, a UK Judge and legal scholar who became a High Court Judge in Kenya in the late 1970s. Leading up to independence in 1963, Cotran was commissioned by the Colony of Kenya's authorities during 1961-62 to research and record 'customary criminal offences'. He produced an overall *Report on customary criminal offences in Kenya* (Cotran 1963a), and also published an article discussing customary law in different ethnic groups within Kenya, noting for example the existence of 'woman-to-woman marriage' (Cotran 1963b). In a later article, Cotran provides a particularly helpful overview of legal institutions and the developing relationships between so-called 'native courts' implementing customary law, and the higher courts implementing English law in a 'typically dual' system (Cotran 1983, 42).

Most importantly Cotran notes that the East Africa Order in Council of 1897 stated that new statutes would apply in a circumscribed context:

> Provided always that the said common law doctrines of equity and the statutes of general application shall be in force in the colony so far only as the circumstances of the colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary (East Africa Order in Council 1897, quoted in: Cotran 1983, 42).

A 'Native Tribunals Ordinance' had specified in section 13a that 'Native Tribunals' formed by a Council of Elders (but supervised by colonial administrative officials) were to implement 'the native law and custom prevailing in the area', 'so far as it is not repugnant to justice or morality' or inconsistent with other laws (Article 4(2), Kenya Colony Order in Council 1921; quoted in: Cotran, 1983, 43). Hence customary law could be over-ruled, effectively defined as inferior. However, customary law nevertheless had a defined legal status and scope applying to many practices of the colonized peoples.

Cotran outlines how the Indian Penal Code initially was applied to Kenya from 1987 and in 1930 was replaced by the Kenyan Penal Code (Cotran 1983). These specified offences applied in the main courts, above the so-called 'native courts'. The Kenyan Penal Code included—and still includes—Section 162 prohibiting 'Unnatural Offences', Section 163 'Attempt to commit unnatural offences' and Section 165 'Indecent practices between males', which together prohibit all sexual activity between males and some between females. The clear context of colonial criminalization thus forms the comparative context for the discussion of customary law. Previous analysis of how Sections 162, 163 and 165 were prosecuted in the higher courts,

examining statistics from colonial ‘Blue Books’ reporting data to the British government, has found that from 1901 to 1946 only 9 convictions were recorded; and occasional instances of racialized reporting show prosecutions focused on ‘European’ (white) and ‘Asiatic’ (coastal) populations, but not ‘Natives’ (indigenous groups)(Gomes da Costa Santos and Waites 2019, 315). This evidence suggests very little prosecution of indigenous people for ‘Unnatural Offences’ under the Penal Code in the main courts.

With a wider understanding of the overall legal framework, higher court practices and how customary law was institutionalised, it is then possible to examine specific reports representing customary law for particular ethnic groups. Some of the data that follows has previously been presented (Gomes da Costa Santos and Waites 2019) but the discussion here allows for an improved methodological reflection and comparative analysis. Moreover, this is the first occasion for a focus centrally on customary law. Three reports on customary law in specific ethnic groups are examined, all produced after World War II; the analysis then turns to a comparison with wider commentaries on the law across Kenya.

In 1951 Penwill produced a study of the customary law of Kamba Customary Law, published in a series ‘Custom and Tradition in East Africa’ (Penwill 1951). Penwill states the study relates to the Ulu Kamba and ‘does not necessarily apply to the Kamba of Kitui’ (Penwill 1951, vii). Regarding methods ‘its basis is the records of appeals heard by District Officers […] and the case files of the Native Appeal Tribunal over the last two years’; the ‘material was discussed and put into a logical form with two senior elders’ and also discussed with ‘all the Presidents of the ten tribunals’ (Penwill 1951, vii). Chapter 7 covers ‘Adultery, Fornication and Unnatural Behaviour, including a section ‘Unnatural Behaviour’ which states:

> If a man commits an unnatural offence with a young boy he must pay over a goat and a bull. If two men commit the offence together, each must pay a goat. Such cases are rare among the Kamba. […] Such cases should now be charged under Section 155 of the Penal Code, but they are normally settled quietly in the locations without ever coming to the Courts. (Penwill 1951, 76)

Mention of Section 155 here seems to be a mistake by Penwill, since 165 would be the relevant section addressing 'Indecent practices between males' (and 155 addresses 'Premises used for prostitution'). The text is accompanied by comment on sexual crimes involving animals and it is also noted that: 'The Kamba regard it as unnatural to have coition with a woman from behind. If a man does this, even with his wife, he must slaughter a goat for purification. By this act he has levelled himself with the animals'. The framing of the discussion perhaps suggests a European line of questioning about sodomy as related to animal behaviour, and possibly a Eurocentric interpretation of responses.

Secondly, a study of Nandi customary law was published by Snell a few years later (Snell 1954). In relation to research methods Snell stated that they had received 'ready co-operation' of chiefs and elders (Snell 1954, vii). The report covered 'Unnatural Offences', stating:

> An offender caught in the act could be killed […] Otherwise he would be beaten by members of his age-grade, or in a serious case would be cursed by the kokwet elders and held in social ridicule' (Snell 1954, 33).

In this case there seem to be a wide range of possible punishments which might beg questions about whether different conceptions of crimes would exist in relation to the ages of participants

and their partners; a homogenisation might be occurring through the translation process in relation to the European category of ‘Unnatural Offences’.

Thirdly, a study of the Luo people’s customary law by Wilson was published shortly before Kenya’s independence (Wilson 1961). The Luo are described as 12 Nilotic tribes in central Nyanza. Part II of the report is titled ‘Marriage Law and Customs’ and within this there is a section ominously titled ‘Failure of the Union’ in which there is comment related to same-sex sexual acts:

> Acts which traditionally carried the sanction of banishment enforced by the elders were: incest, sodomy, bestiality, homosexuality, premeditated murder, continual troublemaking, … witchcraft...

In this instance it is clear that Wilson’s narrative uses the Anglophone western concepts of ‘homosexuality’ and ‘sodomy’ to translate information about crimes relating to same-sex sexual acts. In this report information on research methods is limited and there is not further information about concepts used in African languages prior to translation.

Recent African socio-legal research can help us understand the problematic process of translation involved in producing these three reports. Alan Msosa’s PhD thesis has explained that in contemporary Malawi, references to homosexuality in the English language are often translated as relating to local linguistic terms that relate to sexual acts between older men and young men or boys (Msosa 2018). Language differences and consequent mistranslations thus have a somewhat similar effect to when people in the West have equated homosexuality with paedophilia, leading to negative responses. Therefore, it would not be possible to fully

understand customary law in the Kenyan examples without further research and understanding of the local linguistic and cultural systems. Nevertheless, the English language summaries in the reports do provide some useful evidence about understandings.

Comparing the data on customary law for the Kamba, the Nandi and the Luo, it seems that punishments varied very significantly between ethnic groups. Punishments ranged from being killed at the most extreme for the Nandi, to banishment for the Luo, to the lesser sanction of the payment of a goat for sex between two adult males. This is a substantial disparity in approaches and suggests the need to attend to varying practices of different ethnic groups in this respect. It can also be noted, for example, that only men and boys (with male pronouns) are mentioned for the Kamba and the Nandi; and in relation to the Luo the mention of sodomy also implies a male actor; whereas there is no reference to sexual acts between females being criminalised.

The analysis here has reported the data for each of the reports surveying customary law for a specific ethnic group that it was possible to find from a search of London libraries mentioned. Overall, it is striking that the data for each of the ethnic groups where reports on customary law could be found show a form of criminalization of same-sex sexual acts between males, outside colonial regulation. These findings require questioning the prevailing narrative in much current literature that the criminalization of same-sex sexual acts arrived with British colonialism. For example, *This Alien Legacy* asserted that: ‘Sodomy laws throughout Asia and sub-Saharan Africa have consistently been colonial impositions’ (Human Rights Watch 2008, 10), tending to imply that there were no similar laws previously. Scott Long’s appendix in the earlier Human Rights Watch report *More than a Name* was unambiguous in asserting that criminal laws on same-sex sexual behaviour did not exist prior to colonialism:

> There is no reason to suppose that white colonists brought same-sex sexual behaviour to Africa for the first time. What they did bring, though, was the criminal categorization of that behavior. The acts were indigenous. The name and crime were imported (Human Rights Watch 2003, 256).

By contrast the findings here suggest there may have been some similar laws in certain ethnic groups. Of course, further investigation is needed in Kenya and further colonized contexts; but a preliminary analysis from examining the case of Kenya is that prevailing international narratives of the colonial criminalization of same-sex sexual acts in existing literatures need to be reconsidered, to attend to the mediating effects of customary law.

Wider colonial reviews of law across Kenya were also examined and compared to the reports about specific ethnic groups, but the wider reviews make no mention of offences specific to same-sex sexual acts in customary law. A report relating to customary law across Kenya by Phillips (1945), *Report on Native Tribunals*, omitted any mention of crimes relating to same-sex sexual acts, or gender diversity. In the wider discussion of 'Sexual Cases', there is discussion of the law of marriage, including multiple offences for adultery (Phillips 1945, 266, paragraphs 795-798). The general comment is made that 'Sexual cases originating in a native reserve, and in which all parties concerned are of the same tribe, would often, I think, be more suitably dealt with by a native court than by a European judge or magistrate' (Phillips 1945, 266).

Cotran's 1963 report on customary law across Kenya also differs from the discussed reports on specific ethnic groups. Cotran's report specified a 'method of investigation' involving a

review of ‘all written materials on customary law’ including unpublished material, together with some observation at courts (Cotran 1963, 2). The report outlines various criminal offences related to sexuality—such as for adultery with a married woman or circumcision without parental consent—yet noticeably omits any reference to offences covering same-sex sexual acts. This omission is interesting since Cotran’s stated method should have involved reading the previously discussed reports on specific groups. Cotran is now deceased and it is not possible to know the reason for the omission. One possibility is that references to same-sex acts could have been omitted due to British moral attitudes, but it seems more likely to have been due to the perceived unimportance of these acts for the report. The omission might suggest that customary law for other ethnic groups beyond the Kamba, Nandi and Luo may not have mentioned same-sex sexual acts.

The omission of reference to crimes concerning same-sex sexual acts in reports across Kenya by both Phillips (1945) and Cotran (1963a) thus might suggest disregard for the issue or possibly a decision to leave it invisible in 1963. The neglect of attention to customary law on same-sex sexual acts in these colonial overviews is echoed in contemporary neglect of such aspects of customary law from prevailing activist, intellectual and academic voices in the contemporary international movement for LGBT human rights and equality, and some queer decolonizing movements.

Conclusion

This chapter has argued that a queer legal studies engaged with postcolonial and decolonial studies has much potential to rethink analysis of colonial criminalizations of same-sex sexual

acts and criminalization of transgressive gender practices. It has been demonstrated that contemporary international literatures addressing such criminalizations and resistant decriminalization struggles have neglected the issue of customary law. Revealing the neglect of customary law in narratives of colonial criminalization poses important questions about how to revise narratives of decriminalization.

The research presented here has some clear implications for future studies. The rich data from colonial reports on customary law suggests that these are valuable potential sources for future studies. The reports shed light on the historical situation, rather than relying on contemporary manifestations of customary law. Hence the investigation suggests a research agenda for exploring colonial reports on customary law in different countries, in the British Empire context and perhaps in other empires.

Findings from Kenya clearly demonstrate that customary law held a defined legal status within the colonial legal system and that for several ethnic groups—though not others—there is evidence of specific laws applying to same-sex sexual acts. This demonstrates that we should not speak of colonial criminal codes determining criminalization across all populations. Rather it is demonstrated that colonial criminal codes were only applied to the colonized in specific contexts, especially where engaging in sexual acts with a member of the colonizing population (as suggested in Aldrich's research in territories such as Papua New Guinea: Aldrich 2003).

The findings clearly show criminalization of sexual acts between males for several ethnic groups, though there are no such examples for sexual acts between females. Whether criminalization of males related to only specific sexual acts such as anal intercourse is difficult to judge given problems of translation and interpretation. However, the evidence challenges

narratives in international literatures that portray criminalization only arriving with colonialism.

Furthermore, if findings from Kenya are used to reflect back on international literatures concerning criminalization of same-sex acts, this points to a need for critical reappraisal and rethinking in queer legal studies and more widely. Since the Human Rights Watch (2008) report *This Alien Legacy*, the prevailing analysis informing international sexual politics has been of an emphasis on pervasive colonial criminalization by the British Empire. By contrast the analysis here suggests a need to problematize how LGBT and queer actors in activism and research, from both North and South, have constructed and adhered to a discourse of comprehensive colonial criminalization that has systematically downplayed the existence of customary law. Therefore a clear implication of taking seriously decolonial analyses must be to take customary law seriously. The extent of colonial statutory criminalization has been over-stated, and there is an urgent need for researchers to investigate the current status and forms of customary law across many contexts.

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Notes

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