

# ReportOUT Response to United Nations OHCHR Call For Input



ReportOUT



## The Permanent Shadow: Colonialism, Sexual Orientation and Gender Identity in Zimbabwe and Kenya



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ReportOUT is a global LGBTQ+ human rights organisation

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Registered Charity Number (England and Wales): 1185887

# A Statement from ReportOUT's Chair & Lead Trustee, Human Rights Research

Dear Mr Madrigal-Borloz,

It is a privilege to submit ReportOUT's response to your call for contributions to your report on Colonialism and Sexual Orientation and Gender Identity.

Founded in 2019, ReportOUT is a human rights research organisation in the United Kingdom that documents the lived experiences of SOGIESC (Sexual Orientation, Gender Identity, Expression and Sexual Characteristics) people and communities in different nations across the globe. We use our research to inform the public, educate others and to influence governments and organisations about SOGIESC human rights infringements.

By the end of 2023, ReportOUT will have published six 'deep dive' projects into the lived experiences of SOGIESC communities in Uganda, Zimbabwe, Belize, Morocco, Ethiopia, together with this report on Mongolia. We are proud to be an entirely volunteer-led charity, with volunteers and trustees originating from over thirty nation-states, six of whom contributed to this report.

Our report, focused on Kenya and Zimbabwe demonstrates unequivocally that the legacy of colonialism has a profound impact upon the institutional homophobia faced by SOGIESC citizens of both countries, as demonstrated through legal frameworks, political institutions and societal attitudes. We trust that our research, compiled by our dedicated team of global volunteers will be a valuable contribution to your final report and we thank you and your team's work for investigating this under-researched topic that resonates so profoundly in countries across the globe today

**Drew Dalton.**  
**Chair of Trustees.**  
**Research**

**Phil Thomas**  
**Lead Trustee, Human Rights**



**Drew Dalton**  
Chair of  
Trustees

Drew (He/Him) is the founder and currently the Chair of ReportOUT. He has spent the last 20 years working within the NGO sector on both a national and international level in a range of varied roles. Alongside this, he is a qualified teacher, and is currently working as an academic and social researcher. Drew has a degree in BSc (Hons) Sociology and Social Research, MSc Social Research, MA Gender Research and a PhD in Sociology. Drew has featured on various media outlets, including the BBC, Channel 4 News and the New Arab.



**Phil Thomas**  
Lead Trustee,  
Human Rights  
Research

Phil became a Trustee of ReportOUT in November 2022. He is passionate about geopolitics and LGBTIQ+ histories around the globe and has undertaken research for ReportOUT on a diverse range of countries including Mongolia, Afghanistan and Ukraine. Phil holds a Masters in International Relations from University of Cambridge (UK), MBA from Duke University (USA) and a BA in Modern Languages from University of Durham (UK)



# About ReportOUT



# Who are ReportOUT?

Since 2019, ReportOUT have been at the forefront of protecting the human rights of sexual and gender minorities in the United Kingdom and globally. As a registered charity in England and Wales (registered charity number 1185887) we are **fearless, determined and relentless** in our belief that human rights are fundamental to advancing the lives of sexual and gender minorities, and their communities.

We recognise that we need to succeed in our aims and objectives by also using principles from international development alongside human rights frameworks, and we believe that both of these approaches should **always include sexual and gender minorities as part of them**. We align all of our work with Agenda 2030, in that no one should be left behind.

## **ReportOUT's official aim and objectives are:**

To promote human rights (as set out in the Universal Declaration of Human Rights and subsequent United Nations conventions and declarations) throughout the world for sexual and gender minorities by all or any of the following means:

- Eliminating infringements of human rights;
- Research into human rights issues;
- Raising awareness of human rights issues;
- Educating the public about human rights;
- Monitoring abuses of human rights;
- International advocacy of human rights;
- Providing technical advice to government and others on human rights matters.

## **Our guiding principles:**

- **Principle 1:** No one should be left behind in delivering the articles set out in the Universal Declaration of Human Rights.
- **Principle 2:** Every person has a part to play in achieving the goals and targets set out in the United Nations Sustainable Development Goals.
- **Principle 3:** Positive change should be led by communities within a nation state and ReportOUT will support them to do this.

## **Suggested Citation:**

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# Contributing Researchers



**Stève Cédric Bizimana (Burundi):** Stève Cédric is a Burundian researcher and Human Rights activist. He holds a Bachelor's degree in Political Science and International Relations, as well as Master's degree in Public Administration and Management. His research interests revolve around gender and public policy among other things. He joined ReportOUT as a volunteer human rights researcher to document lived realities and experiences of Sexual and Gender Minorities across the globe and to showcase their stories to a global audience



**Taha Laroussi (Morocco)** Taha holds a bachelor's degree in sociology and is a researcher from Morocco, with a keen interest towards researching and providing sources of knowledge about SOGIESC issues, as his research has been focused around youth, globalization, and SOGIESC people in Morocco, MENA region and the world. Taha has previously consulted and supported research projects in both local and global organizations and by volunteering with ReportOUT as a human rights researcher, he aims to learn and provide a source of knowledge to the world about SOGIESC issues globally.



**Arnold Ochieng Oginga (Kenya)** Arnold is an Advocate of the High Court of Kenya; a Constitutional Law, Human Rights, Electoral justice, and Tech Law expert, and litigates and consults in these fields. He is the CEO and Founder of Ochieng Oginga & Company Advocates and Co-founder of IDEAT Tech Policy Africa which deals with complex and varied areas of Constitutional law, Human Rights in the digital age among others. He is a Certified Sexual and Gender Minority Rights Practitioner; Certified Disability Rights Practitioner; & Certified Social, Cultural, and Economic Rights Practitioner, certified by the University of Pretoria, Centre for Human Rights, South Africa. Arnold is also currently an LLM candidate at the University of East London, United Kingdom. Alongside his Human Rights research with ReportOUT, he is also a volunteer advocate and legal researcher at TrustLaw foundation.



**Chantelle Taggart (UK)** Chantelle has a Bachelor's degree in Sociology, and a Master's Degree in Inequality and Society. Her research primarily falls into areas of human rights abuse, focusing on human trafficking and sex trafficking. She volunteers with ReportOUT in order to expand her knowledge through research into global issues, and looks to implement this knowledge in her teaching roles in the future.



**Ryoko Umemoto (Japan/UK)** Originally born in Tokyo, Ryoko now lives and studies in the UK. They are a Master's student in Philosophy at University of Edinburgh, with a bachelor's degree in Classics from Cambridge. Alongside their work at ReportOUT, they volunteer as a Campaigns Director for CERT Scotland, a policy group for contraceptive education and reform in Scotland. Their interest in global human rights was sparked by the issues trans people face in Japan. As human rights researcher at ReportOUT, they hope to educate themselves and others further about the current social and political climate making LGBT+ rights increasingly vulnerable.



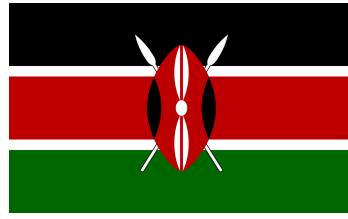
**Kalori Wesonga (Kenya)** Kalori Wesonga joined ReportOUT's Human Rights Research Team in early 2023. He also works as the Project Lead for 'Project Forge' with the United Nations Action Group for Gender Equality. He holds a bachelor's degree in law from Kenyatta University and has research experience in human rights for marginalized communities across Sub-Saharan Africa, STEM and mental health.

# ReportOUT's Response to UN Call For Input



# A Note on Methodology and Approach

We have chosen to focus our response on two countries, **Kenya and Zimbabwe**: two countries with which we have extensive lived and research experience and where a demonstrable link between British colonial attitudes to sexual orientation and gender minorities will be proven:



Our response will consider five of the ten questions posted by the UN OHCHR:

**Question One:** Did the imposition and/or enforcement of colonial laws or policies on sex, gender and sexuality change pre-colonial treatment of sexual orientation and gender identity? What historical or anecdotal evidence is there available about the treatment of gender and sexual diversity before past or present experiences of colonization?

**Question Two:** What laws, policies, and practices regulated or influenced the shaping of or the socio-normative perception of sexual orientation and gender identity in colonial times? How were they introduced, promoted, administered or enforced? Examples could include prohibition of certain sexual acts, but also regulation of sexual or gender identities and expressions (such as bans on cross-dressing).

**Question Three:** What colonial laws regulating sexual orientation and gender identity are still in place today? How are they enforced? How are they being interpreted by national jurisprudence and customary law? What legal, moral, or socio-cultural explanations have been provided, if any, for their continued existence?

**Question Four:** How, if at all, has the protection against violence and discrimination based on sexual orientation and gender identity been transformed and positively or negatively impacted by processes of decolonization?

**Question Seven:** What is the ongoing impact of gender- and sex-regulating colonial laws on the enjoyment of human rights by LGBT persons? How did the imposition of colonial laws on sex and gender shape social and moral ideas about sexual orientation and gender diversity?

**Word Count (excluding question titles and bibliography) 2,499 words**

*ReportOUT will use SOGIESC (Sexual Orientation, Gender Identity, Expression and Sexual Characteristics) within our terminology in this response to refer to sexual and gender minorities.*

# Question One: Life Before Colonialism

**Did the imposition and/or enforcement of colonial laws or policies on sex, gender and sexuality change pre-colonial treatment of sexual orientation and gender identity? What historical or anecdotal evidence is there available about the treatment of gender and sexual diversity before past or present experiences of colonization?**

**Zimbabwe:** Historical evidence from pre-colonial Zimbabwe reveals the existence (and acceptance) of homosexual activity. Cave paintings, some from two thousand years ago, show evidence of same-sex sexual activities (Garlake, 1995). These depictions include San people partaking in male-on-male anal sex (Evaristo 2014). Moreover, the traditional Shona culture had a tolerant attitude youthful same-sex relationships, with those who took issue with the conduct often 'turning a blind eye' (Epprecht, 2013). Similarly, the Ndebele society saw effeminate men held up as spiritual leaders and healers (Mabvurira, et al, 2012). In the 18th Century, the Khoikhoi people had lexis surrounding same-sex relations, with the term 'koetsire' referring to a man who is sexually receptive to another man (Obamwonyi, 2016).

The colonisation of Zimbabwe in the late nineteenth century saw a shift in the treatment of SOGIESC people. In the early colonial period, analysis of court documents reveals continued practice of homosexual love affairs and sex work (Epprecht 1998). However, in the aftermath of colonisation and the consequent imposition of religious conservative views SOGIESC persons were deemed 'unZimbabwean' or 'unAfrican' (Mabvurira, et al, 2012).

**Kenya:** On 1st January; 1862, the British enacted the Indian Penal Code to codify criminal law throughout the British Empire (Edward, 2017). Later, the 1897 East Africa Order in Council prescribed and introduced how British Law was to be applied to British protectorates, including Kenya; the Ordinance assimilated the Indian Penal Code into Kenyan law. Section 377 of the Indian Penal Code provided for the offence of 'carnal intercourse against the order of nature with any man, woman, or animal'. It imposed a maximum punishment of life imprisonment.



# Question One: Life Before Colonialism

**Kenya (cont.):** The colonial legislators introduced this law into Kenya, with no debates or 'cultural consultations', to support colonial control and inculcate European morality into resistant African masses as they believed Africans needed compulsory re-education in sexuality. 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. Section 377 was, therefore, a colonial attempt to set standards of behaviour to reform the colonized and protect the colonizers against moral lapses. It was also the first colonial 'sodomy' law integrated into a Penal Code, and it became a model anti-sodomy law for British colonies (Human Rights Watch, 2023).

The genesis of British colonialism in Kenya marked a new era in which the cultural and personal identities of Kenyan SOGIESC were erased (Liselot, 2019). Liselot (2019) highlights that the limited availability of Kenyan literature on SOGIESC made it easier for Western historians to universalize white cisgender heteronormativity, facilitating the erasure of pre-colonial Kenyan gender norms. As Kenya adopted colonial laws and religions (including Christianity and Islam), the indigenous spirituality of African tribes was undermined and forgotten (Liselot, 2019; Abadir, 2015). Abadir (2015) noted that colonial laws largely regarded African culture, including culture on SOGIESC, as taboo, immoral, and unacceptable.

Anthropological studies show various Kenyan traditions, such as the Meru tribe, that included male marriage and men dressing as women (Epprecht, 2005). Similarly, earlier studies from Kenya revealing that some tribes, like the Kalenjin, still practice woman-woman marriage (Blessol, 2013; Luft, 2016).

Additional literature points to examples such as the Kenyan Nandi tribe in the Great Rift Valley region, practicing same-sex marriage traditions during pre-colonial times. "A woman who had taken a wife was said to have become a man. It is said that she had been promoted to male status" (Bharat et al., 2019). Many African countries did not see gender as a binary as their European colonizers did, nor did they correlate anatomy to gender identity (Leah, 2020). Furthermore, in no African country before colonization do we see any persecution of SOGIESC individuals because of their sexuality, nor any anti- SOGIESC laws (Leah, 2020).

## Question Two: Colonial Laws, Policies, Practices

**What laws, policies, and practices regulated or influenced the shaping of or the socio-normative perception of sexual orientation and gender identity in colonial times? How were they introduced, promoted, administered or enforced? Examples could include prohibition of certain sexual acts, but also regulation of sexual or gender identities and expressions (such as bans on cross dressing).**

**Zimbabwe:** Prior to colonialism, as with most other African nations, the majority of Zimbabwean communities relied on oral customary laws. Because precolonial Zimbabwean customary laws were silent on homosexuality, indigenous homosexualities flourished (McNamara, 2018). The prosecution of homosexuals in Zimbabwe had been introduced by the British colonial authorities at the beginning of the twentieth century at the behest of European missionaries, who were particularly horrified by the sexual contacts between migrant workers in coal mines (Schäfer and Range, 2014).

Although records of specific legal documents and official laws in colonial Zimbabwe are scarce, there is a rich documentation of colonial court rulings in the region that help construct a more complete picture of the criminalization of sodomy in colonial Zimbabwe (King, 2022). Many native Zimbabweans were tried for same-sex practices, as well as cross-dressing. Hence, over 400 cases of homosexual behaviour were recorded between 1892 and 1932 alone (McNamara, 2018). The belief that same-sex sexual practices were morally, and thus legally, wrong was brought to Zimbabwe by European colonizers. These court cases mark the introduction of these laws in Zimbabwe, laying the foundation for future anti-homosexual legislation in the region (King, 2022).

Sodomy remained a criminal offense for the entirety of Britain's colonial occupation of Zimbabwe. In 1975, just five years before Zimbabwe was granted independence, a Rhodesian High Court ruling divided "unnatural offences" into three classes: "sodomy", "bestiality" and a residual group of proscribed "unnatural" sexual acts referred to generally as "an unnatural offence"

## Question Two: Colonial Laws, Policies, Practices

**Zimbabwe (cont.):** This ruling was largely drawn from precedent set by Roman-Dutch common law made by a judge appointed under the British colonial regime. Colonial structures created the legal system under which this court decision was made. This system established state-sanctioned homophobia in the region for the first time, not only introducing this form of legal homophobia to the region, but also leaving behind structures that allowed for the maintenance of state homophobia after the political liberation of Zimbabwe (King, 2022)

**Kenya:** The Penal Code of Kenya, Chapter 63, adopted from the Indian Penal Code, remains the key statute addressing SOGIESC. Sections 162, 163, and 165 make prohibitions against having carnal knowledge of any person against the order of nature; or carnal knowledge of an animal; and make it punishable by imprisonment for 14 years.

The provisions are still being implemented. The situation has been exacerbated by the subsequent enactment of the Constitution of Kenya, 2010, as read with the Marriage Act, 2014, which reserves marriage exclusively to individuals of the opposite sex. The provisions have influenced the formulation of the current proposed Family Protection Bill of Kenya, 2023, which seeks to sanction and criminalize same-sex-relations and sexual conduct and further criminalize SOGIESC by only recognizing 'sex' based on biological identification in the form of the male and female anatomy. In totality, this serves to reinforce the legacy of colonial laws.

## Question Three: Ongoing Colonial Laws

**What colonial laws regulating sexual orientation and gender identity are still in place today? How are they enforced? How are they being interpreted by national jurisprudence and customary law? What legal, moral, or socio-cultural explanations have been provided, if any, for their continued existence?**

**Zimbabwe:** The end of colonial rule did not see an end to anti-SOGIESC policy and ideologies. Prior to 2006, Zimbabwe's criminal provisions operated under the common law which was inherited from British colonial rule (Human Dignity Trust, 2023). Despite the fact that anti-SOGIESC policies were derived from colonial laws, homosexuality is seen as a colonial import from European countries (Shoko and Phiri, 2017). Robert Mugabe's political leadership (1980-2017) perpetuated homophobic views (Long, et al, 2003). Zimbabwe declared independence from British colonialism in 1980. However, the nationalist leaders who fought for liberation retained homophobic beliefs from the colonial era, expanding them into state laws and regulations that criminalized same-sex relationships (King, 2022). In the case of *Banana v State*, the Supreme Court of Zimbabwe ruled by a 3-2 majority that the crime of sodomy did not violate the constitutional protection against gender discrimination (Report OUT, 2021).

Mugabe referred to SOGIESC individuals as '*worse than pigs and dogs*' (Epprecht, 2013:4). The ideologies perpetuated through a fundamental Christian lobby with significant political power have bled into the culture so much that what was once just common law, is now being codified into the criminal code and broader Zimbabwean culture. The Sexual Deviancy Law (2006) was added to the Criminal Code, which now criminalises any act involving contact between two males that would be regarded 'indecent' by a reasonable person (365Gay, 2006). Similarly, Article 78(3) of the 2013 Constitution states that persons of the same sex are prohibited from marrying each other (Human Dignity Trust, 2023).

## Question Three: Ongoing Colonial Laws

**Kenya:** The courts' interventions in Kenya have transformed the protection against violence and discrimination based on SOGIESC. For instance, the pronouncement by the Supreme Court of Kenya in the case of Non-Governmental Organization Coordination Board vs Erick Gitari and Other [2019] on the protection and inclusion of sexual orientation as a ground for non-discrimination to be read into the Constitution of Kenya, 2010.

Though rarely enforced, persons have been charged for allegedly committing 'Unnatural Offences'. In COI & Another vs Chief Magistrate Ukunda Law Courts & 4 Others [2018] eKLR, the appellants were arrested and charged with allegedly committing unnatural offences, from whence they were subjected to forced anal examinations to confirm the charges of their sexual conduct. The court found forced anal examinations unconstitutional and violated a person's right to dignity.

Blesson (2018) observes that resistance to Westernization after Kenya gained independence led to the denial of human rights and freedoms of SOGIESC individuals. Additionally, some socio-political groups argue that SOGIESC rights are Western ideals funded by white imperialists seeking to advance their interests in Kenya through neo-colonialism. One Member of Parliament, Mr. Peter Kaluma, is on record asserting thus 'homosexuality practices are campaigns from Western countries and should not be imposed in Africa' (Standard Newspaper, 2023).

# Question Four: The Impact of Decolonisation

**How, if at all, has the protection against violence and discrimination based on sexual orientation and gender identity been transformed and positively or negatively impacted by processes of decolonization?**

**Zimbabwe:** Despite Zimbabwe's decolonization, same-sex acts remain criminalized, resulting in a lack of protection against violence and discrimination based on sexual orientation and gender identity. Legal gender recognition is also absent (ILGA World, 2023). Studies indicate significant challenges faced by SOGIESC individuals, including physical violence, sexual violence, and verbal harassment (Müller, A., Daskilewicz, K. 2019). Family support for sexual and gender minorities is reported to be lacking (Report OUT, 2021), highlighting the enduring impact of colonial laws on their lives.

**Kenya:** The colonial laws, as prescribed under Sections 162, 163, and 165, are still in place and have been held to be valid by the Kenyan Courts. In the case of *Eric Gitari & 7 others vs Attorney General* [2016], it was held that Kenya is founded on cultural values and principles of governance. As the cumulative civilization of the Kenyan people, the provisions are not unconstitutional as the Constitution recognizes only marriages between persons of the opposite sex; as such, the decriminalization of same-sex sex, because it is consensual and is done in private between adults, would contradict the express provisions, tenor and spirit of the Constitution.

# Question Seven: The Shadow Of Colonialism

**What is the ongoing impact of gender- and sex-regulating colonial laws on the enjoyment of human rights by LGBT persons? How did the imposition of colonial laws on sex and gender shape social and moral ideas about sexual orientation and gender diversity?**

**Zimbabwe:** Historical evidence demonstrates same-sex relationships clearly existed in pre-colonial Zimbabwe, accompanied by greater tolerance and acceptance rooted in non-binary perspectives on gender and sexuality within the culture and ideology of the time. However, British colonialism imposed a Victorian morality, which criminalised same-sex acts, significantly altering societal attitudes towards SOGIESC communities (Stonewall, 2020). Homophobia, therefore, emerged as a colonial import under British rule.

The colonial legacy of homophobia continues to this day, with political leaders deeming homosexuality as a Western import and un-African, disregarding historical facts and pre-colonial acceptance of diverse sexual orientations (King, 2022). Presently, homophobia continues to be enforced by the state, severely limiting the rights of SOGIESC people. Both SOGIESC Individuals and organisations are vulnerable to harassment and violence. As noted by Clément Nyaletsossi, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, SOGIESC organisations are often the target of raids and intimidation by police (ILGA World, 2023). Homophobia institutionalised during the colonial era persists to present day and its weaponization by political and societal institutions continues to harm Zimbabwe's SOGIESC community long after the colonial power has departed.

**Kenya:** The ongoing impact of gender and sex-regulating colonial laws in Kenya manifests as the limitation and, in some cases, prevention of the enjoyment of human rights by SOGIESC persons, resulting in structural, social, economic, and political discrimination.

# Question Seven: The Shadow Of Colonialism

**Kenya (cont.):** Essentially, the recognition of human rights for SOGIESC individuals in Kenya is either legally restricted, non-existent, or not acknowledged, as highlighted by the statement of Kenya's former president, Uhuru Kenyatta, who remarked in a BBC interview, *'Gay rights are of no importance in Kenya.'* This lack of recognition extends to the right to marriage, where the law only acknowledges marriage between individuals of opposite biological sex, thereby denying SOGIESC persons the right to form families and marry, despite historical evidence of same-sex marriages in Kenya before colonialism.

Moreover, this social discrimination is compounded by the prevalence of sexual violence targeting SOGIESC individuals in Kenya, posing a significant threat to their lives. A tragic example is the brutal murder of Sheila Lumumba, a non-conforming lesbian, in 2022, solely due to her sexual orientation (Article 19, 2022). Institutionally, the rights of SOGIESC individuals to freedom of association and expression are curtailed. A notable illustration of this is the ban imposed by the Kenya Film Classification Board in 2022, making all movies with SOGIESC content illegal.

In conclusion, the imposition of colonial laws on sex and gender in Kenya, coupled with Kenya's reluctance to decriminalize laws pertaining to same-sex relations, has resulted in increased hostility and stigma against sexual minorities within the public sphere.; the most recent study on societal perceptions found that 83% of Kenyans do not accept homosexuality (Pew Research Center 2020). This discrimination negatively affects the Kenyan economy with annual costs estimated at US\$1.3 billion, attributed to poor health and unemployment (Thompson Reuters, 2019). Lower economic productivity means Kenya relies heavily on foreign aid to supplement its economy, a perverse legacy of the homophobia of colonialism.



# Conclusion

Colonial laws and religious views continue to cause irreparable damage to the SOGIESC communities in Kenya and Zimbabwe. **As the report reveals, the imposition of anti- SOGIESC laws were justified by European/Christian morality that deemed homosexuality 'unnatural' or 'bestial'.** This solidified SOGIESC identities and activities as cultural and moral issues, marking a contrast to pre-colonial Kenyan and Zimbabwean societies, which did not consider sexual orientations and gender identities a matter of morality. **This moral justification given to homophobia bestowed to these countries a mentality that SOGIESC identities are unAfrican. Consequently, even after the end of colonial rule and efforts to decolonise, anti- SOGIESC laws from the colonial era continue to be enforced in both of these countries.**

Although some progress has been made in Kenya in particular, colonial laws criminalising same-sex acts and same-sex marriage continue to be enforced in both Kenya and Zimbabwe. Such legislation mirrors the lack of social acceptance, discrimination, and dangers SOGIESC people face. **These laws harm not just the SOGIESC community in these countries but also these countries as a whole given that anti-SOGIESC discrimination has detrimental impacts on the economy.**

This report reveals that colonialism has and continues to cause immense damage to Kenyan and Zimbabwean SOGIESC communities. **Colonialism so thoroughly erased the countries' pre-colonial cultures and practices, with tolerant and fluid understandings of sexual orientations and gender identities, that colonially imposed homophobia has come to be accepted and practiced within these societies.**

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