



Gomes da Costa Santos, G. and Waites, M. (2019) Comparative colonialisms for queer analysis: comparing British and Portuguese colonial legacies for same-sex sexualities and gender diversity in Africa – setting a transnational research agenda. *International Review of Sociology = Revue Internationale de Sociologie*, 29(2), pp. 297-326. (doi: [10.1080/03906701.2019.1641277](https://doi.org/10.1080/03906701.2019.1641277))

The material cannot be used for any other purpose without further permission of the publisher and is for private use only.

There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

<http://eprints.gla.ac.uk/189630/>

Deposited on 05 July 2019

Enlighten – Research publications by members of the University of
Glasgow
<http://eprints.gla.ac.uk>

Comparative Colonialisms for Queer Analysis: Comparing British and Portuguese Colonial Legacies for Same-Sex Sexualities and Gender Diversity in Africa—Setting a Transnational Research Agenda

Gustavo Gomes da Costa Santos (Department of Sociology, Federal University of Pernambuco, Recife, Brazil) and Matthew Waites (School of Social and Political Sciences, University of Glasgow, Glasgow, United Kingdom)

Biographical Notes

Dr Gustavo Gomes da Costa Santos is Lecturer in Sociology at the Federal University of Pernambuco (UFPE). He is currently Affiliate Researcher at the University of Glasgow. He has been working in the fields of political sociology, particularly with social movements, sexual and LGBT rights, elections and political parties, citizenship, homophobia and human rights in Latin America and Southern Africa. He was responsible for the chapter on South Africa in the volume *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (School of Advanced Study, 2013), co-edited by Corinne Lennox and Matthew Waites. He has also published (with José Fernando Serrano-Amaya) the entry “LGBT Activism in Latin America” in *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies* (Wiley-Blackwell, 2016), co-edited by Nancy Naples and Renee C. Hoogland. He has also authored peer-reviewed journal articles including *Revista Brasileira de Ciência Política, Contemporânea – Revista de Sociologia, Sexualidad, Salud y Sociedad - Revista Latinoamericana* and *Physis: collective health journal*. He has recently co-edited a special issue on gender and participation of *Estudos de Sociologia – UFPE*.

Dr Matthew Waites is Senior Lecturer in Sociology at the University of Glasgow. He is internationally known in the fields of human rights gender and sexuality, particularly for co-editing (with Corinne Lennox) the volume *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (School of Advanced Study, 2013). He is author of *The Age of Consent: Young People, Sexuality and Citizenship* (Palgrave Macmillan, 2005). He has authored peer-reviewed journal articles in journals including *International Sociology, Sociology, International Journal of Human Rights, Social and Legal Studies, Journal of Genocide Research, Sexualities, Contemporary Politics* and *Genre, Sexualité & Société*. For the British Sociological Association he co-edited *The Sociology of Human Rights* special issue of *Sociology* journal in 2012 (Vol.46, no.5); he also co-edited *The Global Politics of LGBT Human Rights* special issue of *Contemporary Politics* in 2009 (Vol.15, no.1); and has co-edited two special issues of *International Journal of Human Rights* in 2010 and 2012. He is also co-editor of the *Global Queer Politics* book series published by Palgrave Macmillan.

Abstract

Comparative analysis of colonialisms is of critical importance, and hence this article proposes and instigates such systematic comparative research with respect to same-sex sexualities and gender diversity. We offer a historical sociological comparison of the Portuguese and British empires analysing relevant regulation, in relation to two African contexts: Mozambique and Kenya. Through a comparative methodology, we illuminate important differences in the regulation of same-sex sexualities and gender diversity, that have contemporary legacies: a) the difference in timing of criminalisation of same-sex acts and its impacts in the emergence of homosexuality in colonial governance; b) the differences in transboundary regulation, between colonial ideologies and between Protestant and Catholic mission practices; and c) the difference in racialised perceptions of homosexuality as a mainly European desire (in Portuguese colonialism) or as potentially occurring universally (in British colonialism). Identifying such differences can assist those aligned with queer politics to understand and engage coloniality in the present.

Keywords: colonialism; sexuality; queer; Kenya; Mozambique

Introduction

Colonialisms are of critical importance for analysing power relations shaping sexualities and genders, and indeed have arguably been the single most important social structural feature in the regulation of same-sex sexualities and genders outside binaries, worldwide. The significance of imperialism and colonialism has been particularly acute in the legacies of European empires; for example, the British criminalised same-sex sexual acts worldwide, with many laws still in place. Yet existing research has not offered systematic, sustained comparisons between different empires with respect to how same-sex sexualities or gender diversity were regulated. Hence it is time to set a new research

agenda, for comparative analysis of colonialisms in relation to the concerns of global queer politics contributing to decolonizing knowledge and generating new historical insights to illuminate the present.

In setting out to pursue this analytical and methodological agenda we have the concerns of global queer politics in mind, challenging the privileging of heterosexuality and the associated gender binary as social forms (Waites, 2009). We seek to rethink historical sociology and global queer politics through research examining sexuality and gender in relation to colonialism and racism. Like many, we have been inspired by Edward Said's groundbreaking work *Orientalism*, showing how European imperial discourses feminised the east for conquest (Said, 1978). We are further engaged with subsequent postcolonial studies, and more recent decolonial feminist studies, particularly Maria Lugones' work on 'The Coloniality of Gender'—analysing how European colonialism imposed structures of heterosexuality and gender dimorphism (Lugones, 2008). Simultaneously, and relatedly, we draw insights from the new wave of global historical sociology that challenges the analytical privileging of the nation state, instead conceptualising 'imperial-nations' with emphasis on 'transboundary' processes (Go & Lawson, 2017, 1-34). While conscious of specifically decolonial theory, methodology and politics (Mignolo, 2007), our approach here is to adopt an epistemology and methodology oriented to 'decolonizing' knowledge, without claiming to deploy a specifically 'decolonial' approach.

In this article we offer a historical sociological comparison of the Portuguese empire and the British empire regarding regulation of same-sex sexualities and gender diversity, in relation to two African contexts. While the British empire's regulation of same-sex sexualities has been discussed (eg. Hyam, 1990; Aldrich, 2003; Human Rights

Watch, 2008; Lennox & Waites, 2013), there is little such research on Portuguese colonialism, and bringing a different colonialism into Anglophone academic debates is illuminating. To undertake the comparison, we will focus on two contexts with transboundary histories of colonization by European imperial-nations: first, social life in the territory of what is now the state of Mozambique, colonised by Portugal; and secondly, social life in the territory now defined by the state of Kenya, colonised by the United Kingdom. Through a comparative methodology, we illuminate important differences in the regulation of same-sex sexualities and—to a lesser extent—gender diversity, that have significant legacies.

The structure of the article is as follows. Section 2 offers a literature review identifying the main contours of the field. Section 3 outlines epistemology and methodology. Section 4 discusses the Mozambique context in relation to colonial influences, while Section 5 turns to colonial Kenya. Section 6 then offers the comparative analysis, and is followed by the Conclusion. The differences found suggest the potential of the comparative research agenda.

Colonialisms, Sexualities and Genders – A Literature Review

Extensive critical literatures have developed on colonialisms as they relate to gender and sexualities, particularly blossoming since the emergence of postcolonial studies. Theoretically informed postcolonial feminist scholarship by Gayatri Chakravorty Spivak (1988), for example, developed through interdisciplinary engagement with the history research of subaltern studies; and post-structuralism. However, the engagement of postcolonialism with social science and historical sociology has come later (Bhambra,

2007), and while postcolonial sociology has begun to engage with gender and sexuality, this is a field for deepening engagement. Recent critical sexualities scholarship advocates *Decolonizing Sexualities* (Bakshi et al, 2016).

The legacy of Foucault's thinking on biopower is significant for our conceptualisation of how European colonialisms governed populations, and individual bodies, including through religion (Christianity) and the human sciences. Publication of Foucault's lectures of 1975-76 in *Society Must Be Defended*, has revealed colonialism as central, and 'race' rather than sexuality defined as the fundamental category of biopower (lecture 17 March 1976: Foucault, 2004, p.256). However, Foucault's decision not to include this conceptualisation in *The History of Sexuality, Volume One*, published in December 1976, delayed more multi-dimensional analysis (Foucault, 1976). While Foucault and decolonial theorists including Lugones, and Bhabra, all tend to conflate racism and colonialism, Virdee (2014, pp.56-73) emphasises the need to analyse historically shifting relations between racism, the nation and empire—a theme to investigate. Materialist forms of critical historical analysis also offer insights, and global analysis needs to draw from both traditions (Corrêa, Davis & Parker, 2014).

There are history literatures related to each colonialism, generally covering gender as a theme, and sexualities to a lesser extent. In relation to British colonialism, Ronald Hyam's *Empire and Sexuality* opened up analysis of sexual relations, though with a focus on British experience leaving a need to further examine the experience of the colonized (Hyam, 1990). Feminist Anne McClintock (1995) further developed analysis of the interplay between race, gender and sexuality. A further example among innumerable is Lauro (2005), on Belgian colonialism.

There are also contributions focused more specifically on the regulation of same-sex sexualities, and gender diversity. The ground-breaking report *This Alien Legacy*,

written by Alok Gupta, analysed British laws criminalising same-sex sexual behaviour—also mentioning colonial criminalisations by France and Germany (Human Rights Watch, 2008, pp.5-6). The subsequent collection *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth* further highlighted legacies of British criminalisation, whereby many imperial offences remain (Lennox & Waites, 2013); The Commonwealth Equality Network (2019) now note that 35 of 53 Commonwealth states criminalise some consensual adult same-sex sexual behaviour. In general, British colonialism has received more attention to its regulation of same-sex sexualities than other empires, especially regarding legal consequences; leaving a need to further examine law enforcement, customary law and wider social regulation.

Ongoing effects of other imperialisms have been suggested to work less overtly. For example, regarding German and Dutch colonialism, Spurlin (2006) has suggested how legacies of eugenics and Nazi racial ideologies continued to resonate in South Africa after 1945. But there have been very few publications on Portuguese colonialism, gender and homosexuality (Vainfas, 1997; Mott, 2005; Figari, 2009). Contemporary African sexualities scholarship has represented the voices of the colonized in opposition to colonial laws, and increasingly illuminates cultural specificities (eg. Tamale, 2011; Ekine & Abbas, 2013; Nyeck & Epprecht, 2013), but there is scope to create structured and comparative historical accounts of inter-relations between colonizers and colonized.

In relation to gender diversity, Towle and Morgan (2002) provided an overview of how western literatures have mis-represented other cultures. Califia (1997) commented, on how the French word ‘berdache’ was applied to those among First Peoples in North America who now often define as ‘two-spirited’. Lugones (2008, 8-9) has suggested that European colonialism brought gender dimorphism to the Yoruba in west Africa. But again, there is a lack of sustained comparative analysis.

Robert Aldrich's book *Colonialism and Homosexuality* (Aldrich, 2003) perhaps most clearly embodies the contributions of mainstream history research. Aldrich's compendious volume is filled with the fruits of archival work, condensing a vast array of findings with impressive scholarship. Aldrich certainly captures many features of relationships between colonialism and same-sex sexualities, especially the tension between the moral missions of European imperialist ideologies, and how in practice colonialism provided routes for sexual outsiders to find new experiences.

However, Aldrich's book also illustrates the limits of what history scholarship has been able to offer. The focus is largely on 'colonial homosexuality', as the headings of Part I and Part II suggest (p.8). The experiences of the colonized are less explored, as Aldrich acknowledges: 'This study is not primarily about the "colonised"' (2003, p. 8). By focussing on individual lives recorded in archives or biography there is a methodological tendency to privilege the perspectives of white male imperialists.

Aldrich's approach leaves scope for more structured and systematic analysis of how power and processes operated in relation to the colonized. Furthermore, Aldrich's conclusion speaks in generalising terms of European colonialisms, leaving scope for more exploration of differences. Hence where historical sociology research may make a new contribution is with a more structured analysis, distinguishing sociologically between realms such as law, religion and education, to discern how different racialised populations were affected. By combining this investigation of social structures with more sustained comparative analysis, we can illuminate key differences between forms of social regulation.

Epistemology and Methodology

Our aim is to provide a first systematic and critical comparative analysis of colonised contexts in relation to the regulation of same-sex sexualities and gender diversity, and hence contribute to decolonizing knowledge. To develop historical sociological analysis of power relations, we seek to conduct an original, structured and systematic comparison through deployment of sociological differentiations of social realms inhabited by colonizers and the colonized.

Epistemologically, in conceptualising our comparative study we have been conscious of our positionings as researchers based in the UK and Brazil, which in relation to Africa raises issues concerning power and knowledge. This is suggested in previously referenced works including Nyeck and Epprecht (2013) who emphasise the need to start by questioning ‘assumptions ... that come out of Western intellectual traditions’. We have responded by making a contribution to decolonizing knowledge integral to our aim, and by seeking to not assume colonial knowledge-claims through the research process.

Discussion of sex, gender and sexuality raises particular conceptual dilemmas in relation to colonised Africa, requiring clarification. While contemporary queer feminist studies have moved with Butler’s Gender Trouble to centre gender rather than biological sex as having analytical priority (as in much contemporary trans politics), Butler also emphasised Bodies that Matter—highlighting the significance of the sexed body as it is given meaning (Butler, 1993). In the colonial governmental discourse, as we shall see, criminal sexual acts were defined in law using biological sex categories (‘male’), rather than gender. Meanwhile regarding indigenous cultures, Lugones has questioned the existence of gender systems in pre-colonial cultures, including the Yoruba in west Africa (Lugones, 2008, 8-9); and this might imply examining the significance of bodily sex characteristics outside gender—and perhaps cohesive notions of sex. In response, we suggest that analysis requires attention to ‘sex’. Hence, while recognising that

deployments of sex and gender need theorised contextualisation, for this article we choose to use the concept ‘same-sex sexualities’ in preference to ‘same-gender sexualities’ to describe sociologically significant features of specific contexts, though this is a provisional choice, subject to further historical studies of societies involved. This is a methodological usage to represent features of our contexts—alongside and in relation to ‘gender diversity’—but certainly does not imply that we regard this representation as pure description; or have a normative or political preference for sex over gender. Furthermore, we use same-sex sexualities to refer to both acts and feelings, without assuming these coincide; this is an analytical tool and place-holder, without presumed ontology.

There seem various methodologies that can contribute to decolonizing knowledge. A central methodological decision was to use previously un-analysed colonial archive sources, implying a focus on specific social processes of criminalisation; and we acknowledge that findings may thus differ relative to what would be found through other methods, such as oral history with indigenous people. Yet we argue that the findings reveal some new glimpses of the voices of the colonised, which can contribute to decolonizing analyses.

To focus on social changes across time required a variety of sources, typically documents including statutes and reports—often on microfilm—through archival research at the *Arquivo Histórico Ultramarino* and the *Biblioteca Nacional de Portugal* in Lisbon, and at the British Library in London, yielding original data. These archives seem not to have been previously been used to study Mozambique or Kenya on this topic.

Arondekar (2009), in *For the Record*, has provided a uniquely stimulating critical analysis of the uses of the colonial archive in sexuality research. With reference to Derrida, Arondekar problematises, in particular, the motivations of sexuality researchers scouring colonial archives to seek the truth about power under empire. The study argues

for ‘juxtaposing the archive’s fiction effects (the archive as a system of representation) alongside its truth effects (the archive as material with “real” consequences’ (Arondekar, 2009, 4). The study is valuable to reflect on, though a full engagement is beyond the present article’s scope. Among the central issues raised is the problem of researchers interpreting archives through categories from their present. On this we can respond by emphasising that we have sought not to presume contemporary categories; we have approached archives as discourses rather than as straightforwardly documenting ‘truth’, and we acknowledge that selections of evidence are shaped by current contexts. We follow Arondekar’s interest in ‘the processes of subjectification made possible (and desirable) through the very idiom of the archive’—and will examine the use of categories, including of sexuality and raciality, in this light (2009, p.3). Moreover, we are sympathetic to Arondekar’s emphasis on the significance of archival silences, as the analysis will show. Overall, we believe that both our comparative approach and our exploration of previously un-analysed sources create new potentialities that justify archival engagement.

Methodologically, comparative analysis is certainly an under-developed approach in relation to colonialisms, same-sex sexualities and diverse genders. For example, Aldrich’s *Colonialism and Homosexuality* (2003) proposes to consider the British and French empires (p.2), but most chapters focus on the British, and there is no systematic comparison, as in a later valuable volume (Aldrich, 2007).

For our two case studies we have selected social contexts defined in relation to the contemporary state boundaries of Mozambique (colonised by Portugal) and Kenya (colonised by the British), examined from the inception of European colonisation. We define each case as focusing on the population of socially constituted subjects in a colonized territory, but importantly as they exist relationally, in relationship to the

population of the colonizing imperial-nation, through transboundary social processes—as advocated by Go and Lawson (2017, pp. 1-34).

Our choice of cases began with the state of Mozambique, which is particularly interesting as a rare state in Africa for having recently decriminalised same-sex sexual behaviour in 2015. Mozambique is thus the first African state in the (formerly British) Commonwealth to have decriminalised, apart from South Africa and Lesotho, in a context of anti-homosexuality from many African state leaders. Mozambique is also one of only two states—with Rwanda—to have been permitted to join the Commonwealth despite not having been British colonies. Our second case, Kenya, has been selected from former British colonies to provide a suitable comparison with Mozambique—sharing a positioning on the east coast and sea trade influences. We did not select neighbouring Tanzania because it was a German colony until 1919, whereas Kenya became a British Protectorate from 1895.

For each of our case studies in the next two sections, we will provide a historical and contextual introduction, then structure analysis according to two themes: first ‘Legal Regulation and Criminalisation’, and secondly ‘Moral Regulation: Religion and Education’. ‘Moral regulation’ is flexible concept previously used, for example, by Weeks (2012, p.100); here we use it broadly to encompass all forms of non-legal social regulation, though focusing on religion and education. Section 6 ‘Comparative Analysis’, then offers an initial discussion organised around these two themes; but also attends to three themes that emerge from the literature review and data-analysis. First, the differences of periodisation over time. Secondly, the effects of transboundary processes, associated with colonialism. Third, differences in how race and sexology interplayed. We turn first to Mozambique, since the Lusophone context is less familiar in Anglophone literatures.

Portuguese colonialism in Mozambique

The presence of the Portuguese in Africa dates to the 15th century, when navigators founded trading posts (*feitorias*) along west and east coasts. They were the cornerstone for slave and spices trade with local populations as well as for Portuguese occupation. In the 17th and 18th centuries, particularly in the east coast (approximately contemporary Mozambique), Portugal implemented the *prazos* system, in which the Portuguese crown delegated the administration and economic exploitation of vast portions of its dominion to private leasers (*prazeiros*), in a semi-feudal scheme which lasted until mid-19th century (Newitt, 1981). At that time, the Portuguese presence in Africa was restricted to some ports along west and east coasts. The conference of Berlin in 1885 and the possibility of Portugal losing territories to other European powers in the “scramble for Africa” operated as an incentive for the state to increase its administrative and military presence. Treaties with Britain and Germany in 1891 determined the frontiers of Mozambique. Military and scientific expeditions were launched to get effective control. The expeditions faced the resistance of local populations, which extended the struggle for “pacification” into the 20th century. Only after violently securing military control, for example using machine-guns to kill up to 15,000 warriors, could Portugal turn colonisation and sovereignty into a reality (Dias, 2007, p.86).

The effort to colonise territories took place in a context where the Portuguese State suffered from political instability and chronic economic problems. This instability, together with an agrarian-based economy which lacked the capital needed to dynamize colonial efforts, forced Portugal to rely on concession companies not only to forge economic development, but mainly to secure the control of territories. To most of the

companies (mainly organised by German, French and British capital), Lisbon gave rights to economically explore large areas in exchange for a part of revenue. To some, like diamond-extraction concession company Diamang (Angola), the Portuguese government granted quasi-governmental functions, turning them into “self-governing enclaves” (Newitt, 1981, p. 77). The Mozambique and Niassa Companies controlled almost half of the current Mozambican territories and, in the case of the Mozambique Company, its concessions expired only in 1941, when Portugal took direct control of the whole territory (Pereira, 2001).

A specific feature of the Portuguese colonial administration was the tendency to consider their possessions as integral parts of the Portuguese territory (Oliveira, 2014). Local colonial administrative actions had to strictly follow central government directives and almost all pieces of legislation were elaborated in Lisbon. Each colony had a governor responsible to execute and adapt Lisbon directives to local conditions. Governors had wide powers, especially after the Overseas Organic Act of 1963, to legislate by decree in so-called “indigenous affairs” (Abshire & Samuels, 1969).

According to this Act, the colonies were divided into districts which were further divided into councils. Each council has a chief executive officer (Abshire & Samuels, 1969) responsible for daily matters, and two administration tasks: tax collection and labour recruitment. For both tasks, officers had to rely on local chiefs, known as *régulos*. They were local chiefs recruited to secure the control of native populations. In this regard, Portuguese territories experienced some “de facto” administrative autonomy before and after 1963, resulting in something like the British “indirect rule” style of governance (discussed below), in which Portuguese law co-existed alongside indigenous “usages and customs”. This feature of Portuguese colonisation was emphasised as a demonstration of

a supposedly benign colonialism, presented as not imposing European law and tradition, merging them with local customs, in a sort of egalitarian ruling.

However, a closer look into the approaches of Portuguese colonial bureaucracies shows that was not the case. Portuguese colonial officers saw native populations as racially inferior and indigenous “usages and customs” as primitive and sometimes barbarian (Newitt, 1981; Zamparoni, 2012). The 1929 Indigenous Political, Civil and Criminal statute established legal discrimination based on race in the overseas territories, classifying as indigenous all individuals “of the black race or their descendants who, by their enlightenment and customs, could not distinguish themselves to the ordinary of that race”¹. The 1930 Colonial Act went further and established the need of “indigenous special statutes” according with the “state of evolution of native people”². Both decrees indicated that the “native” population was in a primitive state of evolution and indigenous law was inferior compared to European law. Portuguese law was only applied to white citizens and the “*assimilados*” (Assimilated citizens), a status granted to those Africans able to speak fluently and write in Portuguese, and regularly employed (Hall & Young, 1997). With the progress of colonisation, indigenous “usage and customs” were meant to be “assimilated” by Portuguese law (Pereira, 2001). This is confirmed by Serra when analysing the importance of “usage and customs” in Portuguese colonial administration in Mozambique:

“Portugal did indeed have to rely on local authorities and rights, at least as long as it did not meet the human, material and financial conditions necessary for the

¹ Section 2, Decree 16,473, 6th of February 1929.

² Section 22, Decree 18,570, 8th of July, 1930.

political, economic, social, cultural and religious standardisation of the Portuguese colonial empire” (Serra, 2010, p. 9).

Therefore, according to Serra’s analysis, incorporation of indigenous usage and customs in colonial legislation was not an instance of “legal pluralism”, but a consequence of a pragmatic approach to colonisation, which depended on complex and sometimes fragile arrangements with indigenous authorities to guarantee control. The assimilation of indigenous “usage and customs” by colonial authorities faced some resistances, especially by Catholic missionaries, who saw some indigenous traditions as barbarian and un-Christian.

After independence in 1975, the armed conflict between Frelimo (*Frente de Libertação de Moçambique*) and Renamo (*Resistência Nacional Moçambicana*) dominated political life, destroying most of the country’s economy and infrastructure, frustrating Frelimo’s socialist experiment (Newitt, 2018). Much of the Portuguese legislation continued to be enforced, with a new Penal Code only approved in 2014. It decriminalised same-sex sexual acts (sections 70 and 71 of 1954 revised version of the 1886 Portuguese Penal Code) and abortion, in sharp contrast with the tendency of other African countries to restrict sexual and reproductive rights. However, the new family law (2004) does not recognise same-sex unions and the only LGBT Association still struggles to be recognised by State authorities (Authors, forthcoming).

Legal Regulation and Criminalisation

Following the idea of integrity between Portugal and its overseas territories, mainland civil and criminal law was, in theory, applicable to all citizens within the empire regardless of their origins.

In this sense, to understand the regulation of same-sex sexualities in the colonies, one must look at how the issue was regulated in mainland Portugal. Until 1821, sodomy was criminalised in Portugal and her overseas territories under the canonical law which punished the “nefarious sin” with the capital punishment (Mott, 2005). Inspired by the Napoleonic code, Portuguese Penal legislation after 1821 ignored same-sex acts, excluding sodomy. It did not mean homosexuality was legalised, since homosexuals continued to be subject to frequent police raids in public places (like parks, train stations and public bathrooms) under the provision criminalising “indecent exposure” (Cascais, 2016).

However, this dramatically changed in 1912, when the Portuguese Parliament passed new legislation which criminalised, alongside mendicancy and vagrancy, a person who “surrenders him/herself to practice of the vice against nature”³. The law provided that individuals framed as vagrant should be subjected to imprisonment from one month to one year and, in case of recurrence, to transportation to the colonies and/or up to 6 years penal internment. The law was based on a modern understanding of homosexuality, in which the homosexual as an individual (not same-sex sexual intercourse) was the aim of legal repression (Cascais, 2016). The equivalence of homosexuality to vagrancy expressed the anxieties of urbanising Portuguese society, in which idleness was perceived as a social threat (Bastos, 1997).

³ Item 1, Section 3, Law on Vagrancy, 30th of July 1912.

The 1912 law was not immediately extended to the colonies. A special decree was needed to make legislation applicable overseas. Only in 1929, a shorter version of the Metropolitan Vagrancy Law was issued as a decree in Angola and São Tomé e Príncipe⁴. Although the subjects of prosecutions were the same as in Portugal⁵, penalties were different. In Portugal, there were different penalties and levels of punishment. In the case of the 1929 Angolan Decree, the punishment was conscription and forced labour. Apparently, this indicated that the legislation's aim was to provide indigenous labour, particularly to the coffee and cacao plantations in São Tomé, not necessarily to repress the "vice against nature". No record was found in Lisbon archives of any individual being condemned to forced labour on the grounds of the 1929 decree's "vice against nature". In Mozambique, a 1913 Lourenço Marques⁶ (nowadays Maputo) ordinance allowed local authorities to force indigenous people to labour on grounds of vagrancy, intoxication, theft and indecent exposure. However, there is no record of individuals engaged in same-sex acts being condemned to forced labour on grounds of "indecent exposure".

The 1912 vagrancy law provisions were only extended to Portuguese territories in 1954. A revision of the Penal Code⁷ changed many sections of the original 1852 Code, to adapt the code to the New State authoritarian approach, especially by including security measures, such as allowing imprisonment without charge for up to 24 years. Those

⁴ Decree 16,834, 14th of March 1929.

⁵ According to sections 1 and 2, the decree considered as vagrant all individuals over 16 without a permanent job, mendicants, those who explore female prostitutes and those who surrender to practice of the vice against nature (Decree 16.834, 14th March 1929).

⁶ Ordinance 1075, 3rd August 1913.

⁷ Decree 39,688, 5th June 1954.

measures were largely used by the political police (PIDE⁸) to repress political opponents. And they were also used to repress homosexuality.

But why was the provision against “the vice against nature” only extended to the colonies in the 1950s? Apparently, same-sex sexualities seem to be, according to the Portuguese “Scientia sexualis” academics, a particularly urban and “civilised/European” “problem”. Drawing from original studies on homosexual behaviour (such as Krafft-Ebing and Hirschfeld), Portuguese medical academics presented many examples of homosexual behaviour in different cultures, social classes and times. However, they all stressed that homosexual behaviour was more frequent in urban areas, as well as among more educated, middle and upper classes. Aguiar (1926) affirmed that homosexuals tend to concentrate in cities and suggested the existence of a relatively well-developed lesbian and gay sub-culture in European bigger cities.

Santos (1903) aimed that “genetical functions are more inclined to be perverted when progress and civilisation detached men from his natural character” (Santos, 1903, p.48). Neurologist and Noble Prize winner Egas Moniz went further, advocating that in cultured societies, compared to “nomad and savage societies”, the satisfaction of sexual desires is a more elaborated process, connected to a wide complex of needs and aspirations—stressing among them the need to perpetuate our existence, “bequeathing our intellectual and physical qualities to new human beings” (Egas Moniz, 1902, p. XIX). Together with an increase in the neuropathological state of society, Egas Moniz sustained that sensuality has also grown, compelling “the masses to excess and to licentiousness [...] [destroying] the fundamental bases of today societies: morality and family love” (ibid.). According to Egas Moniz, the relationship between licentiousness and the

⁸ International and State Defence Police.

increase in the neuropathological state explained why homosexual behaviour was more frequent among educated classes, in which “nerve predispositions are more likely to the development of sexual perversion and these predispositions exist mainly among more educated environments.” (Egas Moniz, 1902, p. 129). This implied that primitive/African sexualities were based on basic sexual instincts and homosexual behaviour was less likely among indigenous people. Silva (1895) also argued that upper classes, despite being more civilized, are more associated to sexual inversion, since Uranians are more commonly found where there are higher nerve predispositions, as in educated environments.

While these academics admit the higher frequency of homosexual behaviour in urban and upper-class environments, they focused analysis on working class individuals, especially those in male prostitution. This is predictable, since working classes and male prostitutes were more likely to be subjected to police surveillance and control. The perceived problem of male prostitution in large cities could explain why those engaged in the “vice against nature” were compared to “vagrants” by Portuguese legislators. Both were “a class of criminals highly harmful to society not only due to their current parasitism, but also because they constitute the first step towards more pernicious crimes.” (Diário da Câmara dos Deputados, 1912, p.5). Hence, “[...] regenerating this individual, making him fit for life, enabling him to compete with his effort for the proper functioning of the social organism, is to attack crime in one of its most remarkable origins” (ibid).

Therefore, we can infer that there was no apparent reason to extend “the vices against nature” of the 1912 law to overseas territories. The majority of the population in Portuguese colonies were composed by “primitive”/“savage” people living mainly in rural areas. The two biggest cities, Luanda and Lourenço Marques, only reached 100,000

inhabitants in the 1950s and 1960s respectively (Castelo, 2007). Hence same-sex acts were not criminalised in Mozambique until 1954.

The only mention of criminalising the “vice against nature” aimed to apply to the indigenous people is present in a 1946 proposed “criminal code to the indigenous people of Mozambique” drafted by the Portuguese Jurist João Gonçalves Cota. The draft criminal code was the result of work of the “Mozambican ethnological mission” (*Missão Etnológica de Moçambique*) requested to organise a civil and penal code regulating indigenous people based on local traditions and customs (Pinho, 2015). Cota and his team carried out research on native custom and traditions of different social groups in Mozambique and elaborated a criminal and a civil code based on a compilation of what they saw as common and ground principles of “native” law (*direito gentílico*)⁹. Both codes were never enforced. In Cota’s code proposal, there was a section on vagrancy (Chapter VI, Section 108 and 109)¹⁰ which largely “copied” the 1912 vagrancy law. Regarding the “vice against nature”, however, there was an important difference: Cota’s proposal considered criminal only those who “surrender to the practice of the vice against nature with profit motives”¹¹. To grasp Cota’s reasons, we must have in mind racial prejudices which informed understanding of “uses and customs” of indigenous people¹². It seems likely that the “problem” of the vice against nature was, for Cota, not something

⁹ Cristina Nogueira da Silva (2004/2005) analyses the codification of the usage and customs in Portuguese territories in Africa and Asia, showing that the use of indigenous law was broadly recognised by Portuguese colonial judicial authorities. However, she identified an asymmetry, where native “usage and customs” were in an inferior position compared to European Law.

¹⁰ Available in Cota, 1946, p.127,

¹¹ Chapter VI, Section 108, item 3

¹² Pereira demonstrate that Cota’s two main theoretical references were evolutionists Lewis Henry Morgan and Johann Jakob Bachofen.

applicable to indigenous people. Following the Portuguese “scientia sexualis” authors, African indigenous sexuality was close to that of the animals, driven by unrefined sexual instincts. This meant that, probably for Cota, African sexuality was basically heterosexual. Therefore, the only conceivable way of an indigenous person to systematically engage in same-sex sexual practices was for material gains. Hence, Cota’s team were not particularly concerned with repressing same-sex sexual intercourse among indigenous populations, since it would be unlikely that a male African would “pay for sex”. Apparently, the provision proposed to repress indigenous individuals having intercourse “against nature” with an imagined white European partner who could afford to pay.

This specific section on “the vice against nature” in Cota’s proposed code gives us an important insight on the regulation of same-sex relationships in colonial Portuguese Africa: it was not directed at repressing same-sex intercourse among “native” people but at controlling European white male (homo)sexuality. This probably explains why the provision criminalising the vice against nature was only absorbed by the Portuguese Penal Code in 1954. After 1940¹³, the authoritarian Salazar administration turned the colonisation of African territories into a priority. State-funded development projects were implemented to make colonisation economically viable. The Portuguese state subsidised white settlements in Angola and Mozambique. The end of WWII and the emergence of nationalist movements in Africa pushed Salazar’s dictatorship to rely on the rhetoric of “empire” to legitimate its authoritarian ruling at home. In the international arena, the emerging antagonism between Western/capitalist and east/socialist blocs was cleverly

¹³ Thomaz (2002) identifies the 1940 “Portuguese World Exhibition” in Lisbon as a “turning point” in the Salazar approach regarding the colonies. The rhetoric of empire became central to legitimisation of the Portuguese New State.

used by the New State officials to guarantee the support (or, the non-opposition) of United States and other western powers to Portugal's African presence (Oliveira, 2014).

This resulted in a large migration to the two colonies, which saw a huge increase in their white population¹⁴. Claudia Castelo (2007) shows statistics which prove Portugal's effort to colonise. The white population in Angola raised from 44,083 in the 1940 census to 280,101 in the 1970 census. Mozambique also witnessed a steady increase in white population, from 27,438 in 1940 to 162,967 in 1970. It is probably not a coincidence that prostitution was criminalised in the Portuguese territories in Africa and Asia in 1954, the same year as the revision of the Penal Code extending the criminalisation of homosexuality. Salazar's "New State" ideology was strongly committed to a moral Catholic rhetoric. In this rhetoric, same-sex sexualities (as well as prostitution) were perceived as deviance which must be expelled from the society to guarantee social harmony (Oliveira, 2014).

The Lisbon archives reveal no specific records of crime statistics from Mozambique. However, more generally it can be said that the Lisbon archives yield no evidence of any prosecution for the vice against nature' in Mozambique between 1954 and independence. Recently, Francisco Miguel conducted a research at the *Arquivo Histórico de Moçambique* in Maputo, and did not find any record on the enforcement of sections 70 and 71 by Portuguese authorities..¹⁵

¹⁴ It is important to highlight that until late 1930s, the Salazar administration strictly selected educated and mid-class whites to emigrate to Africa, to avoid the formation a white poor class in the Portuguese colonies. (Oliveira, 2014).

¹⁵ Francisco Miguel is currently developing research for a PhD provisionally to be titled *(Homo)sexualidades, masculinidades e movimento LGBT em África: a partir de Moçambique*, at the University of Brasilia, and has given permission to refer to this.

Moral Regulation: Religion and Education

To comprehend the regulation of same-sex sexualities in colonial Africa, one must focus on an important actor in the colonial enterprise: religion, particularly Christian missions (Dores, 2015). Moral values associated with “civilisation”, such as frugality and hard work, were totally attached to mid-19th century bourgeois Christian sexual values of chastity, monogamy and temperance (Tamale, 2014). Polygamy, bride wealth (*lobolo*) and some sexualised “rites de passage” (like *winaliwa*) were perceived as primitive features of indigenous people which should be changed. Education was central to missionary work and its philanthropic approach of enlightening local populations, spreading the supposed benefits of civilisation and progress.

In Portuguese colonialism, the Catholic Church (through its different religious orders) played a central role in the civilising mission in Brazil and Africa from the 16th century. In Brazil, Jesuits were responsible for catechising the indigenous population and for educating white colonists. In Africa, Jesuits and other Portuguese Catholic orders rivalled with Protestant missions. In some areas, like the Tete region and Southern Mozambique, better funded Protestant missions were well organised and in a better position to provide missionary work. In the rush for the souls of Africans, Catholic orders were disadvantaged, having to rely on incentives of Portuguese authorities. To secure their position in Mozambique, Catholic missionaries often complained to Portuguese authorities about the threat posed by Protestant missions to Portugal’s sovereignty. The use of Portuguese language among indigenous people was an integral part of the civilising

mission. Consequently, the practice of many Protestant missionaries of spreading the gospel in the native languages was perceived as “denationalisation” (Dores, 2015).

The rise of Salazar to power in the 1930s allowed a radical change in Portugal’s State-Church relations. The fascist and authoritarian ideology of the “New State” was based in strong Catholic moral values and the Church hierarchies (as in Italy and Spain) played a central role supporting the regime. The 1940 Concordat among the Holy See and the Portuguese State made sacred this “partnership”, by dedicating the education of indigenous people in overseas territories to Catholic missionary orders (Madeira, 2007). The so-called “rudimentary/adaptation education” was based on a simplified version of the Portuguese school curriculum, focused mainly on basic notions of math, Portuguese language and history, hygiene and hand-based work skills. Differently to their Protestant missionary fellows, Catholic missionaries shared the views of Portuguese colonial officials who placed labour as the most important tool to civilise natives. From this perspective, there was no need to provide Africans with a formal/theoretical education, only to give an education as simple as possible which “serves the Christian catholic formation, the pacification of [“native”] rebel souls and the uses in the field of labour” (Silva, 2015). This rudimentary education worked as a safe tool to guarantee cheap native labour and to avoid opposition to Portuguese rule by indigenous people. As it happened, the New State saw education as a threat to the regime (Oliveira, 2014). This could explain the low budget designated to indigenous education in the last decades of Portuguese colonial rule and the consequently poor results in literacy. In 1954, for instance, 183,092 Africans were enrolled in the rudimentary education, representing 3.2% of the African population¹⁶ in Mozambique (Duffy, 1959), compared with British colonies like Northern

¹⁶ According to the 1950 census (Castelo, 2007, p. 216)

Rhodesia, where the school enrolment rate among Africans was 11% (Oliveira, 2014). Higher education was only extended to the African provinces with the foundation of the University of Lourenço Marques (nowadays Eduardo Mondlane University) in Mozambique and Luanda (nowadays Agostino Neto) University in Angola, in 1968.

The weak results of indigenous education by Catholic missionaries could explain a relatively diminished influence of the Catholic Church in enforcing Christian moral values. This can be shown by the conservation of many indigenous traditions and customs, like polygamy, *lobolo*, and the *witeliwa*¹⁷, deemed by Catholic priests and bishops as “primitive” and “barbarian”. Since the 16th century, the relationship between Portuguese state officials and missionaries has swung between cooperation and conflict. In Brazil, for example, Jesuits were the main opponents of enslavement of indigenous population in the 17th and 18th centuries, in contrast with Portuguese political and economic interests (Fausto, 1995). The same seems also to have happened in African territories. A good example of the conflict between Portuguese colonial officials and Catholic ecclesiastical authorities in Mozambique was the opposition posed by the Bishop of Beira, Mr. Resende, to João Gonçalves Cota’s proposal of civil and penal codes based in the indigenous “usage and customs” (Pereira, 2001). Mr. Resende and other Catholic priests opposed the enforcement of both codes, since they would recognise some native “immoral” and “diabolic” practices as witchcraft, polygamy, the pay of *lobolo* (bride

¹⁷ According to Arnfred (2011), *Witeliwa* means initiation rite in Emakhuwa language spoken by Makhuwa people from Northern Mozambique. It is the rite de passage among women and involves sexual rituals, such as simulation of sexual intercourse by older women and extension of a vagina’s labia minora.

wealth) and the *nyau*¹⁸, which should be repressed by colonial authorities (Pereira, 2001). Although the everyday-practices of Catholic missionaries in Mozambique largely depended on a tenuous equilibrium between imposing Christian moral values and accepting some tradition and customs, the Beira Dioceses' Manifesto showed the official position of the Catholic church: "inciting the persecution of other religious cults, defending the repression of identity traits of African cultures and, at the same time, imposing European cultural marks on 'indigenous' populations." (Pereira, 2001, p. 22).

As discussed before, the Portuguese approach regarding the enforcement of the "usage and customs" in Africa has been characterised by some level of acceptance of local tradition by colonial judicial authorities. In many situations, colonial authorities "turned a blind eye" on indigenous traditions like polygamy and *lobolo* to avoid a reaction of African populations. The main aim of the Portuguese colonial officers was to ensure the supply of cheap and disciplined native labour. A good example of this loose approach is reported by Medeiros in his study about male initiation rites among Makhuas in Northern Mozambique (1995, apud Arnfred, 2011). Medeiros showed that in the 1950s, due to the need for labour in cotton farms, colonial officers relied on local *régulos* to control the indigenous population—resulting in acceptance of rituals and tradition. Similarly, Catholic missionaries realised they had to understand the meanings of some indigenous people's traditions, not "in order to eliminate them, but in order to integrate them into Christian context" (Medeiros, 1995, pp.5-6 apud Arnfred, 2011, p. 169). The intensification of armed struggle between Frelimo and the Portuguese army from the 1960s forced Portuguese officers to accept initiation rituals and ceremonies as part of a

¹⁸ Nyau is the denomination of a secret group associated with the use of masks in a spiritual practice of the Chewa people from central Malawi and Western Mozambique—perceived as "evil" by Christian Missionaries (Curran, 1999).

“hearts and minds” politics (Arnfred, 2011). Both examples demonstrate that the Portuguese colonisation could sometimes supersede the moral task of the “civilising mission”, explaining a relatively “relaxed” approach compared to the British.

When we look at same-sex sexualities, there is no record in Lisbon archives of Portuguese Catholic missionaries in the African provinces mentioning any practice of homoerotic or same-sex intercoursing among the natives or even any case or polemic implicating the Catholic church and its missionary orders in the repression of homosexuality. There is a large silence of the Catholic Church regarding homosexuality in African populations, though as Arondekar (2009) argues, archival silences require careful interpretation. The Portuguese *Scientia sexualis* approach to homosexuality, which perceived homosexuality as a particularly “European/civilised” problem, may help to explain the silence of the Catholic Church on same-sex sexual practices among African people.

The Swiss Protestant Missionary Henri-Alexander Junod (1863-1934) provided the only mention of homoerotic sexual practices among Africans in Mozambique, that we were able to find in Lisbon archives. Junod developed an extensive ethnographic analysis of the Tsonga/Ronga people who inhabited Southern Mozambique and parts of Northeast South Africa and Southern Rhodesia (current Zimbabwe). In his book “The Life of a South African Tribe” (1912), Junod reported “unnatural vice” among migrant workers in the Witwatersrand (South Africa). The miners of Tsonga origin named the practice *bukhontxana/nkhontxana* (“inversion of the sexes”), also known as “mines marriages” (Harries, 1990). Junod stressed that the practice was unfamiliar to the Tsonga, suggesting the practices stemmed from confinement to men-only compounds (Harries, 1990). Existing research has documented this exceptional practice, labelled by the British as Portuguese degeneracy (Forman, 2002, p.581); space constraints prohibit further

exploration here (cf. Van Onselen, 1973; Moodie, 1988; Achmat, 1993; Epprecht, 2001). To proceed with analysis, we move to discuss Kenya for comparison.

British colonialism in Kenya

British imperialism can be dated to Ireland's conquest in the 1530s, and imperial expansion grew from the seventeenth century. However, it was only from the 1880s, in the era of the 'New Imperialism' with European imperial-nations' 'scramble for Africa', that most African colonies were established (McKenzie, 2007, p.145). The British took control of a context populated by diverse African peoples.

Kenya historian Ochieng (1985) provided an early history mapping pre-colonial settlement and migrations in what became Kenya. Among the largest social groups by the late nineteenth century were the Kikuyu, Luo and Maasai. Swahili cultures had developed on the coast by the tenth century, engaging with Arab Muslim traders. The Portuguese arrived on the coast from 1498, followed by the Dutch and British in the seventeenth century, but it was Arab trade and influences that predominated there from the eighteenth century.

An 1885 German protectorate quickly came under the control of the British East Africa Company from 1888, with a partition agreement in 1890 creating the British East Africa Protectorate, and transfer of this to the UK Government in 1895 (Sorrenson, 1968, p.9). Despite the unsuccessful Nandi rebellion in 1905-6, in 1920 the Protectorate was annexed as the Colony of Kenya (Morris, 1976, pp.1, 4). Kenya became a territory where significant numbers of white Europeans settled, unlike Uganda for example. Only in 1963 did Kenya gain independence.

While the British initially extended empire through private companies, from the late nineteenth century the approach shifted to formal state control. Berman (1990) has examined the relations between the imperial state and the 'colonial state' in a capitalist context, noting emergent tensions and contradictions between these state authorities, settlers with economic motivations, and Christian missionaries who brought their own moral frameworks. The racism and colonial practices of the British empire has been extensively analysed (eg. Said 1978; Ochieng 1985; Virdee 2014), so we shall focus on elaborating these in relation to our themes in following sections.

In relation to gender, feminist literature from Kenya shows how the position of women was contested through colonialism; illuminating how females were given 'gender roles', and noting female participation in Kikuyu leadership (Ossome, 2018, 38, 55-56). Both male historian Ochieng and feminists highlight aspects of patriarchy, at least in some major ethnic groups. However even recent feminist studies (Ossome 2018) do not fundamentally problematise the association of sex and gender enough to speak to the problematic of the coloniality of gender (Lugones 2008), thus leaving unclear the historical existence of genders outside binaries.

Evidence from neighbouring Buganda has shown that anal intercourse between males was an established practice at the Kabaka's court by the 1880s (Hyam, 1990, pp.186-189). However, the extent of pre-colonial same-sex activity in everyday life has been difficult to establish in Kenya, as elsewhere. As in many African societies, some peoples such as the Nandi had traditions of woman/woman marriage, where a widowed older woman takes a younger wife, though sexuality's involvement is controversial (Smith Oboler, 1980). Research has also shown that the coastal Arab-influenced culture in cities like Mombasa involved male cross-dressing and same-sex sexualities (Shepherd, 1987); but indigenous histories need more attention.

From the 1990s homosexuality became subject to criticism from President Daniel Arap Moi as being against African tradition (Mburu, 2000). In November 2010 Prime Minister Odinga said homosexual couples ‘should be arrested’ (Macharia, 2013, p.273). But in response there has been new activism from groups such as Gay and Lesbian Coalition of Kenya (GALCK), PEMA (Persons Marginalized and Aggrieved) and Gay Kenya. Contemporary scholars and wider human rights NGOs also contest the law (Kenya Human Rights Commission, 2011; Macharia, 2013; Wekesa, 2017), and closer examination of the history may inform such work.

Legal Regulation and Criminalisation

The British colonial legacy for legal regulation of sexualities and genders has been discussed in existing literatures more than the Portuguese (Hyam, 1990; Aldrich, 2003; Human Rights Watch, 2008; Lennox & Waites, 2013), but there is a need to deepen investigation of law’s enforcement and social regulation for different populations. Colonial criminalisation of same-sex acts began with the Indian Penal Code of 1860 (Human Rights Watch, 2008, p.15). This preceded the Offences Against the Person Act of 1861 in the law of England, recodifying offences including buggery (section 61) and attempted buggery (section 62), removing the death penalty. To this day, section 377 of the Indian Penal Code criminalises ‘Unnatural offences’, defined as ‘carnal intercourse against the order of nature with any man, woman or animal’ – explained to mean ‘penetration’, with sentences including life imprisonment (notwithstanding a selective ‘reading down’ by India’s Supreme Court to decriminalize adult consensual acts, in 2018). This offence was gradually extended across British empire territories. The creation of the “gross indecency” offence in England’s Criminal Law Amendment Act

1885 clarified prohibition of all sexual activity between men, and hence later colonial laws contained wider provisions.

Like other British colonies, Kenya inherited the English common law tradition, and a distinction between criminal and civil laws. A Supreme Court was created with imported British lawyers as judges, but subordinate courts often had administrative officers as judges, with less legal training. Initially the British introduced the Indian Penal Code directly, as in many colonies; this applied from the East Africa Order in Council of 1897 (Cotran, 1983, p.42; Wekesa, 2017, p.80). This is an under-remarked feature of British colonial criminalisation demonstrating transboundary regulation prior to dominion-specific laws.

The Kenyan Penal Code later created by the British, from 1930, replicated the Colonial Office Model Code, and remains on the statute (Cotran, 1983, p.44); its offences cover all male same-sex sexual behaviour, and potentially some female. The formulation in India's Section 377 had already been altered slightly in the Griffith's Queensland Penal Code in Australia, in effect from 1901 (Criminal Code Act 1899; Kirby, 2013, pp.66-7); and the Queensland code became the Colonial Office Model Code that was copied in several African states, beginning with Nigeria in 1916 (Human Rights Watch, 2008, p.23). In Kenya's Penal Code, Section 162 'Unnatural offences' replicated the earlier Section 208, stating:

Any person who—
has carnal knowledge of any person against the order of nature; or
has carnal knowledge of an animal; or
permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.

Section 163 ‘Attempt to commit unnatural offences’ (replicating section 209 of the Queensland code) stated:

Any person who attempts to commit any of the offences specified in section 162 of the Code is guilty of a felony and is liable to imprisonment for seven years.

Section 165 ‘Indecent practices between males’ (replicating section 211) stated:

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

As in India, ‘carnal intercourse’ was defined to involve ‘penetration’, though the scope remained for interpretation – for example, regarding oral sex. However, differently, the Griffith formulation made clear that both parties were criminalised, including whoever ‘permits’; and the inclusion of ‘Attempt to commit unnatural offences’ widened the scope. The formulation was different to a prior Sudan Penal Code in 1899 that had only covered non-consensual acts (Human Rights Watch 2008, pp.21-22), so it represented an expansion. Neighbouring countries reforming around the same time, such as Uganda, replicated the same provisions.

It is important to focus on the historical application of criminal law provisions in a context where customary law also existed (Mburu, 2000, p.186), to explore the significance of selective enforcement. Contemporary international literature has tended

to emphasise British imposition of criminal law on colonial subjects; this was particularly the case in the ground-breaking report from Human Rights Watch (2008), *This Alien Legacy*, which set the agenda of much transnational LGBT human rights politics and academic analysis (Lennox & Waites, 2013). That report unambiguously decried British legal regulation of colonial subjects:

Colonial legislators and jurists introduced such laws, 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, p.5).

Moreover, according to *This Alien Legacy*, the criminal laws ‘marked out whole populations as criminal’ (Human Rights Watch, 2008, p.11). The influential Michael Kirby QC has similarly written that the laws ‘were simply imposed to stamp out the ‘vice’ and ‘viciousness’ amongst native peoples’ (Kirby, 2013, p.66). However, somewhat missing from these comments was evidence for these claims about intentionality, and specifically an examination of the extent to which the laws were intended to regulate colonizers, or the colonized, or those who transgressed boundaries between these groups.

Similarly, Kenya scholar Wekesa has emphasised that there were no laws criminalising same-sex acts prior to colonialism, commenting that this was partly because ‘such conduct was not... deemed worthy of formal legal sanction’ (Wekesa, 2017, p.80). However, while legal procedures were not in written form, several reviews of customary

law informed by African elders—discussed below—indicate practices varied between groups.

It can thus be argued differently here that more attention is needed to both the selective enforcement of statutory criminal law, and the significance of customary law. We can achieve a better sociological and socio-legal analysis of the issues if we focus on how different populations were regulated by different parts of law, and corresponding aspects of policing and criminal justice. Among leading voices advocating LGBT human rights, both Human Rights Watch (Gupta with Long) and Kirby, appear to have allowed the impression of a universal criminalisation to go somewhat unqualified by a deeper discussion of customary law that might have gone against the grain of their politics. This also reflects hierarchies within western legal scholarship, where customary law is often neglected.

According to the East Africa Order of 1897, new statutes were to apply, but:

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. (quoted in Cotran, 1983, p.42).

Hence the scope and interpretation of English law was always contextually circumscribed. Cotran has commented that the legal system in Kenya has been described as ‘typically dual’, with ‘a parallel system of courts to administer justice to the indigenous people’, known as ‘Native Tribunals’ until 1951 (Cotran, 1983, pp.42-43). These were to administer:

the native law and custom prevailing in the area of the jurisdiction of the tribunal, so far as it is not repugnant to justice or morality or inconsistent with the provisions of any Order in Council or with any other law in force in the Colony (Native Tribunals Ordinance, section 13a; quoted in Cotran, 1983, p.43).

Importantly the Supreme Court only had to be guided by ‘native law’, and ultimately could over-rule it, including where ‘repugnant to justice or morality’ (Cotran, 1983, p.43). Customary law was certainly regarded as inferior (Wekesa, 2017, p.81). A ‘native’ Council of Elders, supposedly derived from local customs though under supervision of district administrative officers, continued to operate modified indigenous systems of justice—though separating judicial and executive roles, and not where exceptional cases arose (Cotran, 1983, p.43; Jearey, 1960. pp.410-414). Gradually, especially after 1944, ‘Native Tribunals’ were given jurisdiction to try Penal Code offences including from same-sex sexual offences (Wekesa, 2017, p.81), but this was not done under native law; customary criminal law was displaced. Insufficient respect for customary law both before and after independence was criticised by English Judge Cotran, who served as Puisne Judge in Kenya from 1977 to 1982 (Cotran, 1983). However, it is nevertheless clear that customary law was largely left to operate on certain issues.

In this context let us turn to our new evidence on the extent of prosecutions enforcing criminal sex offences. In fact, within all the literatures on British colonial law regulating same-sex sexual practices across the empire, legal research has proceeded with a focus on specific cases, while there appears to have been no study systematically and comprehensively examining overall data on prosecutions in a colony. For example, Hyam (1990) and Aldrich (2003) lacked this. A significant contribution is therefore offered here in a review of available data from British imperial government publications for colonial Kenya, held in the British Library. Specifically, data-collection has focused

on the annual 'Blue Books' of statistics for official use that accompanied public Annual Reports required from each colonial Governor (Rubin, 1976); the non-public 'official archive' was a key instrument of governance (Arondekar 2009, 13-14). Blue Books can be viewed on microfilm for their publication period from 1901 to 1946 (Kenya, 1976), containing data on Offences Against the Person, usually with specific information on 'Unnatural Crimes'.

The 'Unnatural Crimes' category of offence is listed from the first Blue Book of 1901-02, in a section titled 'Criminal Statistics'; within this, in Table IV 'Indictments and Informations in the Superior Courts'. The category's presence demonstrates it was annually in the consciousness of the Governor, and of some governing authorities in the colony, and in London. Initially 'Unnatural Crimes' was listed for 'Superior Courts' only. However, from 1926 a table for 'Subordinate Courts' appeared, and sometimes listed 'Unnatural Crimes' or 'Unnatural Offences' even when there were none, as in 1929. 'Subordinate Courts' included various district courts, only some with a legally qualified stipendiary magistrate. These did not include the 'Native' Courts (Jearey, 1960), and hence unfortunately data available does not include rulings of customary law courts.

Recorded prosecutions of 'Unnatural Crimes' were rare and the figures deserve careful scrutiny over time. In the first reports for 1901, 1902 and 1903 there were zero. In the report for 1904-1905, one Unnatural Crime is recorded in Table IV for the first time, as a 'Judgement for the Crown'; in this year, unlike others, there is a distinction noted between three populations – 'European', 'Indians' and 'Natives' – with the Unnatural Crime listed beside 'Indians'. There were no Unnatural Crimes recorded in 1905-6 or 1906-7. In 1907-08 three Unnatural crimes are noted to have been charged, but with only two convictions, both unusually labelled by race: 'A' for 'Asiatic'. In 1908-10 there were zero cases; in 1911 one conviction; in 1912, zero; in 1913, 2 convictions;

in 1914-16, zero. After a gap in production of Blue Books from 1916 to 1926, there are zero crimes in 1926, 1927. One male is convicted in 1928. For 1929 and 1930, zero. In 1931, there is one clear charge but acquittal, labelled 'Asiatic', with two 'Indecent assault' offences noted for 'Natives', potentially applying to male/female behaviour (in this year 12 'Native' men were also convicted for rape). In 1932 there was one 'Unnatural Crime'; in 1933-1934, none; in 1935, one; in 1936 none. In 1937 and 1938 'Unnatural Crime' tellingly became grouped with 'rape' and 'Attempted Rape', disguising any specific figures. During the Second World War from 1939 to 1944, Blue Books were not published, and were produced as typescript with reduced data on crimes; the records show no instances of 'Unnatural Offences'. The final published Blue Books in 1945 and 1946 also make no mention.

Analysing this data from the Blue Books period 1901-1946, among years where data is given we find 18 years with zero convictions, five with one conviction and two years with two convictions. Even if we ignore years where Unnatural Crimes were not distinctly identified in the tables (1916-26, and 1937 onwards), we can still observe that the mode average number of convictions was zero, and the total 9 convictions over 27 years implies a mean average of 0.33 – so no convictions in a standard year. This data thus provides original and significant evidence that 'Unnatural Crimes' were generally not prosecuted against indigenous African people in Kenya, and hence perhaps in similar African colonies. Furthermore, the index of Kenya Law Reports makes no mention of unnatural crimes (Errington, 1953); and Judicial Department reports between 1918 and 1963 did not report convictions (Morris 1984).

Furthermore, where racial categories are used, the data very interestingly suggests it was 'Asiatics' (in coastal areas) who were prosecuted, with no examples of indigenous Africans being convicted. The occasional racial coding of the data through population

categories of European, Asiatic and Native in several years, perhaps prompted by particular events or governing anxieties, is suggestive of a wider racial biopolitics (Foucault 2004), and ‘the classificatory imperatives of colonial knowledge’ (Arondekar 2009, 16). Here while the archive offers limited data, as Arondekar’s discussion suggests, with understanding of its form and context, it can still be interpreted to generate insight. It is suggestive of ‘the centrality, rather than liminality, of the race-sex nexus’ (Arondekar, 2009, 14); it seems colonial authorities were aware of, and tolerated, a lack of prosecution of African same-sex acts.

But archival research also enables us to increase knowledge of customary law. A systematic search of London libraries was conducted for official reviews of customary law among specific social groups in Kenya, including the British Library and Institute of Advanced Legal Studies. A Report on Native Tribunals in 1945 from the Legal Department in Kenya makes no reference to ‘Unnatural offences’ or same-sex sexual acts, commenting only in general terms: ‘Sexual cases originating in a native reserve [...] would often, I think, be more suitably dealt with by a native court’ (Phillips. 1945, p.266). A later review using ‘all written materials’ and some observation in courts also named no same-sex crimes in customary law (Cotran, 1963, p.2). However, Penwill, in a 1951 study of Kamba Customary Law ‘discussed and put into a logical form with two senior elders’, has a chapter ‘Adultery, fornication and Unnatural behaviour’ that states ‘If a man commits an unnatural offence with a young boy, he must pay over a goat and bull. If two men commit the offence together, each must pay a goat [...] Such cases should now be charged under section 155 of the Penal code, but they are normally settled quietly’ (Penwill, 1951, pp. vii, 76). Snell’s discussion of Nandi law, claiming ‘ready co-operation’ of ‘chiefs and elders’, has a section ‘Unnatural Offences’ commenting ‘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, pp. vii, 33). Wilson's study of Luo law refers to 'Acts which traditionally carried the sanction of banishment' as including 'sodomy' and 'homosexuality' (Wilson, 1961, paragraph 176). Power relations would have mediated communications with African elders, and the reports offer only mediated representations of indigenous voices; yet the purpose of the reports was to accurately document African understandings, so they need to be taken seriously as sources for analyses contributing towards decolonizing knowledge. Collectively these studies suggest there was varying criminalisation in customary law by several social groups, so the pursuit of decolonizing analysis involves exploring complexity.

Of particular importance to understanding British practices is the philosophy of 'indirect rule', whereby colonial control focused on military and taxation issues. This was originally advocated by Frederick Lugard as High Commissioner in Nigeria from around 1922 (Lugard, 1922), and subsequently moderated to 'indirect administration' in East Africa by Donald Charles Cameron, Governor of Tanganyika (contemporary Tanzania). However, in Kenya, unlike Tanganyika, government had to address the interests of a substantial settler community (Morris, 1976, p.6).

British governance, as in other colonies, operated differentiated and hierarchical systems of law, generally without pro-active attempts to make all of colonial criminal law enforced on indigenous populations. This typically meant that cases of conflict between indigenous people were dealt with in the so-called 'Native Tribunals'—rarely proceeding to higher courts. There is a lack of evidence to suggest that offences relating to same-sex sexual acts by indigenous people were actively policed or prosecuted. This is consistent with existing literature: in Aldrich's (2003) account of New Guinea, case data

overwhelmingly reveals prosecutions involving indigenous people in interactions with colonials (pp.252-262).

The significant implications of indirect rule and the British approach to customary law become clearer if we think through how legal processes work. Typically points of legal conflict between colonizers and colonised involved instances of conflict between colonised people, as in conflicts over *sati* in India (Spivak, 1988), where a woman might appeal to colonial authorities to circumvent indigenous law. However, in the case of consensual same-sex acts, the only circumstance likely to lead to involvement of British criminal law would be if a third party believed the treatment of such acts by a Council of Elders to be insufficiently harsh. Alternatively, such cases would only be raised by the British through accidental discovery.

In recent decades some legal cases following Kenya's independence have used the laws in the penal code to prosecute same-sex acts; the National Police Service recorded 595 cases from 2010 to 2014 (Wekesa, 2017, p.83). The laws have remained despite public debates over the Sexual Offences Act passed in 2006. This suggests entrenched heteronormativity (Macharia, 2013).

Moral Regulation: Religion and Education

Colonial interventions on sexual matters were usually initiated by missionaries rather than the British administration, and when the missions challenged clitoridectomy in Kenya in 1929, the British government declined to criminalise the practice (Hyam, 1990, pp.189-197). However, while British colonialism's acceptance of customary law from the nineteenth century avoided much legal regulation, the other side of anti-slavery colonial

ideology (after 1834) was that indigenous people with certain rights were subject to more insidious forms of moral regulation; worth considering in relation to Foucault's (2007) insight that modern 'governmentality' works through formally free subjects. A 1937 British parliamentary Select Committee on Aborigines (British Settlements) emphasized aims 'to promote the spread of Civilization [...] and to lead them to the peaceful and voluntary reception of the Christian Religion' (quoted in Elbourne, 2003). However, this humanitarian approach advocated from the imperial core was in tension with the ideology of settlers, using a conception of civilization associated with capitalist progress; and in the late nineteenth century new forms of 'scientific' racism came to prevail (McKenzie, 2007). Hence investigating Christian missionary interventions is important but represents only one dimension of colonialism.

The British Empire was a Protestant empire, with the Anglican Church at its heart, though other churches also sent missionaries and influences abroad. The British monarch was Head of the Church of England while also ruling over the empire, thus institutionalizing Anglicanism. This had important consequences for religious teaching and practices relative to Catholic countries, but arguably these differences derived less from doctrinal differences about same-sex acts, and more from the institutional approaches of the different churches with respect to conversion, in different contexts. The Anglican Church appears to have generally sought conversion through teaching with some expectation of consent. In particular, church activity varied depending on whether settlement occurred.

Protestant missionary activity in what is now Kenya began with Dr. Johann Ludwing Krapf of the Church Missionary Society arriving in 1844. The East Africa Mission subsequently worked with indigenous people. The Anglican Church of Kenya was founded in 1884 and began mass conversions from 1916 after a Swahili New

Testament translation. However, the first African bishops were only consecrated from 1954 (Anglican Church of Kenya, 2018). Since there was initially little settlement in Kenya, there were correspondingly limited attempts to convert indigenous people to Christianity until around 1916. Church teachings on sexual behaviour of course represented forms of biopolitical intervention in relation to health and population (Foucault 2007). However, this would only gradually have significant influence on indigenous people's discourse and behaviour after 1916.

In a discussion of the Kenya context focused on white men's relations with African women, Hyam (1990, pp.160-170) comments: 'Perhaps the standards of white officers, civil and military, were nowhere as dubious as they were in the newly formed British East Africa Protectorate (Kenya)' (p.160). Hyam's research convincingly demonstrates that there was sexual laxity with frequent female concubinage into the twentieth century; and only following a delay after the social purity campaigns from the 1880s in the United Kingdom was moral regulation in the colonies implemented, from 1909 (Hyam, 1990, p.168). However, he offers no examples of prosecutions for same-sex activity involving indigenous people, in any period.

If we consider how British colonialism was informed by sexuality theories, some strands of sexology such as from Krafft-Ebing and Ellis favoured universalist essentialist theories of homosexuality. Freud's psychoanalytic approach allowed for racial specificities but was even more marginal in influence on policy. More significant prior to World War II were the eugenic theories that informed much Fabian thought; but there does not seem evidence of British sexual science or policy regarding same-sex desire as exclusively European (Weeks, 2012).

In more recent times, anthropologist Mary Porter has reported some groups – Samburu, Turkana, Rendille and Boran – as considering homosexuality an 'abomination',

for which punishment may include being buried alive. It is unclear whether this only applies to a western model of homosexuality (Mburu, 2000, p. 187), but it does not seem that all opposition to same-sex behaviour derives from colonialism.

Comparative analysis

Having discussed colonialisms in both Mozambique and Kenya, we can now draw comparisons between our case studies for our historical sociology of colonialisms, sexualities and genders. We will compare legal and moral regulation and then more specific themes. However, first it is necessary to outline an overall conceptualisation of colonial power relations, in which to situate data-analysis.

Colonial philosophies such as the British notion of ‘indirect rule’ from Lugard tended to be expressed as involving a benign co-existence of different cultures, including through ‘native courts’. But for a critical perspective it is essential to grasp the overall structuring of colonial power. Beneficent colonial comments on the developmental role of customary law embodied a forgetfulness about the initial uses and threats of violence involved in assertions of colonial control, including the use of guns by the Portuguese and British militaries. In this sense the sociology of violence needs to underpin our conception of colonial structures, to grasp their conditions of existence. From the establishment of colonies, both colonizer and colonized were conscious of a power relation underpinned by violence, and notions of a ‘civilizing mission’ not only assumed cultural hierarchies, they also disguised the violence of colonialism. Here we need to draw from the insights of critical political theorists to conceptualise the space permitted for ‘native’ cultures and courts; for example, Gramsci’s (1971) emphasis on how consent is organised in contexts including underlying coercion; Hall’s (2000) problematisation of

liberal multiculturalism discourses with a critical multiculturalism; or Brown's (1995) problematisation of liberal tolerance and 'freedom' in the context of social hierarchies. In this light and within the parameters of control established through violence, we suggest careful use of Foucault's (2007) conception 'governmentality' working through active subjects to conceptualise Portuguese and British colonial governmentalities; each to varying degrees allowing indigenous people forms of space and agency, yet always within an overall hierarchy underpinned by violence.

Before turning to detailed comparison, it may first be useful to emphasise some shared general features of Portuguese and British colonialisms. First, there is a heteronormativity in colonial discourse that assumes heterosexuality as both natural and preferable. Secondly there is a tendency to conceive homosexuality as a condition and more than a practice, although we argue that same-sex acts among Africans were not necessarily seen in these terms. These similarities form the backdrop for examining differences.

Comparing in relation to 'Legal Regulation and Criminalisation', while both empires used legal formulations coding same-sex acts as 'against nature' or 'unnatural', there are clear contrasts. Firstly, the most immediately striking difference is with respect to the dates of legal prohibitions. In Mozambique and other Portuguese colonies, Portugal's law against the 'vice against nature' was only extended to colonies in 1954. By contrast, in Kenya the British Empire's criminalisation of 'carnal intercourse against the order of nature' commenced in 1897 when the Indian Penal Code was introduced; and from 1930 the Kenyan Penal Code extended this to cover 'gross indecency'. Hence, we can see a major difference in the periodisation of legal offences. An important finding is thus that in the first half of the twentieth century, criminalisation through law was a feature of the British Empire, but not the Portuguese.

But we can also see significant differences in the forms and implementation of law. Regarding the approach to law's implementation, the Portuguese approach after 1954, while formally recognising customary law, appears to have been more interventionist in practice, reflecting an ideology of colonial control under Salazar's New State until 1974. However, regarding implementation specifically for men's same-sex sexual acts, actual coloniser practices until 1946 appear similar in not intervening within indigenous groups. Records are not available on whether British implementation increased between 1946 and 1963, but despite the 1954 Portuguese criminalisation, Portuguese archives show no record of any prosecution. Our close data-analysis shows that different colonial approaches to law generally did not correspond to regulatory practices for same-sex sexualities.

Regarding our theme of Moral Regulation, the central difference in relation to religion that emerges is between the Catholic association of Portuguese colonialism, and the Protestant (Anglican) character of British colonialism. But as sociologists of religion have emphasised at least since Durkheim's classic *Suicide*, sociological effects of religion often derive less from theological, doctrinal differences and more from the social and institutional characteristics of church organisation and practices. Regarding Mozambique and Kenya, what is most significant seems to be the different relations of church and state over time; even after social purity's delayed colonial influence, British 'indirect rule' maintained some distinction between church and state (Hyam 1990; Berman 1990). Generally, after the inception of the fascist New State under Salazar from the 1930s, a divergence emerged between the Portuguese religious and familial colonial ideology and the British ideology of 'Indirect Rule'. But if we look beyond ideology to practices, the British missions worked through education (including Bible-reading) to achieve 'civilisation'; whereas the Catholic Church (responsible for indigenous school education

from 1940) focused on 'civilisation' through labour, in accordance with Portuguese colonial governance. Therefore there seems to have been more effective moral regulation within the British colonies.

Hyam has previously commented regarding sexuality that for British colonial society 'there was often a convenient safety-valve nearby, usually provided by the Portuguese' (Hyam, 1990, p.108). This suggestion of British/Portuguese differences resonates somewhat with our findings. However, the quote is most applicable to the period after British moral tightening regarding concubinage in 1909.

With materialist approaches and social history in mind, we also considered whether there might be differences in the organisation of work that might have shaped experiences. However, we have found no particular evidence concerning organisation and regulation of labour in relation to same-sex sexualities or gender diversity, aside from the exceptional instances of boy-wives in mines which are a particular phenomenon already covered in existing literature. Furthermore, while we have considered gender diversity issues, the data we have found in the archives has yielded limited evidence on gender diversity issues (existing literature on boy-wives is again relevant); but the comparative analysis is suggestive for future gender research.

Let us now focus on more specific themes for comparison as suggested earlier. First, what is revealed by examining the theme of periodisation and differences over time suggested by a historical sociology approach? We have demonstrated that major divergence in legal regulation of same-sex acts emerged from the 1897 British criminalisation in Kenya to the 1954 Portuguese criminalisation in Mozambique. But we also argue that there was a major divergence in the climate of moral (as well as legal) regulation, with a tightening of imperial sexual morality in British colonial Kenya from 1909 that contrasted with limited Portuguese moral regulation concerning relations with

Africans until the 1950s. However, this seemed to only marginally increase British prosecutions of European and Asian people, but not of Africans. The late criminalisation in Mozambique seems to partly explain why homosexuality did not emerge as an issue of governmental repression.

Secondly the theme of transboundary processes (Go and Lawson, 2017, p. 2) can be used as a frame to comment on the different characters of imperial relations. Both Portuguese and British powers in certain ways allowed local customs. After the high tide of British Victorian sexual moralism, after 1940 the character of Portuguese colonial ideology and rhetoric became more interventionist, advocating a closer legal and institutional integration of the imperial-nation with colonies, relative to the British approach of 'indirect rule'. However, transboundary *practices* show something different, with the British Missions more active in transboundary moral regulation. Despite the Portuguese legal change in 1954, the transboundary work of the church missions seems to have been more influential on social attitudes. It is possible that contextual Catholic pragmatism may have influenced the less homophobic present attitudes and recent decriminalisation in Mozambique, relative to British colonies .

Third, regarding race and sexology, there seems to be a marked difference between the Portuguese sexology that regarded homosexuality as a mainly European desire, and the British (and German, and Austrian) sexology that regarded same-sex desire as potentially occurring universally. As such our study contributes to a historical understanding of how (as Virdee's work suggests) specific understandings of racism interplay in different ways with colonialism over time. They also have a changing interplay with gender and sexuality. We suggest racial sexology may have influenced the absence of Portuguese criminalisation in the first half of the twentieth century.

Conclusion

Our analysis is offered as commencing a process of systematic comparative analysis that can inform queer politics, especially in its forms concerned with multiple inequalities such as related to racism and colonialism. We also offer the work as a contribution to decolonizing knowledge, though perhaps surprisingly this has led us to challenge both western and African commentators who have sought to idealize pre-colonial African approaches to same-sex sexualities. While the unavailability of data from customary courts through archives limits what we can know about African people's experiences, our archival research has identified reviews of customary laws that somewhat involved African authorities, and these have offered some significant account of the nature of customary legal practices. The British official reviews of customary law offer mediated yet significant representations of how colonisers heard the voices of indigenous people describe their own punishments for same-sex acts; and while these require careful interpretation, they seem likely to have been broadly accurate as representations of what was translated, since the purpose of the reviews was to understand the practices of the colonized.

We argue that the analysis has made a case for comparative analysis of colonialisms with respect to same-sex sexualities and gender diversity in general terms. Nevertheless we acknowledge that while our findings have proved illuminating of same-sex sexualities, our findings have revealed little about gender diversity. Furthermore, the particular methods used have been more revealing with respect to sex acts between males than those between females. We recognise therefore that further research is needed on these themes, though the issues are useful to raise.

However, the main strength of the research is in its contribution to the understanding of differences in the different regulatory approaches of empires. We have demonstrated substantial differences in the extent and forms of both legal regulation and moral regulation, making a case for literatures and debates on colonial regulation of same-sex sexualities to deepen research on law enforcement and policing, and customary law, while also highlighting how religion's influence worked more through imperial policy in the Portuguese case and more through the missions and education in the British case. Identifying such differences can, we believe, assist those aligned with queer politics to understand and engage colonial contexts in the present.

References

Abshire, D., & Samuels, M. (1969). *Portuguese Africa: a handbook*. London: Pall Mall Press.

Achmat, Z. (1993). "Apostles of civilised vice": 'Immoral practices' and 'unnatural vice' in South African prisons and compounds, 1890–1920. *Social Dynamics*, 19(2), 92-110.

Aguiar, A. A. (1926). *Evolução da pederastia e do lesbismo na Europa: contribuição para o estudo da inversão sexual* [Evolution of pederasty and lesbianism in Europe: a contribution to the study of sexual inversion]. Lisboa: Arquivo da Universidade de Lisboa.

Aldrich, R. (2003) *Colonialism and Homosexuality* Abingdon: Routledge.

Aldrich, R. (2007). *The Age of Empires*. London: Thames & Hudson.

Anglican Church of Kenya. (2018). 'Church History', at: <http://www.ackenya.org/ack/history.html> (accessed 17 June 2018).

Arnfred, S. (2011). *Sexuality and gender in Mozambique*. Rochester: James Currey.

Arondekar, A. (2009) *For the Record: On Sexuality and the Colonial Archive in India*. Durham: Duke University Press.

Bakshi, S., Jivraj, S. & Posocco, S. (2016). *Decolonizing Sexualities: Transnational Perspectives, Critical Interventions*. Oxford: Counterpress.

Bastos, S. (1997). *O Estado Novo e os seus vadios: Contribuição para o estudo das identidades marginais e da sua repressão* [The New State and its vagrants: a contribution to the study of marginal identities and their repression] Lisboa: Dom Quixote.

- Berman, B. (1990) *Control and Crisis in Colonial Kenya*. London: James Currey.
- Bhabra, G. (2007) *Rethinking Modernity: Postcolonialism and the Sociological Imagination*. Houndmills: Palgrave Macmillan.
- Brown, W. (1995). *States of Injury: Power and Freedom in Late Modernity*. New Jersey: Princeton University Press.
- Butler, J. (1993) *Bodies the Matter: On the Discursive Limits of 'Sex'*. New York: Routledge.
- Califia, P. (1997). *Sex Changes: The Politics of Transgenderism*. San Francisco: Cleis Press.
- Cascais, A. F. (2016). A homossexualidade nas malhas da lei no Portugal dos séculos XIX e XX [Homosexuality in the net of the law in 19th and 20th centuries' Portugal]. *International Journal of Iberian Studies*, 29(2), 95–112.
- Castelo, C. (2007). *Passagens para África: povoamento de Angola e Moçambique com naturais da Metrópole* [Tickets to Africa: Angola and Mozambique population with Metropolitan citizens]. Porto: Edições Afrontamento.
- Corrêa, S., Davis, B. R. & Parker, R. (2014). 'Sexualities and Globalities'; in D. L. Tolman & L. M. Diamond, (eds). *APA Handbook of Sexuality and Psychology: Vol. 2. Contextual Approaches*. American Psychological Association. <http://dx.doi.org/10.1037/14194-009>
- Cota, J. G. (1944). *Mitologia e Direito Consuetudinário dos Indígenas de Moçambique: estudo de Etnologia mandado elaborar pelo Governo Geral da Colónia de Moçambique* [Mythology and Common law of Mozambican indigenous people: an ethnological study elaborated by the General Government of the colony of Mozambique]. Lourenço Marques: Imprensa Nacional de Moçambique.
- Cota, J. G. (1946). *Projeto Definitivo do Código Penal dos indígenas da Colónia de Moçambique, acompanhado de um relatório e de um estudo sobre direito criminal indígena* [Final Bill of the Penal Code of indigenous people of the colony of Mozambique, followed by a report and study on indigenous criminal law]. Lourenço Marques; Imprensa Nacional de Moçambique.
- Cotran, E. (1963). *Report on customary criminal offenses in Kenya*. Nairobi: Government Printer.
- Cotran, E. (1983). The development and reform of the law in Kenya. *Journal of African Law*, 27 (1), 42-61.
- Criminal Code Act 1899, 63 Vic No.9, at: http://ozcase.library.qut.edu.au/qlhc/documents/CrimCode1899_63Vic_9.pdf (accessed 12 June 2018).

- Curran, D. (1999). Nyau Masks and Ritual. *African Arts*. 32 (3), 68-77.
- Diário da Câmara dos Deputados [Gazette of the Chamber of Deputies]. (1912). Sessão N.º 128, 5 de Junho.
- Dias, J. (2007). 'Portugal: Empire-building in the Old World and the New', pp. 68-91; in R. Aldrich, (ed). *The Age of Empires*. London: Thames & Hudson.
- Dores, H. G. (2015). *A missão da república: política, religião e o império colonial português* [The mission of the republic: politics, religion and the Portuguese colonial empire]. Lisboa: Edições 70.
- Duffy, J. (1959). *Portuguese Africa*. Cambridge: Harvard University Press.
- Egas Moniz, A. (1902). *A vida sexual: Physiologia (volume I) e pathologia (volume II)* [The sexual life: physiology (volume I) and Pathology (volume II)]. Coimbra: França Amador Editor.
- Ekine, S. & Abbas, H., (eds). (2013). *Queer African Reader*. Nairobi: Pambazuka Press.
- Elbourne, E. (2003). The Sin of the Settler: The 1835-36 Select Committee on Aborigines and Debates over Virtue and Conquest in the Early Nineteenth-Century British White Settler Empire. *Journal of Colonialism and Colonial History*, 4 (3)
- Epprecht, M. (2001). "Unnatural Vice" in South Africa: The 1907 Commission of Enquiry. *The International Journal of African Historical Studies*, 34 (1), 121-140.
- Errington, K. (1953). *A Digest of the East African and Kenya Law Reports 1897-1952*. Nairobi: Government Printer.
- Fausto, B. (1995). *História do Brasil* [History of Brazil]. São Paulo: EDUSP.
- Figari, C. (2009). *Eróticas de la disidencia en América Latina. Brasil, siglos XVII al XX* [Erotics of dissidence in Latin America: Brazil, 17th to 20th Centuries]. Buenos Aires: Clacso – Ciccus.
- Forman, R. (2002). Randy on the Rand: Portuguese African Labor and the Discourse on "Unnatural Vice" in the Transvaal in the Early Twentieth Century. *Journal of the History of Sexuality*, 11 (4), 570-609.
- Foucault, M. (1976). *Histoire de la sexualité I. La volonté de savoir* [History of Sexuality: The will to knowledge]. Paris: Gallimard.
- Foucault, M. (2004). *Society Must Be Defended: Lectures at the Collège de France 1975-1976*. London: Penguin.
- Foucault, M. (2007). *Security, Territory, Population*. Houndmills: Palgrave Macmillan.
- Go, J. & Lawson, G. (2017). *Global Historical Sociology*. Cambridge: Cambridge University Press.

- Gramsci, A. (1971). *Selections from the Prison Notebooks*. London: Lawrence and Wishart.
- Hall, S. (2000). 'Conclusion: the Multicultural Question'; in B. Hesse, (ed). *Un/Settled Multiculturalisms: Diasporas, Entanglements, Transruptions*. London: Zed Books. pp.209-240.
- Hall, M. & Young, T. (1997). *Confronting Leviathan: Mozambique since independence*. London, Hurst & Co.
- Harries, P. (1990). Symbols and Sexuality: Culture and Identity on the Early Witwatersrand Gold Mines. *Gender & History*, 2 (3), 318-336.
- Human Rights Watch. (2008). *This alien legacy: the origins of 'sodomy' laws in British colonialism*. New York: Human Rights Watch.
- Hyam, R. (1990). *Empire and Sexuality: The British Experience*. Manchester: Manchester University Press.
- Jearey, J.H. (1960). The Structure, Composition and Jurisdiction of Courts and Authorities Enforcing the Criminal Law in British African Territories. *The International and Comparative Law Quarterly*, 9 (3), 396-414.
- Kenya joins attack on African gays. (1999, September 30). *IOL*. Retrieved from <https://www.iol.co.za/news/africa/kenya-joins-attack-on-african-gays-14609>.
- Kenya. (1976). *Government Publications Relating to Kenya 1897-1963*. Film no. 96995. Reels 1-132. Wakefield: EP Microform.
- Kenya Human Rights Commission. (2011). *The Outlawed Amongst Us*. Nairobi: Kenya Human Rights Commission.
- Kirby, M. (2013). 'The sodomy offence: England's least lovely criminal export?', in: C. Lennox and M. Waites, (eds). *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change*. London: School of Advanced Study, pp.61-82.
- Lauro, A. (2005). *Coloniaux, ménagères et prostituées au Congo Belge 1885-1930* [Colonies, managers and prostitutes in Belgian Congo 1885-1930]. Brussels: Labor.
- Lennox, C. & Waites, M. (eds). (2013). *Human rights, sexual orientation and gender identity in the Commonwealth: struggles for decriminalisation and change*. London: School of Advanced Study.
- Lugard, F. (1922). *The Dual Mandate in British Tropical Africa*. London: William Blackwood and Sons.
- Lugones, M. (2008). 'The Coloniality of Gender'. *Worlds & Knowledge Otherwise*, Spring, pp.1-17.

Macharia, K. (2013). 'Queer Kenya in Law and Policy', pp.273-289; in S. Ekine and H. Abbas, (eds). *Queer African Reader*. Nairobi: Pambazuka Press, Fahamu.

Madeira, A. I. (2007). *Ler, escrever e orar: uma análise histórica e comparada dos discursos sobre a educação, o ensino e a escola em Moçambique (1850– 1950)* [Read, write and pray: an historical and comparative analysis on discourse on education, teaching and school in Mozambique (1850-1950)]. (Unpublished Doctoral Dissertation). University of Lisbon. Retrieved from http://repositorio.ul.pt/bitstream/10451/7063/1/ulfp031302_td.pdf

Mburu, J. (2000). Awakenings: dreams and delusions of an incipient gay and lesbian movement in Kenya, in P. Drucker. *Different Rainbows*. London: Millivres Ltd, pp.179-191.

McClintock, A. (1995). *Imperial Leather: Race, Gender and Sexuality in the Colonial Context*. London: Routledge.

McKenzie, K. (2007). 'Britain: Ruling the Waves', in R. Aldrich (ed). *The Age of Empires*. London: Thames & Hudson. pp. 128-151.

Mignolo, W. (2007) 'Delinking', *Cultural Studies*, 21 (2-3), pp.449-514.

Moodie, T. D. (1988). Migrant and male sexuality on the South African gold mines. *Journal of Southern African Studies*, 14 (2), 228-256.

Morris, H.F. (1976). 'Introduction', in N. Rubin. *Government Publications Relating to Kenya 1897-1963*. London: University of London.

Morris, H.F. (1984). *Annual Departmental Reports Relating to Kenya and the East Africa High Commission 1903/4-1963*. Film no. 97282. Reel 34. Wakefield: Microform.

Mott, L. (2005). Raízes históricas da homossexualidade no Atlântico Lusófono negro [Homosexuality's historical roots in the Portuguese-speaking Black Atlantic]. *Afro-Ásia*, 33, 9-33.

Newitt, M. (1981). *Portugal in Africa: the last hundred years*. London: C. Hurst & co.

Newitt, M. (2018). *A short history of Mozambique*. Johannesburg & Cape Town, Jonathan Ball Publishers.

Nogueira da Silva, C. (2004/2005). Missão civilizacional e a codificação dos usos e costumes na doutrina colonial portuguesa (Séculos XIX-XX) [Civilizational mission and the codification of usages and customs in the Portuguese colonial doctrine]. *Quaderni Fiorentini*, 33/34 (2), 899-919.

Nyeck, S. N. & Epprecht, M., (eds). (2013). *Sexual Diversity in Africa*. Montreal: McGill-Queen's University Press.

Ochieng, W.R. (1985) *A History of Kenya*. London: Macmillan.

Oliveira, P. A. (2014). O ciclo africano (Parte IV) [The African cycle (Part IV)] In. P. A. Oliveira, & J. P. Costa, (eds). *História da Expansão e do Império Português* [History of the Portuguese empire and expansion]. Lisboa: Esfera dos Livros.

Ossome, L. (2018) *Gender, Ethnicity and Violence in Kenya's Transitions to Democracy*. Lanham: Lexington Books.

Penwill, D.J. (1951). *Kamba Customary Law*. London: Macmillan.

Pereira, R. M. (2001). A “Missão etnológica de Moçambique”. A codificação dos “usos e costumes indígenas” no direito colonial português. Notas de Investigação. [The Ethnological mission in Mozambique: the codification of indigenous ‘usages and customs’ in the Portuguese colonial law. Research notes] *Cadernos de Estudos Africanos* [Online], 1, 125-177.

Phillips, A. (1945). *Report on Native Tribunals*. Nairobi: Government Printer.

Pinho, O. (2015). O “Destino das Mulheres e de sua Carne”: regulação de gênero e o Estado em Moçambique [‘Women’s fate and of their flesh’: State and gender regulation in Mozambique]. *Cadernos Pagu* (45), 157-179.

Rubin, N. (1976). *Government Publications Relating to Kenya 1897-1963*. London: University of London.

Said, E. (1978). *Orientalism*. London: Routledge & Kegan Paul.

Santos, A. P. (1903). *Perversão Sexual* [Sexual perversion]. Famalicão: Typografia Minerva.

Serra, C. (2010). *Estado, pluralismo jurídico e recursos naturais*. [State, legal pluralism and national resources]. Retrieved from https://www.academia.edu/4510355/Trabalho_Pluralismo_Juridico_1_Carlos_Serra.

Shepherd, G. (1987). Rank, gender and homosexuality: Mombasa as a key to understanding sexual options’, pp.240-270, in: P. Caplan. *The Cultural Construction of Sexuality*. London: Tavistock.

Silva, A. P. (1895). *A Inversão Sexual: Estudos Médico-Sociais* [Sexual inversion: medical and social studies]. Porto: Typografia Gutemberg.

Silva, G. B. (2015). A Educação Colonial do Império Português em África (1850-1950) [Colonial education in the Portuguese empire in Africa (1850-1950)]. *Cadernos do Tempo Presente*, 21, 67-83.

Smith Oboler, R. (1980). Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya. *Ethnology*, 19 (1), 69-88.

Snell, G.S. (1954). *Nandi Customary Law*. London: Macmillan & Co.

- Sorrenson, M.P.K. (1968). *Origins of European Settlement in Kenya*. London: Oxford University Press.
- Spivak, G. C. (1988). 'Can the Subaltern Speak?'; in Nelson, C. & Grossberg, L. (eds). *Marxism and the Interpretation of Culture*. Illinois: University of Illinois.
- Spurlin, W.J. (2006). *Imperialism within the Margins*. Houndmills, Palgrave Macmillan.
- Tamale, S. (2011). *African Sexualities: A Reader*. Cape Town: Pambazuka Press.
- Tamale, S. (2014). Exploring the contours of African sexualities: Religion, law and power. *African Human Rights Law Journal*, 14(1), 150-177.
- The Commonwealth Equality Network. (2019). 'The Commonwealth Equality Network', Retrieved from <https://www.commonwealthequality.org/>.
- Thomaz, O. R. (2002). *Ecos do Atlântico Sul* [Echo of Southern Atlantic]. Rio de Janeiro: Editora da UFRJ/ FAPESP.
- Towle, E.B. & Morgan, L.M. (2002). Romancing the Transgender narrative: Rethinking the Use of the "Third Gender" Concept. *GLQ*, 8 (4), 469-497.
- Vainfas, Ronaldo. (1997). *Trópico dos pecados: moral, sexualidade e Inquisição no Brasil* [Tropics of sins: moral, sexuality and the Inquisition in Brazil]. Rio de Janeiro: Nova Fronteira.
- Van Onselen, C. (1973). Black Workers in Central African Industry. *Journal of Southern African Studies*, 1 (2), 228-246.
- Virdee, S. (2014). *Racism, Class and the Racialized Outsider*. New York: Palgrave Macmillan.
- Waites, M. (2009). Critique of "sexual orientation" and "gender identity" in human rights discourse: global queer politics beyond the Yogyakarta Principles, in: Kollman, K. & Waites, M. (eds.) Special Issue: The Global Politics of LGBT Human Rights, *Contemporary Politics*, 15 (1), 137-156.
- Weeks, J. (1985). *Sexuality and its Discontents*. London: Routledge & Kegan Paul.
- Weeks, J. (2012). *Sex, Politics and Society: the regulation of sexuality since 1800*. Third edition. Harlow: Pearson Education.
- Wekesa, S. M. (2017). Decriminalisation of homosexuality in Kenya: the prospects and challenges, in: S. Namwase & A. Jjuuko. (eds). *Protecting the Human Rights of Sexual Minorities in Contemporary Africa*. Pretoria: Pretoria University Law Press.
- Wilson, G. (1961). *Luo Customary Law and Marriage Laws*. Nairobi: Government Printer.

Zamparoni, V. (2012). *De escravo a cozinheiro: colonialismo e racismo em Moçambique*
[From slave to cook: colonialism and racism in Mozambique]. Salvador: EDUFBA.