



The
University
Of
Sheffield.

**Fighting invisibility at the intersection of sexuality, gender and race: A queer
postcolonial analysis of international human rights law**

By:

Isabel Simonsen Carrascal

A thesis submitted in partial fulfilment of the requirements for the degree of
Doctor of Philosophy

The University of Sheffield
School of Law

March 2022.

Abstract

The international human rights of sexual and gender diverse people are subject to considerable political and academic controversy, despite these groups being subjected to violence and discrimination all over the world. Central to these controversies are the rights of non-western sexual and gender diverse peoples, with both conservative and radical voices converging, for different reasons, on the inapplicability of human rights to these groups. However, these debates have not sufficiently considered the only human rights mechanism specialised in the protection of sexual and gender diversity, that is the UN Independent Expert on sexual orientation and gender identity (IE) and have largely been conducted without the benefit of the application of queer postcolonial critique.

This thesis examines the protection of non-western sexual and gender diverse people using queer postcolonial approaches to critically analyse the IE on sexual orientation and gender identity. To do so, I explore literature using both queer and postcolonial theory to identify specific analytical insights into the way that non-western people are excluded and marginalised. These insights will then be applied to the IE in two ways. Firstly, I examine the challenges and opportunities the IE faces to address the specific situation of non-western sexual and gender diverse people. Secondly, I apply these queer postcolonial insights using a deconstructive methodology to analyse the treatment of non-western sexual and gender diverse people by the IE when examining and interpreting human rights in the annual reports. From this analysis, I conclude that despite the IE having the opportunity to address the situation of non-western peoples, western approaches to sexuality and gender are privileged in the human rights interpretations contained in the reports effectively excluding non-western sexual and gender diverse peoples from consideration.

Acknowledgements

First and foremost, I am immensely grateful to my supervisors for all the support, encouragement and guidance provided throughout this project. To Damian A Gonzalez-Salzberg, thank you for inspiring me intellectually from the LLM leading me to embark on this project and for coming on this journey with me. Your intellectual guidance has been priceless, while still allowing me to grow and find my own path. Thank you for taking the time to chat through all my questions and frustrations and supporting me in other academic endeavours such as teaching. To Graham Gee, for enriching my research with your knowledge and interesting ideas as well as helping me to keep focused. Thank you for all your dedication and support as well as your understanding in moments of difficulty. To both, I am incredibly thankful for your careful consideration, commentary, and critiques of my drafts and for all your care and thoughtfulness when life has come in the way of this project. I could not have asked for better supervisors.

To the University of Sheffield Department of Law and to all my colleagues at the PGR Office for the community and for making this process less lonely than it could have been. In particular, to Claire Yau, Louisa McMahon and Eray Sinan Demirhan, for all the fun and laughter you brought during the first years of this process. A special thanks to PGR Director Layla Skinns for supporting me when I really needed it and for all the help and guidance provided.

To my friends, Kristin Indreeide, Nina Hovden Gregersen og Paulian Dworzynska for keeping me company on the long walks to clear my mind and stretching my legs after hours of sitting in front of the computer. To Sagar Deva, without your encouragement and guidance this process would have never started. A special thanks to Claire Christina Johnston for all your support over the years both academic and otherwise. It has been invaluable, there is really nothing that seems irresolvable in your company. To my best friend Charlotte van Delden Nyrud, for being you and helping me keep it real and remembering the world outside this process.

To my mum, Rosa Maria Carrascal for all your encouragement over the years, for your small and big gestures to make sure that I have felt loved and supported throughout the process. This project would not have been born if it was not for you teaching me to be critical and to speak up against inequality. To my dad, Jan Ketil Simonsen, for all the motivation and assistance over the years and for teaching me the value of different knowledges and in seeing the world from different perspectives. To our Zambian family, thank you for showing me the limits of western epistemology and knowledge – without you this project would never have happened.

To my sister Iris Simonsen Carrascal, thank you for always being there, for listening to me, for keeping me company, for checking in, for sending encouraging mail and for making me smile most days throughout this process.

To my partner Ayesha Iqbal. Words cannot express the gratitude I feel for all the support you have given me from the beginning to the end of this project. Thank you for all the encouragement when I have felt discouraged, for cheering me on when I wanted to give up, for taking the time to listen when I have been stuck throughout the process. Thank you for helping me through the emotional rollercoaster that this project has sent me on, for keeping me grounded, for making sure that I have had everything I need and for reminding me to take breaks and to live a little as well. Without you this project would have never been completed.

To the University health service (in particular Dr. Hodges) and the MS team at Sheffield Hallamshire Hospital, thank you for seeing me and for supporting me throughout some of the inevitable misadventures that life has thrown at me during this process. Lastly, I am grateful to my therapist Bay Whitaker for helping me navigate life and its difficulties while completing this thesis.

Table of Contents

.....	1
Abstract	1
Acknowledgements	1
Chapter 1. Introduction	1
1. Introduction	1
1.1 Research Questions	3
1.2 Original Contribution	4
2. Research Contexts: Achieving Freedom from Oppression for Non-Western Sexually and gender diverse Peoples	6
2.1 Limits to this Research.....	15
2.2 Key Terms	18
3. Significance of this Research and Contribution	19
4. Methodology	20
5. Key Findings	21
6. Chapter Overview	24
Chapter 2. Queer Theory	29
Introduction	29
1. Defining queer theory	30
2. Queer theory and human rights law	34
3. Queer theory and non-Western sexual and gender diversity	36
4. Queer insights	39
4.1 Sex/Gender Binary and the Performance of Identity	39
4.2 Queer theories' approaches to sexuality	42
4.2 a) Queer theory and the artificiality of modern sexual identities.....	43
4.2 b) Heteronormativity	48
4.2 c) Homonormativity and the queer rejection of assimilationist strategies	52
Conclusion	54
Chapter 3. Postcolonial theory	57
Introduction	57
1. Defining Postcolonial Theory	59
1.2 Terminology and location of postcolonial theory: contention and critique	65
2. Postcolonial Theory, sexual and gender diversity	67
3. Postcolonial Theory and International Human Rights Law	68
3.1 International human rights law: convergence between postcolonial theory and critical race approaches and anti-racists movements	70
4. Insights from Postcolonial Theory	75
4.1. Postcolonial Discourse Analysis: Edward Said's Critique in Orientalism (1978)	75
4.2 Provincialisation of European Thought and Knowledge	79
4.3 Deconstructing racial identities, hybridity and Bhabha's alternative human rights.....	81
4.4 Recovering the subaltern voices	87

Conclusion	90
Chapter 4. Queer Postcolonial Approaches	93
Introduction	93
1 Bridging queer theory and postcolonial theory in the context of international human rights law	95
2. Queer postcolonial Insights	99
2.1 Orientalism and the influence of the civilised/uncivilised binary in international discourse on sexual and gender diversity	99
2.2 Patriarchal heteronormativity: colonial anxieties, racialisation of sexual difference and heteropatriarchal nationalism.....	105
2.3 The oppressive character of the universalisation of Western sexual and gender knowledge	114
3. Revising international human rights law through the analysis of representation of non-Western sexual and gender diversity	117
a) Local re-negotiations of Western sexual categories and activist methods	118
b) Representation of non-Western female same-sex desire as a challenge to patriarchal heteronormativity	122
c) Revising the nation through the experiences of queer postcolonial subjects	124
4. Bridging the Analysis of Race, Sexuality and Gender and Human Rights Law: Intersectionality and the Queer Postcolonial Challenge	127
Conclusion	136
Chapter 5. Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity.....	138
Introduction	138
1. The Special Procedures System Today: Background and Development.....	140
1.1 Background	141
1.2 Special Procedures Today.....	146
1.3 Contribution of the Special Procedures to the Promotion and Protection of Human Rights.....	151
2. Adopting the mandate of the IE: opposition, challenges, and the urgency in addressing violence and discrimination against sexually and gender diverse peoples internationally.....	153
2.1 Adopting the mandate of the IE	153
2.2 State opposition, cooperation, and continued support for the mandate	161
2.3 The urgency in addressing violence and discrimination on the ground: COVID-19 and intersectionality	166
3. The Independent Expert to date: main approaches and achievements.....	179
3.1 Mandate and Mandate Holders	181
3.2 Main Approaches and Achievements.....	183
Conclusion	187
Chapter 6. Critical Analysis of the Protection of Sexual Diversity in the Reports.....	189
Introduction	189
1. Intersectionality.....	192
2. Privileging of Western Identities in the Reports: Exclusion and Lack of Representation	196
2.1 Privileging and Negation.....	198
2.2. Privileging and Orientalism.....	201
2.3 Sexual Orientation	203
3. Root Causes: Missing the Underpinning Structures of Oppression.....	207

3.1. Criminalisation as a root cause of violence and discrimination	208
3.2. Pathologisation	218
3.3. “Conversion Therapies”	225
4. Ending Violence and Discrimination	232
4.1 Non-Discrimination	232
4.2 Statistics and the Structures of Normalisation	237
4.3 Inclusion, Victimisation and Erasure of Queer Postcolonial Worlds	243
Conclusion	248
Chapter 7. Critical Analysis of the Protection of Gender Diversity in the Reports.....	251
Introduction	251
1. Gender Theory as Defined in the Reports.....	253
1.1 Challenging the impact of Western Gender Hierarchies.....	255
1.2 Gender Identity.....	261
1.3 Biology and Intersex Subjects.....	263
2. Gender Diverse Subjects in the Reports.....	269
2.1. Trans Subjects	269
2.2. Gender diverse subjects	271
2.3. Recognition of non-Western Gender Identity	274
3. Pathologisation and Stigma	278
3.1. Examining the Diagnosis in the ICD	280
3.2. Diagnosing Children: Ensuring Normative Adults	286
4. Legal Recognition	290
Conclusion	297
Chapter 8. Conclusion and Future Research Prospects.....	299
1. Research Overview.....	299
2. Research Findings.....	305
<i>2.1 Implications of findings and conclusions for policy discussions and further development of the work of the IE and other key stakeholders.....</i>	308
2.1a) Developing the role of the IE through discursive changes based on the analysis in chapters 6 and 7.	308
2.1b) Development of the mandate through dialogue and cooperation: implications for the human rights system and key stakeholders	312
3. Contribution to Literature.....	315
4. Limitations of this Study	318
5. Future Research Prospects.....	320
Bibliography	323
Table of cases	323
Table of legislation.....	323
Table of UN Resolutions	323
Other international documents.....	326
Books	327
Book chapters.....	332
Journal Articles	337
Blogs, online news reports and platforms.....	346
Other references	351

Chapter 1. Introduction

1. Introduction

This thesis aims to identify and assess the treatment of non-Western sexually and gender diverse people under international human rights law, using insights drawn from what will be termed 'queer postcolonial approaches'. The international human rights of sexually and gender diverse peoples is subject to much political and academic controversy.¹ Central to current debates is the inclusion or exclusion of non-Western sexually and gender diverse people, with at times both conservative and radical approaches converging, albeit from different perspectives, in questioning the applicability of human rights to these groups.² With the state as a primary actor legitimising oppression, it might be assumed that those targeted by state action would turn for protection to international human rights law, which after all is focused on regulating how states exercise power.³ However, the construction of an international discourse on the rights of sexually and gender diverse peoples has been shaped by questions of power and hierarchies of race, class, religion and nationality.⁴ To date, these human rights discourses and debates have largely been conducted without the benefit of insights from queer postcolonial approaches and without the consideration of the human rights interpretations by the United Nations (UN) Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity (IE). Outside of human rights debates, researchers have used queer theory and postcolonial theory to investigate how sexuality, gender, and race intersect in oppressing non-Western sexually

¹ Michael Joel Voss 'Contesting Sexual Orientation and Gender Identity at the UN Human Rights Council' [2018] 19:1 Human Rights Rev 1; Anthony Tirado Chase 'Human right contestations: sexual orientation and gender identity' [2016] 20:6 The International Journal of Human Rights 703; Kelly Kollman and Matthew Waites 'The global politics of lesbian, gay, bisexual and transgender human rights: an introduction' [2009] 15:1 Contemporary Politics 1.

² Anthony Tirado Chase 'Human right contestations: sexual orientation and gender identity' [2016] 20:6 The International Journal of Human Rights 703; Amar Wahab 'Homosexuality/Homophobia is Un-African?: Mapping Transnational Discourse in the Context of Uganda's Anti-Homosexuality Bill/Act' [2016] 63.5 Journal of Homosexuality 685; Momin Rahman 'Queer Rights and the Triangulation of Western Exceptionalism' [2014] 13:3 Journal of Human Rights 274; Rahul Rao *Third World Protests: Between Home and the World* (OUP 2010) 173-195; Simon Obendorf 'Homosexual Rights and the Non-Western World: A Postcolonial Reading of Homosexual Rights in International Human Rights Law' [2000] 15.7 Third World Legal Studies 179;

³ Anthony Tirado Chase 'Human right contestations: sexual orientation and gender identity' [2016] 20:6 The International Journal of Human Rights 703, 705.

⁴ Rahul Rao *Third World Protests: Between Home and the World* (OUP 2010) 173-195.

and gender diverse peoples.⁵ These approaches identify several structures of oppression emerging from colonialism and Western heteropatriarchy that underpin contemporary political and legal discourses, rendering the experiences of non-Western people invisible.⁶

Building on insights of queer postcolonial theories, I argue that categories of race, gender and sexuality are intertwined and create structures of oppression and marginalisation that affect non-Western sexually and gender diverse peoples in particular. Therefore, it is paramount to bring the analysis of these structures of oppression to international human rights law and counter the marginalisation and exclusion of non-Western sexually and gender diverse peoples.

One of the primary objectives of this thesis' is to draw on insights from queer postcolonial approaches and apply them in the context of international human rights law. More particularly, I explore the structures of oppression and illegibility within the rights interpretations by the UN Independent Expert (IE) on protection against violence and discrimination based on sexual orientation and gender identity (hereinafter IE).⁷ The IE is a recent (2016) special procedure and human rights body on the topic of gender and sexuality at the UN. A secondary objective of this thesis is to assess the strengths and weaknesses of the IE in protecting sexually and gender diverse peoples. The IE plays a norm, development, and standard setting role in the protection of sexually and gender diverse peoples at the UN.⁸ Through analysing the human rights interpretation offered by the IE, I explore the multiple and complex ways in which non-Western sexually and gender diverse subjects are considered, marginalised, and excluded in the reports. I also assess the IE's approach to the forms of

⁵ See Gayathri Gopinath *Impossible Desires: Queer Diaspora and South Asian Public Cultures* (Duke University Press 2005); Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011); John C. Hawley (eds) *Postcolonial, queer: Theoretical Intersection* (State University of New York Press 2001).

⁶ Ibid.

⁷ UNHRC 'Resolution Adopted by the Human Rights Council on 30 of June 2016 'Protection against violence and discrimination based on sexual orientation and gender identity'' [2016] UN.Doc. A/HRC/RES/32/2.

⁸ Elvira Dominguez-Redondo 'Human Rights through the Backdoor: The Contribution of Special Procedures to the Normative Coherence and Contradictions of International Human Rights Law' in Carla M. Buckley, Alice Donald and Phillip Leach (eds) *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill 2016) 548; Christophe Golay, Claire Mahon and Ioana Cismas 'The Impact of UN special procedures on the development of economic, social and cultural rights' [2011] 15.2 The International Journal of Human Rights 299.

oppression of non-Western sexually and gender diverse subjects identified by queer postcolonial approaches.

1.1 Research Questions

With the above in mind, this thesis responds to the following research questions:

What insights do queer postcolonial approaches offer regarding the nature, content, and boundaries of human rights protection for non-Western sexually and gender diverse peoples?

This question is answered throughout the different chapters of this thesis. Chapters 2 and 3 offer accounts of queer theory and postcolonial theory, and in doing so, identify insights from those theories that can be applied to critically assess the legal reproduction of dominant sexual, gender, and racial norms. Chapter 4 draws on existing research, using queer and postcolonial theories to identify the discourses that, at the intersection of race, sexuality, and gender, create additional structures of oppression that affect non-Western sexually and gender diverse peoples. Chapter 5 considers some of the institutional and political boundaries impacting the work of the IE, which in turn shape (and limit) the ability of the IE to act as an effective guardian of non-Western sexually and gender diverse peoples. Chapters 6 and 7 apply the queer postcolonial insights identified in chapter 4 to analyse the reports by the IE. The analysis offers insight into the nature, content, and boundaries of the human rights protection as established by the mandate holder.

What insights into the oppression of sexually and gender diverse peoples can be found in existing research using both queer and postcolonial theories and applied to the analysis of international law?

Chapter 4 explores this question in depth by examining studies that used queer and postcolonial theories to analyse the situation of non-Western sexually and gender diverse subjects. From these different studies, this chapter offers insights into the oppression, marginalisation, and exclusion of non-Western sexual subjects within dominant discourses. Moreover, this chapter identifies some key changes in the analysis of sexuality and gender

that aimed to remedy the discursive invisibility of non-Western sexually and gender diverse subjects.

What institutional challenges and opportunities does the Independent Expert face?

To answer this, chapter 5 examines the IE in more detail. In this chapter I consider the institutional background to the IE and the political nature of the adoption of the mandate. I also discuss the contrast between the IE's limited resources and the urgency in addressing the systematic and widespread violence and discrimination committed against sexually and gender diverse people globally.

What insight does a queer postcolonial analysis offer to the content and boundaries of the Independent Expert's human rights interpretations in the reports of the mandate?

The analysis of chapter 6 and 7 aims to answer this question. Through the application of queer postcolonial approaches, these two chapters examine the operation of dominant discursive structures within the analysis by mandate holders. In this chapter I also discuss the implication of the latter for the application of human rights law to non-Western sexually and gender diverse peoples.

1.2 Original Contribution

One of the principal contributions of this thesis is the first systematic application of insights drawn from queer postcolonial theories to the analysis of international human rights law. More specifically, there is yet to be any postcolonial queer analysis of the work of the IE. The literature exploring the application of queer and postcolonial theories has not focused on international human rights law as an area where the exclusion and oppression of non-Western gender diverse people needs to be identified and upended.⁹ Typically, academic works on queer theory and postcolonial theory offer perspectives on the convergence between imperialism, race, sexuality, and gender in different contexts. Some of these approaches explore international activism, but do not discuss international human rights law

⁹ Gopinath, Aydemir and Hawley (n 5).

documents or decisions made by human rights bodies specifically.¹⁰ Similarly, there is research using queer theory, postcolonial theory, and other critical perspectives such as feminism, that critique international human rights law in general, but not with a focus on the IE.¹¹ Again, these contributions use insights from queer theory and postcolonial analysis but do not offer a review of existing queer postcolonial approaches. While there are some reviews of the discourse established by UN human rights bodies on the rights of sexually and gender diverse peoples, they do not apply a critical queer postcolonial framework, nor do they examine the IE.¹² Moreover, there have been some scholarly analyses of the adoption of the mandate of the IE¹³ but there is no general study of the special procedure. Lastly, there have been some references to, and deconstructive analyses of, parts of the reports by the IE.¹⁴ However, this research has considered only a fraction of the reports together with other human rights documents, and is focused on the definition of gender identity rather than on the entirety of the human rights interpretations offered by the IE.¹⁵

In light of the above, the original contribution of this thesis is threefold, exploring theory, institutional frameworks, and human rights interpretations. First, this thesis examines the existing literature articulating queer postcolonial theory, and in so doing identifies key analytical insights that can be used to examine international human rights law. Second, this thesis offers an important contribution via the first holistic exploration of the IE, including

¹⁰ Aydemir (n 5) 11; Wahab (n 2); Rahman (n 2); Rao (n 2); Leticia Sabsay 'The emergence of the other sexual citizen: orientalism and the modernisation of sexuality' [2012] 16.5-6 *Citizenship Studies* 605; Jasbir Puar, Amit Rai, 'Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots' [2002] 72 *Social Text* 117; Jasbir Puar 'Rethinking homonationalism' [2013] 45.02 *International Journal of Middle East Studies* 336; Fatima El-Tayed "Gays who cannot properly be gay': Queer Muslims in the neoliberal European city' 2012] 19 (1) *European Journal of Women's Studies* 79.

¹¹ Ratna Kapur *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing 2018); Ratna Kapur 'In the Aftermath of Critique We Are Not in Epistemic Free Fall: Human Rights, the Subaltern Subjects and Non-liberal Search for Freedom and Happiness' [2014] 25 *Law and Critique* 25; Ratna Kapur 'De-radicalising the rights claims of sexual subalterns through "tolerance"' in Robert Leckey and Kim Brooks (eds) *Queer Theory: Law, Culture and Empire* (Routledge: London 2010) 39.

¹² Dominic McGoldrick 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' [2016] 16 *Human Rights Law Review* 613; Ignacio Saiz 'Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN' [2004] 7.2 *Health and Human Rights* 48, 57.

¹³ Voss (n 1); Eduard Jordaan 'The Challenge of Adopting Sexual Orientation Resolutions at the UN Human Rights Council' [2016] 8 *Journal of Human Rights Practice* 298.

¹⁴ Sandra Duffy 'Contested Subjects of Human Rights: Trans and Gender-variant Subjects of International Human Rights Law' [2021] 84.5 *MLR* 1.

¹⁵ *Ibid.*

examining the institutional framework and specificity of the human rights mechanism. Thirdly, and building on the previous two contributions, this thesis applies different insights drawn from multiple queer postcolonial approaches to the majority of the reports by both mandate holders of the post of the IE. In doing so this thesis offers new insights into the protection of non-Western sexually and gender diverse peoples under international law. These insights include identifying the operation of orientalist and heteronormative approaches to sexual and gender diversity, lack of acknowledgement and representation of non-Western sexual and gender diversity, and the marginalisation of non-Western people in the analysis of sexual and gender-based oppression.

2. Research Contexts: Achieving Freedom from Oppression for Non-Western Sexually and gender diverse Peoples

Important motivation and background to this thesis, is grappling with the widespread and systematic nature of violence and discrimination committed against sexually and gender diverse people all over the world. Following I give a brief introduction to the most reported forms of violence and discrimination that will be considered more in-depth in chapter 5 on the grounds for establishing the mandate of the IE. To begin 71 jurisdictions criminalise same-sex relationships between men, and 43 of them also criminalise those between women.¹⁶ In 11 of these countries death penalty is a legal possibility if somebody is found guilty of same-sex relations.¹⁷ At least 26 countries target gender diverse people through criminal legislation that penalises ‘cross-dressing’, ‘impersonation’, and ‘disguise’ or public vagrancy laws.¹⁸ Criminalisation places sexually and gender diverse people outside the protection of the law leading to a range of human rights abuses including arbitrary arrests and the infliction of intrusive practices such as ‘anal examinations’.¹⁹ Criminalisation further legitimises private forms of violence including familial violence, forced marriages and rape. Penal legislation prevents access to services and institutions such as healthcare.²⁰ Violence and discrimination committed against sexual, and gender diverse people are not exclusive to states that

¹⁶ Human Dignity Trust ‘LGBT and the Law’ < <https://www.humandignitytrust.org/lgbt-the-law/>> accessed 7 of March 2022.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

criminalise same-sex relations and gender identity. Targeted killings, beatings, rape and sexual violence are reported all over the world.²¹ Countries such as Brazil and the US (neither criminalise same-sex activity) top the murder rate statistics against trans people, with trans women of colour being particularly victimised.²² Despite being victims of violence and discrimination, sexually and gender diverse people are more likely to face difficulties when interacting with law enforcement.²³ Reports point to a lack of effective investigation and prosecution of acts of violence and discrimination committed against sexually and gender diverse people and acts of discrimination, harassment and violence committed by law enforcement officials towards these groups.²⁴

Discrimination and stigma are likely to impact sexually and gender diverse people in other areas of their lives as well. Discrimination, bullying, and exclusion are reported in the context of education, employment, and housing. Sexually and gender diverse people are trapped in cycles of inequality and poverty which are often compounded by family and community rejection.²⁵ Moreover, sexually and gender diverse people are likely to face discrimination, violence and abuse in the healthcare sector including continued pathologisation, subjection

²¹ UNOCHR 'Born Free and Equal' (2019) UN Doc. HR/PUB/12/06/Rev.1, 13, <<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>> accessed 7 of March 2022.

²² Ester Pinheiro 'Brazil continues to be the country with the largest number of trans people killed' (translated by Ana Paula Rocha, Brasil de Fato 23 January 2022) <<https://www.brasildefato.com.br/2022/01/23/brazil-continues-to-be-the-country-with-the-largest-number-of-trans-people-killed>> accessed 16 of February 22; Transrespect Versus Transphobia (TVT) 'Trans Murder Monitoring Update- Trans Day of Remembrance 2021' (TVT 11th of November) < <https://transrespect.org/en/tmm-update-tdor-2021/#>> last accessed 16 of February 2022.

²³ UNOCHR 'Born Free and Equal' (2019) UN Doc. HR/PUB/12/06/Rev.1, 19, <<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>> accessed 7 of March 2022.

²⁴ Ibid; Human Dignity Trust 'Transgender people say law enforcement officials are main perpetrators of harassment violence and abuse against them' (*Human Dignity Trust* 19th of May 2019) < <https://www.humandignitytrust.org/news/transgender-people-say-law-enforcement-officials-are-main-perpetrators-of-harassment-violence-and-abuse-against-them/>> accessed 16 of February 2022.

²⁵ UNOCHR 'Born Free and Equal' (2019) UN Doc. HR/PUB/12/06/Rev.1, 61--66, <<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>> accessed 7 of March 2022; Graeme Reid 'LGBTQ Inequality and Vulnerability in the Pandemic: Around the world, LGBTQ people are more vulnerable to the pandemic – especially where their status intersects with poverty' (*Human Rights Watch* 18 June 2020) < <https://www.hrw.org/news/2020/06/18/lgbtq-inequality-and-vulnerability-pandemic#>> accessed 16 of February 2022; Brodie Fraser, Nevil Piers, Elinor Chisholm, Hera Cook 'LGBTIQ+ homelessness: A review of the literature' [2019] 16 (15) *International Journal of Environmental Research and Public Health* 1677; International Labour Organisation (ILO) 'Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work. Results of the ILO's PRIDE Project' (ILO 2016) < https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_481575.pdf> accessed 16 of February 2022.

to practices aimed at ‘correcting’ their sexual and gender diversity such as ‘normalising’ surgeries for intersex individuals and conversion therapies.²⁶ Trans and gender diverse people are often forced to undergo medical evaluations and treatments to be recognised according to their self-declared gender.²⁷ In addition to the experiences of violence and discrimination, sexually and gender diverse people are often prevented from being able to organise and participate in political processes to better their collective conditions.²⁸ The latter takes different forms such as legal bans against ‘gay-propaganda’²⁹, police surveillance of sexually and gender diverse activist, and raids of the activists groups premises,³⁰ and policing of online platforms and apps.³¹ Censorship of the media and online platform including blocking sites with content for sexually and gender diverse peoples are other examples.³²

In sum, sexually and gender diverse people are subjected to violence and discrimination in a widespread and systematic manner. Such acts of violence and discrimination are committed by a range of actors, including private individuals, families, communities as well as public ones such as law enforcement, education authorities and health care professionals. Violence and discrimination are also committed in a range of contexts affecting sexually and gender diverse people’s ability to live freely without fear or of being excluded and marginalised as well as impacting their access to goods and services such as healthcare, employment, and political participation. Moreover, sexually and gender diverse people are more likely to experience

²⁶ UNOCHR ‘Born Free and Equal’ (2019) UN Doc. HR/PUB/12/06/Rev.1, 35-38, <<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>> accessed 7 of March 2022.

²⁷ UNOCHR ‘Born Free and Equal’ (2019) UN Doc. HR/PUB/12/06/Rev.1, 67, <<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>> accessed 7 of March 2022.

²⁸ Outright International, The Citizen Lab and OONI ‘NO ACCESS. LGBTIQ Website Censorship in Six Countries’ (*Outright International, The Citizen Lab and OONI* 10 of August 2021) <<https://outrightinternational.org/content/no-access-lgbtq-website-censorship-six-countries>> accessed 16 of February 2022.

²⁹ Elene Kurtanidze ‘Dismantling LGBT+ rights as a means of control in Russia’ (Perspectives 30 April 2021) <<https://freedomhouse.org/article/dismantling-lgbt-rights-means-control-russia>> accessed 16 of February 2022.

³⁰ Emmanuel Akinwotu ‘Ghanaian LGBTQ+ centre closes after threats and abuse’ (*The Guardian* 25 of February 2021) <<https://www.theguardian.com/global-development/2021/feb/25/lgbtq-ghanaians-under-threat-after-backlash-against-new-support-centre>> accessed 16 of February 2022.

³¹ Outright International, The Citizen Lab and OONI ‘NO ACCESS. LGBTIQ Website Censorship in Six Countries’ (*Outright International, The Citizen Lab and OONI* 10 of August 2021) <<https://outrightinternational.org/content/no-access-lgbtq-website-censorship-six-countries>> accessed 16 of February 2022.

³² Ibid.

poverty and worse health outcomes due to the social inequality and stigma they face.³³ The COVID pandemic has increased some of these pre-existing inequalities. ‘Stay at home’ and isolation directives have led to an increase of familial violence.³⁴ Social isolation of sexually and gender diverse people has increased as the latter often rely on informal networks for support.³⁵ Sexually and gender diverse people are more likely to be affected by the economic challenges of the pandemic. They tend to be employed in the informal sector or sectors most affected by the pandemic such as hospitality and entertainment industry.³⁶ Restrictions on healthcare services have resulted in the deprioritisation of healthcare services such as hormone treatments for trans and gender diverse people.³⁷ COVID has also been an excuse for law enforcement and officials to target sexually and gender diverse people under the guise of ‘public health’.³⁸ Lastly, it is difficult to grasp the full extent of the violence and discrimination committed against sexually and gender diverse people because of lacking up to date empirical knowledge of the circumstances on the ground.³⁹

In light of the widespread and systematic nature of the violence and discrimination committed against sexually and gender diverse people all over the world, this thesis focuses on international human rights law as a tool for challenging and remedying the latter. Historically sexually and gender diverse peoples have been excluded from human rights

³³ Jorge Medina-Martínez, Carlos Saus-Ortega, María Montserrat Sánchez-Lorente, Eva María Sosa-Palanca, Pedro García-Martínez, and María Isabel Mármol-López ‘Health Inequities in LGBT People and Nursing Interventions to Reduce Them: A Systematic Review’ [2021] 18 (22) *Int J Environ Res Public Health* 11801.

³⁴ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Covid-19’ [2020] UN.Doc. A/75/258, ¶11-14, p. 4-6.

³⁵ *Ibid*, ¶12, p.5.

³⁶ *Ibid*, ¶33-34, p.11.

³⁷ *Ibid*, ¶29, p. 10; International Commission of Jurists (ICJ) ‘Living Like People Who Die Slowly: The Need for Right to Health Compliant Covid-19 Responses’ (ICJ September 2020) 63 < <http://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>> accessed 16 of February 2022.

³⁸ International Commission of Jurists (ICJ) ‘Living Like People Who Die Slowly: The Need for Right to Health Compliant Covid-19 Responses’ (ICJ September 2020) 63 < <http://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>> accessed 16 of February 2022.

³⁹ Transrespect Versus Transphobia (TVT) ‘Trans Murder Monitoring Update- Trans Day of Remembrance 2021’ (TVT 11th of November) available on < <https://transrespect.org/en/tmm-update-tdor-2021/#>> last accessed 16 of February 2022; Mark Bell ‘Analysis and comparative review of equality data collection practices in the European Union: Data collection in relation to LGBTI people’ (*European Union 2017*) < file:///Users/isabel/Downloads/report_on_equality_data_and_lgbt_people_7E662C39-037D-E4A0-3B0E67E7ADBFD052_45790.pdf> accessed 16 of February 2022; The World Bank ‘sexual orientation and gender identity’ < <https://www.worldbank.org/en/topic/sexual-orientation-and-gender-identity#1>> accessed 16 of February 2022.

protection.⁴⁰ During the first 40 years of the modern human rights regime none of the international human rights documents referred to violations committed against sexually and gender diverse peoples.⁴¹ Furthermore, none of the human rights monitoring bodies referred to the rights of these peoples when interpreting and defining state obligations under international law. Not until 1981 did the European Court of Human Rights offer some protection for certain sexually diverse peoples. In the 1981 case of *Dudgeon v UK* the European Court decided that criminalisation of homosexuality violated the right to privacy.⁴² It took another 15 years for one of the UN human rights bodies to address the same question: in 1994 the Human Rights Committee (responsible for monitoring the International Covenant on Civil and Political Rights) held in *Toonen v. Australia* that criminalisation of homosexuality violates the right to privacy and the right to non-discrimination.⁴³ At the time, the decision in *Toonen* was hailed as ‘the first juridical recognition of gay rights on a universal level’, and it is said to have brought hope that human rights could become a vehicle to end oppression against sexually and gender diverse peoples.⁴⁴ Since *Toonen*, the rights of sexually and gender diverse peoples have slowly become integrated within the international regime through the work of the human rights monitoring bodies⁴⁵ as well as activism by civil society and states in international institutions.⁴⁶ Furthermore, activists and states have increasingly brought the protection of these groups to international forums, culminating in the establishment of a specialised human rights monitoring body on the topic.⁴⁷ In 2016 the UN Human Rights Council created the mandate of the IE on the protection against violence and discrimination based on sexual orientation and gender identity.⁴⁸ The IE is responsible for assessing the protection and promotion of the rights of sexually and gender diverse people all over the world.⁴⁹ The work of the IE is the central focus of this thesis.

⁴⁰ Saiz (n 12), 49.

⁴¹ Ibid.

⁴² *Dudgeon v UK* (1981) 4 EHRR 149.

⁴³ *Toonen v. Australia*, Communication No. 488/1992, U.N.Doc. CCPR/C/50/D/488/1992(1994).

⁴⁴ Saiz (n 12) 49.

⁴⁵ Ibid.

⁴⁶ Kollman and Waites (n 1) 1-17.

⁴⁷ Voss (n 1); Jordaan (n 13).

⁴⁸ UNHRC ‘Resolution Adopted by the Human Rights Council on 30 of June 2016 ‘Protection against violence and discrimination based on sexual orientation and gender identity’’ [2016] UN.Doc. A/HRC/RES/32/2.

⁴⁹ Ibid.

Notwithstanding the creation of the mandate of the IE, the inclusion of sexually and gender diverse peoples within the international human rights regime is still subject to much political and intellectual debate.⁵⁰ As one commentator has put it, ‘the rights of sexually and gender diverse peoples are perhaps the most contentious issue in contemporary human rights.’⁵¹ Non-Western states and commentators tend to attack human rights protection of sexually and gender diverse peoples, claiming that these are ‘Western impositions’.⁵² At the same time, Western states and activists have often been quick in using lack of protection of sexual and gender-based rights to demonise the non-West, and in this way arguably falling into well-known colonial tropes of pitting the apparent ‘modern and ‘civilised’ West against its ‘backwards’ other.⁵³ Moreover, while sexual and gender diversity have existed in virtually all cultures, their transformation into individual personal identities is a relatively new phenomenon, and this is the result of specific historic-political developments in the West.⁵⁴ The limitations of categories such as ‘gay’ or ‘lesbian’, which are used in much international human rights discourse to represent the experiences of gender and sexuality all over the world, have been considered by many commentators.⁵⁵ Some commentators have gone so far as to assert that human rights impose these categories on non-Western people, creating demands for identities where they have not previously existed.⁵⁶ Others have questioned the ability of the human rights framework to achieve real freedom for sexually and gender diverse peoples.⁵⁷ These critics are sceptical of human rights, arguing that they might reinforce rather than challenge oppressive structures against sexually and gender diverse people.⁵⁸ Notably in relation to sexually and gender diverse people, conservative and radical approaches converge in their questioning of the application of human rights to non-Western people.⁵⁹ Only the

⁵⁰ Voss (n 1); Chase (n 1); Kollman and Waites (n 1).

⁵¹ Chase (n 1).

⁵² Ibid 704; Rao (n 2) ; Voss (n 1); Jordaan (n 13).

⁵³ Wahab (n 2); Rahman (n 2); Rao (n 2)

⁵⁴ Michel Foucault *The History of Sexuality, Volume 1. An Introduction* (Translated from French by Robert Hurley, Phanteon Books 1978).

⁵⁵ Aeyal Gross ‘Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation’ [2007] 101 Proceedings of the Annual Meeting (American Society of International Law) 129.

⁵⁶ Joseph Massad *Desiring Arabs* (Chicago University Press 2007) 163, 174; Rahul Rao *Third World Protests: Between Home and the World* (OUP 2010) 176.

⁵⁷ Ratna Kapur *Gender, Alterity and Human Rights: Freedom in a fishbowl* (Edward Elgar Publishing 2018) 1.

⁵⁸ Matthew Waites ‘Critique of ‘sexual orientation’ and ‘gender identity’ in human rights discourse: global queer politics beyond the Yogyakarta Principles’ [2009] 15.1 Contemporary Politics 137.

⁵⁹ Chase (n 1).

justification differs; for conservatives human rights are too radical, whilst for post-structuralists they are not radical enough.⁶⁰

The conflicts around the recognition of sexually and gender diverse subjects point to broader questions about the legitimacy of human rights to serve as a source for sustained political change.⁶¹ Human rights can be a matter of problematic top-down impositions, as some of the research outlined above have suggested. However, as a framework that aims at curtailing state power, it was previously successfully used by marginalised groups to advance socio-political, economic, and cultural empowerment.⁶² The question of how to best protect sexually and gender diverse peoples from oppression depends on the different historical, socio-political, cultural, and economic contexts. Ratna Kapur argues that sexually and gender diverse peoples and others should actively delink from a human rights project that is fundamentally limited by Western Eurocentric liberal epistemological frameworks.⁶³ Furthermore, Kapur contends that human rights do not secure real freedom for non-Western sexually and gender diverse subjects, but rather that they are normalising, that is, used by governments to secure people's compliance with certain (neoliberal, heterosexual and euro-American) norms.⁶⁴ On the other hand, Anthony Tirado Chase believes that it is possible to reconstruct human rights to become relevant to everyday struggles for marginalised peoples.⁶⁵ Chase argues that, in reality, human rights can gain validity from the everyday struggles of marginalised peoples who have invoked them to gain empowerment.⁶⁶ Thus, human rights law can be reconceptualised and expanded by the work of those local actors on the ground engaging with the international human rights framework, international institutions and transnational activist networks.⁶⁷ For Chase, it is within these local-global interactions that human rights for sexually and gender diverse people can be reconstructed to operate not as an imposition of Western prescriptions, but as relevant tools to challenge oppression by sexually and gender diverse subjects.⁶⁸ The IE forms part of this network of

⁶⁰ Chase (n 1).

⁶¹ Ibid.

⁶² Ibid.

⁶³ Kapur (n 57) 1.

⁶⁴ Ibid 1-24.

⁶⁵ Chase (n 1).

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

actors operating both at international and local level to protect human rights, and as explored further in chapter 5, has potential to engage in redefining human rights to be more relevant to local populations.

Outside the strict human rights law arena, structures regulating sexuality, gender and race are intimately intertwined. Theorists have attempted to address questions of oppression, exclusion, and marginalisation through examining the intersection of these structures of sexuality, gender and race.⁶⁹ Approaches that draw on queer and postcolonial theories (or what I will call queer postcolonial approaches) are explored in depth in chapter 4, where the goal is to show how such approaches can cast light on specific ways in which non-Western sexually and gender diverse people are excluded in international discourse.⁷⁰ Queer postcolonial approaches identify how discursive structures of oppression go unnoticed in the analysis that focuses exclusively on sexuality or gender alone.⁷¹ Through identifying the multiple ways in which sexuality, gender, and race are central to each other's construction, queer postcolonial approaches identify key structures of oppression that need to be dismantled to ensure freedom for all sexually and gender diverse subjects.⁷² By integrating both queer and postcolonial perspectives, queer postcolonial approaches bridge the gap between the rival approaches outlined above that construct the international battles about sexually and gender diverse people as necessarily negative or positive. Moreover, queer

⁶⁹ See Gopinath, Aydemir, Hawley (n 5).

⁷⁰ Murat Aydemir 'Introduction' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 1; William J. Spurling 'Broadening Postcolonial Studies/Decolonising Queer Studies' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 185; John C. Hawley 'Introduction' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 1.

⁷¹ See for example Murat Aydemir 'Introduction' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 1; Spurlin (n 45); Ann Laura Stoler *Race and the education of desire: Foucault's History of Sexuality and the colonial order of things* (Duke University Press 1995); Scott Long 'Unbearable witness: how Western activists (mis) recognize sexuality in Iran' [2009] 15.1 *Contemporary Politics* 119; Puar and Rai (n 10) ; Puar (n 10); Jarrod Hayes 'Queer Resistance to (Neo-) colonialism in Algeria' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 79, 88; Rodrick A. Ferguson *Aberrations in Black: Toward a Queer of Colour Critique* (University of Minnesota Press: Minneapolis 2004).

⁷² See for example Hema Chari 'Colonial Fantasies and Postcolonial Identities' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 277; Gopinath (n 5); Aniko Imre 'Lesbian Representation and Postcolonial Allegory' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi & New York 2011) 185; Ann Laura Stoler *Race and the education of desire: Foucault's History of Sexuality and the colonial order of things* (Duke University Press 1995); Ferguson *Aberrations in Black: Toward a Queer of Colour Critique* (University of Minnesota Press: Minneapolis 2004).

postcolonial approaches propose mechanisms to remedy the general invisibility and exclusion of non-Western subjects within the dominant Western discourses, which for these purposes would include international human rights law discourses.⁷³ Re-routing the analysis of oppression from the universal to the local, and from victimisation to the celebration of difference, queer postcolonial approaches offer analytical alternatives that can exceed Eurocentric-liberal underpinnings of international human rights law. By bringing these approaches to the analysis of the IE, I aim to offer new insights into the nature, content, and boundaries of international human rights law.

It is against the backdrop of these struggles with human rights as a tool for challenging the oppression of sexually and gender diverse peoples that I focus on the work of the IE on protection against violence and discrimination based on sexual orientation and gender identity. While chapter 5 explores the IE as a mechanism of human rights protection in more depth, for the purpose of the introduction, it is worth noting that the IE is the only specialised human rights body for sexuality and gender diversity under the auspices of the UN.⁷⁴ Moreover, as a special procedure, the IE faces some unique challenges as well as opportunities in the application of human rights prescriptions to non-Western sexually and gender diverse people. One of the primary challenges is that the IE is, as all special procedures, dependent on state support to secure the continuation of the mandate.⁷⁵ Another challenge is the limited resources available to the IE when implementing the mandate in light of the widespread and systematic nature of violence and discrimination committed against sexually and gender diverse people. Nonetheless, the IEs enjoy a great deal of flexibility in implementing the mandate and setting the direction for the human rights

⁷³ See for example Malreddy Pavan Kumar '(An)other Way of Being Human: 'indigenous' alternatives (s) to postcolonial humanism' [2011] 32.9 Third World Quarterly 1557; Ratna Kapur 'De-radicalising the rights claims of sexual subalterns through 'tolerance'' in Robert Leckey and Kim Brooks eds. *Queer Theory: Law, Culture and Empire* (Routledge: London 2010) 39; Anikó Imre 'Lesbian Representation and Postcolonial Allegory' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 185; Ryan D. Fong 'Weaving a Different Kind of Tartan: Musicality Spectrality and Kinship in Jackie Kay's *Trumpet*' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 243, 247.

⁷⁴ UNHRC 'Resolution Adopted by the Human Rights Council on 30 of June 2016 'Protection against violence and discrimination based on sexual orientation and gender identity'' [2016] UN.Doc. A/HRC/RES/32/2.

⁷⁵ Jane Connor, 'Special Procedures: Independence and Impartiality' in Aoife Nolan, Rosa Freedman and Therese Murphy (eds) *The United Nations Special Procedures System* (Brill 2017) 54.

mechanism.⁷⁶ To date, two mandate holders have given greater depth to the international understanding of violence and discrimination committed against sexual and gender diverse people.⁷⁷ The mandate holders have drawn attention to certain areas of violence and discrimination such as pathologisation and the practice of so-called ‘conversion therapies’ aimed at ‘curing’ sexual and gender diversity.⁷⁸ Furthermore, the IE relies on the cooperation of non-governmental organisations (‘NGOs’) and civil society to inform the work under the mandate, which opens the scope for the consideration of a range of voices and commentaries under the mandate.⁷⁹ As a special procedure, the IE also visits other countries. These visits allow the mandate holder to experience the reality of the human rights situation on the ground and engage with the local population⁸⁰ creating opportunities for interacting with non-Western sexually and gender diverse peoples beyond dominant narratives that exclude them. Stepping back, it seems reasonable to suggest that the IE has an important bridging role to play in any attempt to re-imagine human rights in such a way that categorical top-down impositions are avoided.

2.1 Limits to this Research

Theoretical approaches to gender and sexuality are as varied as the subjects they seek to represent. In this thesis, the focus is on queer postcolonial theories, since these offer a highly effective way to bring into focus non-Western sexually and gender diverse subjects, or at least

⁷⁶ Jane Connor, ‘Special Procedures: Independence and Impartiality’ in Aoife Nolan, Rosa Freedman and Therese Murphy (eds) *The United Nations Special Procedures System* (Brill 2017) 54; Joanna Naples-Mitchell ‘Perspectives of the UN Special Rapporteurs on their role: inherent tensions and unique contributions to human rights; [2011] 15:2 *The International Journal of Human Rights* 232.

⁷⁷ ARC International ‘Appointing an Independent Expert on Sexual Orientation and Gender identity: An Analysis of Process Result and Implications’ (2016) ><http://arc-international.net/research-and-publications/research-and-analysis/>> accessed 20 February 2022 10.

⁷⁸ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172; UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Legal recognition of gender identity and depathologisation’’ [2018] UN.Doc. A/73/152.; UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Social inclusion’’ [2019] UN.Doc. A/74/181; UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Practices of so-called “conversion therapy”’ [2020] UN.Doc. A/HRC/44/53.

⁷⁹ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’’ [2021] UN.Doc. A/HRC/47/27, ¶16, p.4.

⁸⁰ Citing former Special Rapporteur on Nigel Rodley Felice D. Gaer ‘Picking and Choosing? Country Visit by Thematic Special Procedures’ in in Aoife Nolan, Rosa Freedman and Therese Murphy (eds) *The United Nations Special Procedures System* (Brill 2017) 89.

so I argue. It is worth emphasising that this is not necessarily the only effective way to centre non-Western sexually and gender diverse subjects within international human rights law. There might be other perspectives, in particular postcolonial feminism⁸¹ and decolonial queer approaches,⁸² which would have been interesting to explore in the context of the IE. Yet, neither queer nor postcolonial theories are fixed analytical frameworks, but rather they are composed of numerous perspectives that have in common the analysis of the multiple and complex intersections between race, gender, and sexuality. The analytical framework established in chapter 4 is constructed by a range of different approaches engaging both queer and postcolonial theories. This thesis does not purport to offer an all-encompassing survey of queer theory, postcolonial theory, or queer postcolonial approaches. Rather, it seeks (in chapter 4) to articulate a queer postcolonial approach that can be used (in chapters 6 and 7) to analyse the work of the IE. For the purposes of this thesis, the queer postcolonial approach expounded in chapter 4 captures important queer postcolonial insights, but it must be stressed that these insights themselves are no more than fragments of insight into the complex and multiple historical and contemporary colonial-imperial contexts in which sexual and gender subjects live. Nevertheless, queer postcolonial approaches provide tools to identify the establishment and reproduction of sexual, gender and racial structures affecting the visibility and invisibility of non-Western sexually and gender diverse people in universal discourses such as human rights.

Similarly, the IE is not the only human rights body engaging with the rights of sexually and gender diverse peoples. Prior to the adoption of the mandate of the IE, both UN treaty bodies and other special procedures made decisions on the rights of these groups.⁸³ For example, the UN Human Rights Committee mentioned above, the Committee on the Rights of the Child, Committee on the Elimination of Discrimination against Women, the Special Rapporteur on torture, and the Special Rapporteur on the rights of migrants all have included sexually and gender diverse people in their interpretation of rights and will continue to do so even while

⁸¹ Ritu Tyagi 'Understanding Postcolonial Feminism in relation with Postcolonial and Feminists Theories' [2014] Vol. 1.2 International Journal of Language and Linguistics 45.

⁸² See for example Pedro Paulo Gomez Pereira 'Reflecting on the Decolonial Queer' [2019] 25.3 GLQ 403.

⁸³ Saiz (n 12) 49.

the IE exists.⁸⁴ Regional human rights bodies, in particular the European Court of Human Rights and the Inter-American Court of Human Rights, are at the forefront of expanding and developing the rights of sexually and gender diverse people under their respective jurisdictions.⁸⁵ Notably, the mandate holder has often discussed and included reference to the decisions by all these bodies in the reports subjected to analysis in chapters 6 and 7. While this thesis will include some discussion of references by the IE to decisions by other human rights bodies, it is noteworthy that this thesis does not propose to offer in depth and complete engagement with the work of these bodies *per se*. Thus, there might be human rights interpretations which, if subjected to the same queer postcolonial analysis, would render different insights into the human rights of sexually and gender diverse peoples than those identified in this research. Nevertheless, this research can serve as a starting point for comparing decisions by these different human rights bodies, as it offers a systematic review of all the human rights analysis of the IE. To date, there is no research as far as I am aware that has done so, either in general or from a queer postcolonial perspective.

Lastly, this research offers an overall assessment of the treatment of sexual and gender diversity in the reports of the IE by focusing on specific analytical points that emerge from the application of queer postcolonial approaches. In the eight reports analysed, the IE touches upon a range of topics, makes numerous assessments, and analyses and identifies subjects,

⁸⁴ UNOCHR 'Born Free and Equal' (2019) UN Doc. HR/PUB/12/06/Rev.1 available at:

<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>; Sandra Duffy 'Contested Subjects of Human Rights: Trans and Gender-variant Subjects of International Human Rights Law' [2021] 84.5 MRL 1.

⁸⁵ See for example Paul R. Johnson *Homosexuality and the European Court of Human Rights* (Routledge 2012); Loveday Hodson 'Sexual Orientation and the European Convention on Human Rights: What of the L in LGBT?' [2019] 23:3 Journal of Lesbian Studies 383; Francesca Romana Ammaturo 'The Council of Europe and the creation of LGBT identities through language and discourse: a critical analysis of case law and institutional practices' [2019] 23:4 The International Journal of Human Rights 575; Damian A. Gonzalez-Salzberg 'An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of Ap, Gar, con and Nicot v France' [2018] 81 (3) Modern Law Review 526; Jolane T Lauzon 'Parental Rights for Lesbian, Gay, Bisexual and Transsexual Persons: A Comparison Between the European and Inter-American Systems of Human Rights' [2019] 49 Revue générale de droit 207; Nicolás Carrillo-Santarelli 'Gender Identity, and Equality and Non-Discrimination of Same Sex Couples' [2018] 112.3 The American Journal of International Law 479; Laura Clérico 'Discriminación por orientación sexual y derechos de la seguridad social en la jurisprudencia de la Corte Interamericana de Derechos Humanos (Corte IDH) y del Tribunal Europeo de Derechos Humanos (TEDH) Una historia de divergencias?' [2019] 47 Revista de la Facultad de Derecho available at: <http://dx.doi.org/10.22187/rfd2019n47a5>; Intern-American Commission on Human Rights 'Recognition of the Rights of LGBTI Persons' [2018] Inter-American Commission on Human Rights available at: <http://www.oas.org/en/iachr/reports/pdfs/LGBTI-RecognitionRights2019.pdf>.

types of violence and oppression, and proposes solutions.⁸⁶ This thesis attempts to address all these systematically and in as much depth as possible. However, because the analysis is oriented by queer postcolonial insights that examine underpinning structures of understanding, there will be areas of the reports that are considered less relevant. For example, the parts of the report dedicated to highlighting measures taken by states or other bodies on the topic of sexually and gender diverse peoples, or some more specific references to individual acts of violence, have not been considered in depth in the analysis.⁸⁷ For similar reasons the 2020 Covid report by the mandate holder has not been analysed in chapters 6 or 7.⁸⁸ However, there are some references to COVID-19 and the report by the IE in chapters 5 and 8. Nonetheless, because of the newness of this research in exploring all these topics by the IE, the analysis conducted and conclusions reached in chapters 5, 6, 7 and 8 lay the groundwork for further research, including covering points left unexplored in this thesis.

2.2 Key Terms

In this research the following terms will be used:

a) Queer postcolonial approaches: queer postcolonial approaches are used to refer to the range of analytical engagements drawing on queer theory and postcolonial theory to examine

⁸⁶ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/72/172; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/HRC/35/36.; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43.; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Legal recognition of gender identity and depathologisation'' [2018] UN.Doc. A/73/152; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity'' [2019] UN.Doc. A/HRC/41/45.; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Practices of so-called "conversion therapy"' [2020] UN.Doc. A/HRC/44/53; Gender identity: UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27.

⁸⁷ Ibid.

⁸⁸ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Covid-19'' [2020] UN.Doc. A/75/258.

oppression of non-Western sexually and gender diverse peoples at the intersection of imperialism, race, sexuality, and gender.

b) Sexually and gender diverse individuals/groups/peoples is used in this thesis to refer to all persons that are in one way or another affected by structures of Western patriarchal heteronormativity. While there are a range of other terms used in the literature, such as lesbian, gay, bisexual, trans, sexual orientation, gender identity, queer, and postcolonial queer, I use diversity to be as inclusive and open to different identities and experiences of sexuality and gender as possible. By using diversity rather than other pre-established categories, regardless of how open they might theoretically be, such as 'queer', I aim at transcending the inevitable reductionism that comes with the definition of such identities.

c) Non-Western is used to refer to all those that are discursively excluded from white Western subjectivity. Consequently, non-Western refer to all those who, because of their race, colour, culture, religion, geographical location, or immigration status are considered 'other' to the ideal white Western person.

3. Significance of this Research and Contribution

This thesis is significant as it explores the limitations of the existing human rights laws approach to non-Western sexually and gender diverse individuals and groups. In doing so, this thesis seeks to centre non-Western sexually and gender diverse groups in legal analysis, using insights exploring the specificity of their oppression and marginalisation. As touched upon above, one of the key underpinning questions in debates on the rights of non-Western sexually and gender diverse people is the suitability of the human rights framework to free these groups from oppression. This thesis responds to these debates by exploring the reproduction of structures of exclusion and marginalisation of non-Western peoples, such as Western-centrism and heteronormativity in the interpretation of human rights by the IE. Through this analysis, this thesis shows that non-Western sexually and gender diverse people continue to be marginalised under international human rights law. Furthermore, the thesis identifies that the IE fail to contextualise and consider the application of proposed human rights solutions in different local circumstances. In doing so, the IE reinforces the marginalisation of non-Western sexually and gender diverse people in the analysis of violence

and discrimination and when setting standards of protection. Through the examination of queer postcolonial insights, I also identify key analytical changes that the IE could use to be less exclusionary in his interpretation of human rights. By doing so I acknowledge the limitations of the existing human rights protection to free non-Western sexually and gender diverse people from oppression, while proposing solutions that might help remedy the boundaries identified in future human rights interpretations.

4. Methodology

This thesis follows a critical approach to human rights law, drawing on queer postcolonial approaches. While the umbrella term ‘critical approaches to law’ does not have a clear and agreed definition, it refers to assorted theories that are critical of various aspects of Western society and the role of law in giving effect to certain forms of power and injustice.⁸⁹ Historically, the discipline of human rights has been dominated by doctrinal research that focuses on an evaluation of the law according to the parameters set by the legal system itself.⁹⁰ However, from the 2000s there has been increased interest in applying a variety of non-legal perspectives to international human rights law in light of the growing evidence that doctrinal approaches alone may be insufficient to explore the causes of injustice.⁹¹ This research is situated within this growing field of critical research aiming to expose the different ways human rights law legitimises and delegitimises different subjects and experiences. The critical perspectives used in this thesis draw upon literature emanating from queer and postcolonial theories which render visible the multiple ways in which sexuality, gender, and race intersect in systems of oppression and exclusion. Both queer and postcolonial theories follow a deconstructive methodology.⁹² Deconstruction in this sense refers to ‘critical analysis aimed at drawing attention to the different elements present in discourses, but which are

⁸⁹ Donald Nicolson, ‘Critical Approaches in Halliday’, S. (ed), *An Introduction to the Study of Law*, (W. Green, Sweet & Maxwell, 2012) p. 43

⁹⁰ Damian A. Gonzalez-Salzberg and Loveday Hodson ‘Introduction’ in Damian A. Gonzalez-Salzberg and Loveday Hodson (eds) *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge 2019) 2.

⁹¹ Ibid 3.

⁹² Damian A. Gonzalez-Salzberg ‘A queer approach to Advisory Opinion 24/2017 on LGBT rights’ in Damian A. Gonzalez-Salzberg and Loveday Hodson (eds) *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge 2019) 101; Roy Alpana, ‘Postcolonial Theory and Law: A Critical Introduction’ [2008] 29 Adel. L Rev. 315.

often overlooked'.⁹³ In the context of international human rights law, as explored further in chapters 2 and 3, queer and postcolonial inquiry offer a different reading of law that allows for the interrogation of sexual, gender, racial and imperial values and norms that might underpin and be present in human rights interpretations.

Using insights from queer postcolonial approaches, I perform a deconstructive reading of the annual reports by the IE. As a special procedure, the IE is required to report on activities, define human rights issues, establish areas of priority, and clarify the legal framework for his work.⁹⁴ The reports constitute important tools in addressing violence and discrimination committed against sexually and gender diverse people through human rights standards setting and their subsequent use by civil society and other institutions and organisations.⁹⁵ As explored further in chapter 5, the IE has contributed to the greater understanding of the systematic and widespread violence and discrimination committed against sexually and gender diverse peoples internationally.⁹⁶ To date, the mandate holder has submitted in total nine reports to the UN Human Rights Council and the UN General Assembly. All the reports by the IEs are available to download from the website of the UN office of the High Commissioner of Human Rights.⁹⁷ Eight out of these reports are subjected to analysis in chapter 6 and 7. The only report that has not been analysed in this chapters 6 and 7 is as mentioned the 2020 COVID-19 report by the IE.⁹⁸

5. Key Findings

One of the main findings of this thesis is that categories of sexuality, gender, and race are constitutive of each other, creating systems of oppression that are missed in the analysis of

⁹³ Gonzalez-Salzberg (n 79) 101.

⁹⁴ Dominguez-Redondo (n 8).

⁹⁵ Ibid.

⁹⁶ UNHRC "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity" [2017] UN.Doc/ A/HRC/35/36.; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Practices of so-called "conversion therapy"' [2020] UN.Doc A/HRC/44/53.

⁹⁷ Website of the UN Office of the High Commissioner on Human Rights available at: <<https://www.ohchr.org/EN/pages/home.aspx> > last accessed 28th of August 2021.

⁹⁸ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Covid-19'' [2020] UN.Doc. A/75/258.

sexuality or gender alone. The thesis explains and demonstrates the relevance of this when analysing international human rights law. As explored in depth in chapter 4 of this thesis, colonialism inextricably linked sexuality, gender, and race by centring these in the creation of difference between the coloniser and the colonised. The imagined failure of the colonised in adhering to the norms of Western heteropatriarchy was consistently invoked by colonial powers to establish the inferiority of the non-West compared to the West. This failure to comply with Western gender and sexual norms was also central to the colonial justification for the exploitation of the colonial population. Moreover, compliance with Western heteropatriarchy became a primary means for assimilation of non-Western peoples. The centrality of sexuality and gender to colonial discourse resulted in the creation of systems of oppression, binding racialised subjects in different but interconnected ways to white Europeans. Because the world continues to be structured in ways that favour the West after the end of formal colonialism, narratives about racial-sexual and gender difference continue to structure our understanding of gender and sexuality. For example, as explored in the section above on context, contemporary international discourse on sexuality and gender is embedded in narratives about race and imperialism, underscoring the continuity of colonial approaches to sexuality and gender today. Therefore, rather than being considered separate categories of oppression that at times overlap, sexuality, gender and race should be seen as inherently interlinked, producing multiple subject positions and structures of oppression. Moreover, any attempt at analysing sexuality and gender as separate from race and imperialism risks rendering the oppression of non-Western sexually and gender diverse peoples invisible—and this includes any analysis conducted with reference to international human rights law. The analyses in chapter 6 and 7 of the reports by the IE show how the separation of sexuality and gender from race and imperialism in the analysis of violence and discrimination leads to the exclusion of non-Western peoples from the mandate.

The second key finding of this research is that Western heteronormative paradigms are privileged in the analysis of the reports by the IE to the detriment of non-Western sexually and gender diverse peoples. To contextualise the reports of the IE, chapters 2 and 3 outline that international law has historically favoured heteronormative and Western approaches in the interpretation of human rights. Consequently, while there are pre-existing conditions that might support the privileging of Western paradigms in the reports, chapter 5 also find that

the IE does have opportunities to transcend the boundaries of Western paradigms through engaging with civil society through country visits and receiving submissions. Thus, there is opportunity to rethink the protection of sexually and gender diverse peoples under the mandate. However, the analysis of the reports in chapters 6 and 7 finds that the IE has not taken such an opportunity and rather privileges Western paradigms. The IE only emphasises Western sexual identities in the reports examined in chapter 6 rendering any non-Western sexual diversity invisible under the mandate. By only centring Western sexual categories in the analysis, the IE further fails to consider the different local circumstances in which non-Western sexually diverse people live. The analysis in chapter 6 also finds that the IE fails to contextualise the discussion of 'solutions' to violence and discrimination. Thus, the IE misses some potentially dangerous effects of such solutions to non-Western sexually and gender diverse people such as the normalising impulse of data collection. Furthermore, queer postcolonial approaches call for a change in the values that inform human rights interpretations. For example, from individually to community-focused human rights to challenge some of the erasure of the non-West under international law. The IE does not engage in such a change in values, therefore missing some of the structures that specifically impact non-Western sexually and gender diverse people when setting standards of protection. In the reports discussed in chapter 7, the privileging of Western paradigms is identified in the IE's exclusive reliance on Western gender constructions in the analysis of oppression of gender diversity. By doing so, the IE erases non-Western gender diversity from the analysis, resulting in the mandate holder proposing solutions to end violence and discrimination that could be directly harmful to non-Western peoples.

Finally, this study found that there are certain key changes to the analysis of oppression of sexual and gender diversity that can challenge the exclusion and marginalisation of non-Western subjects. Firstly, intersectionality should not be considered an addition to the general analysis of oppression. Instead, intersectionality should constitute the starting point for the analysis of violence and discrimination to ensure that non-Western and non-white sexually and gender diverse people do not become marginalised and excluded. Furthermore, the West should be provincialized under human rights law. The analysis of violence and discrimination and the identification of standards for protection has to be come localised to account for the difference in experience among sexually and gender diverse subjects.

Moreover, the analysis should engage with a more structural rather than categorical approach to human rights violations. Lastly, values such as cooperation and dialogue from queer postcolonial approaches should be included in the processes of human rights interpretations. Together, these changes can not only help prevent the exclusion of non-Western peoples in international discourse but can also challenge the continued universalisation of Western prescriptions under international human rights law.

6. Chapter Overview

The following chapter examines queer theory as a critical approach to analysing the nature, content, and boundaries of human rights protection of sexually and gender diverse peoples. The aim of this chapter is giving an understanding of queer theory in the context of international human rights law and in relation to the queer postcolonial approaches explored in chapter 4. The chapter begins defining queer theory considering some of the background, key concerns, and method of analysis. In this section I discuss queer theories' concern with sexual and gender categories and the privileging of heterosexuality through discourses, structures, institutions, and cultural and socio-political practices. Having given a working definition of queer theory, section 2 considers queer theory and international human rights law. The discussion considers some limits to the protection of sexual and gender diversity under international human rights law pointing to the benefits of queer analysis in this context. Section 3 considers some of limits to queer analysis of international human rights law. In this part of the chapter, I examine queer theories lack of engagement with the relationship between race and sexuality, as well as the lack of concern for non-Western sexual and gender diversity. In the last part of the chapter I examine the central theoretical engagements of queer theory that together with insights from postcolonial theory examined in chapter 3 underpin the analyses in chapters 4, 6 and 7. In this part of the chapter I examine the conceptualisation of sex as socially constructed and therefore open to re-definition outside the limits of binary gender structures underpinned by heterosexuality; the rejection of the fixity of sexual identities; the challenge to the regulation of sexuality through the good/bad binary, and the contestation of heteronormativity and homonormativity by queer theorists.

Chapter 3 examines postcolonial theory as a critical approach to analysing the nature, content, and boundaries of human rights protection of non-Western individuals and groups.

In common with the analysis in chapter 2, is oriented towards giving an understanding of postcolonial theory, both in relation to queer theory and as a critique of international human rights law. This chapter begins exploring the definition of postcolonial theory, identifying key targets of analysis and methodologies. From this definition, I explore some of the boundaries in postcolonial analysis when it comes to exploring the oppression and subversion of non-Western sexually and gender diverse people. Despite the latter, the analysis in this section considers how postcolonial theory can challenge the inherent western centrism in queer theory and support the representation of non-Western sexually and gender diverse people in the analysis of international human rights law. Following, part 3 of this chapter explores postcolonial critique in the context of international human rights law, highlighting the need for decentring the west in human rights interpretations. The last part of section 3 explores postcolonial theory and its convergence with other critical race approaches and anti-racists movements in the international context. The last part of chapter 3 examines specific insights of postcolonial theory underpinning the analysis in chapters 4, 6 and 7. This section discusses deconstructing imperial and racist understandings in Western epistemology and knowledge, provincialisation of the West in the analyses of the universal, the artificiality of racial categories, and the recovery of subaltern subjects. In this section of the chapter, I also consider Bhabha's approach to cultural rights as an example of a postcolonial revision of international human rights law.

Chapter 4 builds on the previous two chapters to articulate this thesis's understanding of what I term 'queer postcolonial approaches'. These approaches draw on queer and postcolonial theories to explore the intersection of imperialism, race, sexuality and gender in the exclusion and oppression of non-Western sexually and gender diverse subjects. The chapter begins building on the analyses in chapters 2 and 3 to give a more in-depth exploration of the boundaries to each theory's approach to non-Western sexually and gender diverse individuals and groups. Furthermore, section 1 considers queer and postcolonial critique in the context of international human rights law outlining how the use of both theories can help remedy the limits of each theory's approach to non-Western sexually and gender diverse people. Section 2 of this chapter explores insights from scholars using both queer and postcolonial theory to examine the oppression of non-Western sexually and gender diverse people. None of these texts offer a complete overview or systematic study of

the use of queer and postcolonial theories. However, from these different contributions it is possible to identify fundamental analytical considerations which give shape to what I term queer postcolonial approaches. Collectively, these approaches offer insights into the oppression of non-Western sexually and gender diverse peoples. In short, queer postcolonial approaches render visible the invisibility of non-Western sexually and gender diverse people in dominant discourses due to the underpinning imperial and heteropatriarchal structures of signification. Chapter 4 further identifies queer postcolonial approaches to countering this exclusion by refocusing the analysis and representing non-Western sexually and gender diverse people. The last section of the chapter explores intersectional analysis as a tool used by international human rights bodies to examine multiple forms of oppression including those derived from race, sexuality, and gender. The chapter explores intersectionality as a tool for refocusing the analysis to the most marginalised and excluded persons, concluding that in the context of the IE, intersectional analysis would require the use of queer postcolonial approaches to refocus the analysis to non-Western sexually and gender diverse subjects.

Chapter 5 offers an overview of the creation and conditions of the IE on protection of violence and discrimination based on sexual orientation and gender identity. The purpose of this chapter is to offer context to the reports that are critically analysed in chapter 6 and 7 from a queer postcolonial perspective. The IE is a special procedure, so the first part of this chapter explores the background and main characteristics of this human rights mechanism today. The second part of this chapter examines the Independent Expert considering some of the political and on the ground challenges facing the mandate. In this section, I consider the complex political negotiations leading to the adoption of the mandate. From that analysis I examine some of the main arguments against the IE as well as those for the mandate, including the need for an international mechanism to address violence and discrimination against sexually and gender diverse people. The last part of chapter 5 examines the mandate of the IE to date. This part of the chapter discusses the mandate holders, their main achievements, and practices in implementing the mandate. The contribution by the IE to achieve a greater understanding of the situation for sexually and gender diverse people internationally is also highlighted.

In chapter 6 I critically analyse the reports by the IE on the topic of sexuality, applying the insights of queer postcolonial approaches identified in chapter 4. The purpose of this chapter is to identify the treatment of non-Western sexually diverse people under the mandate. The chapter examines six of the nine annual reports of the IE that considers the rights of sexually diverse peoples. Returning to the discussions at the end of chapter 4, this chapter begins with an analysis of intersectionality, as defined by the mandate holder in the reports. I conclude that the IE's approach to intersectionality differs substantially to that envisioned in chapter 4. From there, the analysis moves to the privileging of Western sexual categories in the reports, emphasising the need to change the analysis towards structures rather than categories of oppression. This analysis further touches upon the lack of representation of non-Western sexual diversity and the operation of orientalist structures of signification in the report's consideration of the non-West. The second part of the chapter discussed the 'root causes' of violence and discrimination identified by the mandate holder. More specifically, I examine criminalisation, pathologisation, and conversion therapy as considered by the mandate holders. Through applying queer postcolonial insights, the analysis concludes that the IE misses non-Western sexually and gender diverse subjects in the discussion of root causes. Moreover, the examination identifies the operation of heteronormativity in the definition of these root causes. The final analysis of this chapter focuses on the 'solutions' to violence and discrimination offered by the IE, specifically non-discrimination legislation, data collection, and social inclusion. In this section on 'solutions' I draw attention to some of the boundaries of these 'solutions' to address some of the causes of inequality for non-western sexual and gender diverse people. I conclude the chapter by suggesting that the mandate holder fails to engage with the structures of oppression of non-Western sexually and gender diverse people, thus marginalising these peoples in the reports.

Like chapter 6, chapter 7 applies queer postcolonial approaches to the reports of the IE but on the topic of the protection of gender diversity. The goal of this chapter is to examine how non-Western gender diverse peoples are treated in the reports. I ground this analysis in the two reports by the IE that to date are focused primarily on questions of gender. The analysis of this section explores western underpinnings of the gender system considered in the reports that is the binary hierarchal division of gender based on biology. From these discussions I conclude that the mandate holder fails to engage with all the consequences for the regulation

of gender diversity and intersectional oppression emanating from the colonial spread of western gender norms. Section 1 further explores the link between western approaches to gender and the definition of 'gender identity' in the reports as well as the consideration of intersex individuals. Part 2 of this chapter examines other categories used by the IE to refer to 'gender diversity'. In this section I explore the definition of trans and gender diversity in the reports as well as references to non-Western gender diversity. Through the analysis in part 2 I identify the exclusion and marginalisation of non-Western gender diversity despite the IE's explicit reference to the latter groups in the reports. The chapter then examines pathologisation of gender diversity as one of the few causes of oppression of gender diverse peoples identified by the mandate holder. This analysis explores the medical discourse about gender diverse peoples, underpinning the International Classification of Disease discussed by the IE. The analysis concludes the mandate holder limits the discussion of pathologisation only to certain subjects, rather than the overall structure of Western gender normativity, missing the effect of the latter on non-Western sexually and gender diverse peoples. The final section of chapter 7 explores legal recognition as the primary solution proposed by the IE to end oppression against gender diverse peoples. The analysis determines that legal recognition be identified as a tool of governmentality that reinforces the exclusion of non-Western diversity under the reports. chapter 7 concludes that because Western approaches to gender are favoured in the reports, the experiences of non-Western gender diverse peoples are rendered invisible.

The final chapter summarises the main findings of the thesis before considering their implications for the development of the mandate of the IE and, more generally, international human rights law. The second part of the conclusion outlines the key limitations of the study. The chapter ends with a reflection on future directions for research based on the findings of this thesis.

Chapter 2. Queer Theory

Introduction

This chapter examines queer theory as one of the critical perspectives that, together with postcolonial theory, informs the analysis of international human rights in this thesis. To this end, the chapter is oriented towards giving an understanding of queer theory in the context of international human rights law and in relation to the queer postcolonial approaches explored in chapter 4. The chapter begins defining queer theory considering some of the background, key concerns, and method of analysis. In this section I discuss queer theories' concern with sexual and gender categories and the privileging of heterosexuality through discourses, structures, institutions, and cultural and socio-political practices. Furthermore, I touch upon the influence of poststructuralism on queer theory, in particular discourse analysis and the use of deconstruction as a method. Lastly, section 1 considers queers opposition to dominant understandings of sexuality and gender through the disruption of existing (sexual and gender) categories, and celebration of the diversity that exists beyond them. Having given a working definition of queer theory, section 2 considers queer theory and international human rights law. The aspiration of human rights law to universality and to its use by victims all over the world to seek redress from injustices, violations, and abuse from a queer perspective is examined in this section. The analysis considers some limits to the protection of sexual and gender diversity under international human rights law, underscoring how the legal construction of sexual and gender categories can restrict the individuals protected by human rights. The section concludes that queer deconstruction allows for the interrogation of the underpinning (sexual and gender) discourses and structures that inform legal analysis, supporting the expansion of protected sexual and gender subjects under international human rights law.

Having underscored that queer critique can support the diversification of sexual and gender subjects under international human rights law, section 3 considers some of the boundaries to the ability of queer theories to do so. More specifically in this section I consider queer theories lack of engagement with the relationship between race and sexuality, as well as the lack of concern for non-Western sexual and gender diversity. While the relationship between race,

imperialism, gender, and sexuality is explored further in chapter 4, section 3 concludes that queer theory is unable to properly include non-white and non-Western in the critical analysis. Therefore, in the context of international human rights law there are limits to queer theories' ability to identify the boundaries of legal sexual and gender categories and their protection when applied to non-white and non-Western individuals and groups. To remedy these limits in queer theory, as discussed elsewhere, this thesis uses postcolonial theory explored in chapter 3 to identify specific queer postcolonial insights that can be applied in the context of international human rights law. Consequently, the last section of this chapter considers key queer insights that inform the queer postcolonial approaches discussed in chapter 4 and are applied to the analysis of the human rights interpretations by the IE.

Section 4 begins considering queer theories' rejection of the biological foundations of the binary gender system for its restrictive effect on gender diversity. In this section I discuss Judith Butler's analysis in *Gender Trouble*¹ exploring the queer critique of the binary sex and gender system, pointing to its limits and exclusions. In the second part of section 4 I explore queer theoretical insight into the regulation of sexuality in the West. The analysis begins considering the influence of Michel Foucault's history of sexuality on queer theory, and moves to discuss the artificial and restrictive nature of the modern Western homo- and heterosexual categories. This analysis explores the dependent and privileged position of heterosexuality in relation to homosexuality. Furthering the analysis of heterosexual privilege, section 4 examines queer critique of heteronormativity, pointing to the oppressive system of regulation of sexual diversity and the influence good/bad sex binary and the sexual hierarchy. Lastly, the section discusses the queer rejection of assimilationist strategies (homonormativity) in achieving real freedom for sexually and gender diverse peoples as it reinforces, rather than challenges, existing oppressive structures.

1. Defining queer theory

Queer theory emerged in the 1980s and 1990s US academy from a complex array of critical and cultural interventions including gay and lesbian movements, queer AIDS activism, feminism, poststructuralism, anti-racists movements and subcultural sexual practices such as

¹ Judith Butler *Gender Trouble: Feminism and the Subversion of Identity* (Routledge Classics 2006).

BDSM.² Queer theory is not a singular, systematic, conceptual or methodological framework, but a collection of intellectual engagements regarding the relations between sex, gender and sexual desire.³ The term 'queer theory' was proposed by Teresa de Lauretis to make theory queer, that is challenge the heterosexist assumptions underpinning academic theory. The same author also proposed the concept of 'queering theory', that is, calling attention to what is perverse about theorising sexual desire and pleasure.⁴ De Lauretis further explained: 'Queer theory conveys a double emphasis – on the conceptual and speculative work involved in discourse production, and on the necessary critical work of deconstructing our own discourses and their constructed silences.'⁵ Gonzalez-Salzberg proposes that de Lauretis' definition underscores two of the core elements of queer theory; the first being the influence of Michel Foucault, as de Lauretis refers to discourse production.⁶ Discourse production as theorised by Foucault explains that knowledge and language is not merely descriptive of a pre-given reality, but rather they create the very reality they proclaim to describe.⁷ Thus, queer theorists understand (sexual and gender) knowledge as the result of specific historical processes rather than corresponding to any pre-existing universal truths.⁸ In doing so queer theorists, influenced by poststructuralism, resist the idea of scientific objectivity and neutrality in knowledge production.⁹ Rather, science is understood as dependent upon the extra-scientific dimension determined by desires, acts, thoughts, history, politics and so on.¹⁰ The focus is more on exploring the limits, what is presumed and excluded for existing structures, truths and knowledge.¹¹ To do so, queer theorists use deconstruction as a tool, which is the second element referred to by de Lauretis in the definition above.¹² Through deconstructing texts queer theory uncovered privileged meanings hidden in discourses and

² There are numerous background works etc. see for example William B. Turner, *Genealogy of Queer Theory* (Temple University Press, Philadelphia 2000) 3.

³ Tasmin Spargo *Foucault and Queer Theory* (Icon Books 1999) 9.

⁴ David Halperin 'The Normalization of Queer Theory' [2003] 45.2-4 *Journal of Homosexuality* 399, Damian A. Gonzalez-Salzberg *Sexuality and transsexuality under the European Convention on Human Rights: a queer reading of human rights law* (Heart 2019) 13.

⁵ Teresa de Lauretis 'Queer theory: Lesbian and Gays sexualities, An Introduction' (1991) 3 *Differences: A Journal of Feminists Cultural Studies* iii, iv.

⁶ Damian A. Gonzalez-Salzberg *Sexuality and transsexuality under the European Convention on Human Rights: a queer reading of human rights law* (Heart 2019) 13.

⁷ *Ibid.*

⁸ Nikkie Sullivan *A Critical Introduction to Queer Theory* (New York University Press 2003) 39; Spargo (n 3).

⁹ James Williams, *Understanding Poststructuralism* (Acumen Publishing 2005) 2-3, 7.

¹⁰ *Ibid.*, 7.

¹¹ Williams (n 9) 7.

¹² Gonzalez-Salzberg (n 6) 13.

knowledge on sex, gender and sexuality; this identifies the exclusion, erasure and violence that can sometimes be found in established values and morals, and disrupts the meanings that inform our understandings of sexuality and gender historically, individually, culturally and socio-politically.¹³

For most of the 19th and 20th century, the study of sex, gender and sexuality was mostly left to psychiatrists and sexologists.¹⁴ From these medical discourses three main understandings of sexuality and gender have had significant impact on our understanding of sexuality in the West today: that sexuality is an essential aspect of identity, that sexuality is binary, based on the sex/gender of desire, and that people can be identified as normal or abnormal based on their sexuality.¹⁵ Queer theory challenges the cohesiveness of these understandings. Eve Sedgwick explains that queer [can] refer to ‘the open mesh of possibilities, gaps, overlaps, dissonances and resonances, lapses and excess of meaning when the constituent elements of anyone’s gender, of anyone’s sexuality aren’t made (or can’t be made) to signify monolithically.’¹⁶ This explanation emphasises two main concerns of queer theory, gender and sexuality, while at the same time shedding light on queer theories’ critical stance towards the assumed coherence of the two notions.¹⁷ The critique of the assumed coherence and of sexual and gender identities in general is a fundamental part of queer theory.¹⁸ Part of this critique is the deconstruction and continuous questioning of identities constructed through binary oppositions, such as man/woman or gay/straight, that result in two mandatory sexes, two consequential genders and two sexualities.¹⁹ Furthermore, sexuality and gender are not solely regulated through the individual but rather through a range of cultural and socio-political structures and practices that are not always explicitly concerned with sexuality or gender. Therefore queer theory intervenes, interrogating those texts that ‘normally would

¹³ Gonzalez-Salzberg (n 6) 24.

¹⁴ Jane McLaughlin, Mark E. Casey and Diane Richardson, ‘Introduction’ in Jane McLaughlin, Mark E. Casey and Diane Richardson eds. *Intersections Between Feminist and Queer Theory* (Palgrave MacMillan, New York 2006) 1.

¹⁵ Sullivan (n 8) 7.

¹⁶ Eve Kosofsky Sedgwick *Tendencies* (Routledge 1994) 7.

¹⁷ Damian A. Gonzalez-Salzberg ‘A Queer Approach to Advisory Opinion 24/2017 on LGBT Rights’ in Damian A. Gonzalez-Salzberg and Loveday Hodson (eds) *Research Methods for International Human Rights Law Beyond the Traditional Paradigm* (Routledge 2020) 98, 99.

¹⁸ Gonzalez-Salzberg (n 6) 18.

¹⁹ Gonzalez-Salzberg (n 6) 18.

not be seen as the terrain of sexuality, and to conduct queer 'readings' of ostensibly heterosexual and nonsexualised texts'.²⁰ Through such inquiry queer theory explores the institutions, structures of understandings and practices through which heterosexuality becomes privileged and normalised as the default sexuality (heteronormativity).²¹ As a result queer theory challenges certain assumptions of heteronormativity, including cisnormativity (the presumption that everybody is cissexual, that there is correspondence between gender identity and the birth sex) and mononormativity (which reifies the couple as the ideal type of intimate relationship).²²

To counter these dominant understandings of sexuality and gender queer theory does not refer in itself to a specific identity or category but refers to a positionality against the normative.²³ Queer refers to 'whatever is at odds with normal, the legitimate, the dominant'.²⁴ Queerness becomes the resistance to the ideals of being heteronormative in identity, behaviour, appearance, and relationships.²⁵ Therefore queer theory moves beyond LGBT categories, focusing on those sexual desires and genders that cannot be comprehended by fixed categories, as well as celebrating those identities that disrupt the normative arrangements of sexuality and gender.²⁶ Lastly, queer theory rejects assimilationist and liberal rights strategies in favour of 'a politics of carnival, transgression and parody which leads to deconstruction, decentring, deconstructivist readings and anti-assimilationist politics'.²⁷ Queer theory is a call for transgression of all conventional categories and breaking of boundaries of the erotic, gendered and interpersonal.²⁸

Having outlined some key areas of intervention as well as the method of queer theory, the following section considers queer critique in the context of international human rights law.

²⁰ Arlene Stein and Ken Plummer 'I Can't Even Think Straight' "Queer" Theory and the Missing Sexual Revolution in Sociology' [1994] 12.2 Sociological Theory 176, 182; Gonzalez-Salzburg (n 6) 20.

²¹ Gonzalez-Salzburg (n 6) 19.

²² Arlene Stein and Ken Plummer 'I Can't Even Think Straight' "Queer" Theory and the Missing Sexual Revolution in Sociology' [1994] 12.2 Sociological Theory 176, 182; Gonzalez-Salzburg (n 6) 20.

²³ David Halperin 'The Normalization of Queer Theory' [2003] 45.2-4 Journal of Homosexuality 399.

²⁴ Ibid.

²⁵ Michael Warner 'Introduction: Fear of a Queer Planet' [1991] 93 Social Text, 3, 16.

²⁶ Gonzalez-Salzburg (n 6) 19.

²⁷ Stein and Plummer (n 20).

²⁸ Stein and Plummer (n 20).

2. Queer theory and human rights law

International human rights law can be defined as those rights that are held by all individuals, everywhere, by the mere fact of being human.²⁹ These rights are characterised by their aspiration to universality, which can be summed up as ‘every right for every person everywhere’.³⁰ The modern international human rights law regime emerged as a result of atrocities committed by the Nazi regime in the Second World War.³¹ The post war consensus established the need to protect the basic rights of all people of the world by means of some universally accepted standards, prompting the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.³² From the promulgation of the UDHR the international human rights law regime has grown exponentially into a number of different human rights conventions and protection mechanisms.³³ Thus, international human rights law recognises several fundamental rights applicable to everyone regardless of citizenship or territorial legislation, and gives victims of injustices all over the world a universal language to communicate their suffering.³⁴ Furthermore, the international human rights regime has established processes for victims to seek redress for the injustices they face, which are aimed at putting an end to the human rights violations and in certain circumstances lead to victims receiving some form of reparation.³⁵ The IE, as explored further in chapter 5, forms part of this international human rights system, and is tasked with identifying both violence and discrimination as well as solutions to end abuses for sexually and gender diverse people all over the world.

²⁹ Damian A. Gonzalez-Salzberg and Loveday Hodson ‘Introduction: Human rights research beyond the doctrinal approach’ in Damian A. Gonzalez-Salzberg and Loveday Hodson (eds) *Research Methodologies for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge 2020) 1.

³⁰ Damian A. Gonzalez-Salzberg *Sexuality and transsexuality under the European Convention on Human Rights: a queer reading of human rights law* (Heart 2019) 1.

³¹ Ibid.

³² Ibid.; Bonny Ibhawoh ‘Human rights for some: sexual minorities and the exclusionary impulse’ [2014] 69 (4) *International Journal* 612.

³³ Mashood A. Baderin and Manisuli Ssenyonjo ‘Development of International Human Rights Regime Before and After the UDHR’ in Mashood A. Baderin and Manisuli Ssenyonjo eds. *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 3.

³⁴ Ibid.

³⁵ Mashood A. Baderin and Manisuli Ssenyonjo ‘Development of International Human Rights Regime Before and After the UDHR’ in Mashood A. Baderin and Manisuli Ssenyonjo eds. *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 3.

Today, international human rights have become a primary tool in struggles for justice and equality all over the world.³⁶ However, they are not a perfect invention and despite the aspiration to universality, numerous individuals and groups have fallen outside human rights protection at certain points in time. As discussed in the introduction to this thesis, sexually and gender diverse people have historically been excluded from human rights protection.³⁷ Furthermore, the progressive inclusion of sexually and gender diverse people within the regime has been both uneven and inconsistent dependent on the interpretations of human rights law mechanisms prompted by advocacy groups working internationally.³⁸ This inconsistent treatment of sexually and gender diverse peoples under international human rights law points towards the way that law and legal decisions are embedded with considerations about gender and sexuality, despite its claim to neutrality, objectivity and universality.³⁹ In particular, the individual entitled to universal human rights has been conceived as gendered and sexual in specific ways that serve to marginalise and exclude individuals and groups.⁴⁰ Queer theory is concerned with the construction of sexual and gender categories, their underpinning meanings and potentially oppressive and exclusive nature. Thus, applying queer theory to international human rights law allows for the interrogation of underpinning assumptions and strictures in the construction of legal subjects; the influence of cisnormativity, heteronormativity and mononormativity in the identification of protected individuals, groups and relationships and explicit and implicit categorical boundaries and exclusions.⁴¹ This is a particularly critical task in the context of the IE, who will necessarily deal with the identification of sexual and gender subjects for the purpose of human rights protection.

Simultaneously, while queer theory is very much a critical project it also offers alternative ethical and moral formulations that can help inform a revision of international human rights

³⁶ Gonzalez-Salzberg and Hodson (n 29) 2; Ratna Kapur *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing 2018) 6.

³⁷ Ignacio Saiz 'Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN' [2004] 7.2 Health and Human Rights 48, 49.

³⁸ Ibid.

³⁹ Gonzalez-Salzberg (n 17) 101.

⁴⁰ Gonzalez-Salzberg (n 6) 2.

⁴¹ Gonzalez-Salzberg (n 17) 101.

law.⁴² In the most general sense, it is obvious that queer theory provides ethical commitments to diversity, personal autonomy, compassion, love and freedom from sexual and gender norms.⁴³ Drawing on Michael Warner's enumeration of queer principles in *The Trouble with Normal*, Gonzalez-Salzberg argues that human rights law can incorporate queer values such as accommodating diverse sexualities, genders and intimate relationships without discrimination, protect sexual minorities and gender diverse individuals from being forced to assimilate into dominant [hetero]normative standards and lifestyles, as well as denouncing any institution that attempts to punish those who do not take part in it.⁴⁴ Through diversifying the sexual and gender subjects of international human rights law, queer theory can support international human rights in achieving its aspiration to universality.⁴⁵ However, queer theory has its own limitations when it comes to supporting human rights in achieving universality. As the following section explores, queer theories' lack of engagement with racial inequality, and the inherent Western-centrism of its analysis, significantly limits its applicability to non-Western sexually and gender diverse people on its own.

3. Queer theory and non-Western sexual and gender diversity

As mentioned in section 1, queer theory emerged within the US academy from several critical and activist engagements including feminist and anti-racists movements. In particular, 1960s and 1970s black feminists laid some of the foundations for queer thinking about identity and difference as they theorised about exclusion and resistance from the margins.⁴⁶ Authors such as Audre Lorde and 'bell hooks' critiqued mainstream feminism for being too homogenous and centred exclusively around issues affecting middle class white women.⁴⁷ These activists and writers challenged the sentimental notion of 'sisterhood', arguing that it operated to exclude and silence women of colour from voicing their experiences of race, sexuality, class,

⁴² Aleardo Zanghellini 'Queer, antinormativity, counter-normativity and abjection' [2009] 18.1 Griffith Law Review 1.

⁴³ Ibid.

⁴⁴ Gonzalez-Salzberg (n 6) 25.

⁴⁵ Ibid.

⁴⁶ Hannah McCann and Whitney Monaghan *queer theory now: From foundations to futures* (Red Globe Press 2019) 6.

⁴⁷ Audre Lorde *Sister Outsider: Essay and Speeches* (Crossing Press Feminist Series 1984), bell hooks *Ain't I a woman: Black women and feminism* (Pluto 1982).

and other social issues within the same conversation as gender inequality.⁴⁸ These women exposed the lack of socio-political representation in dominant discourses deriving from the homogenising impulse in identity politics. Similarly, as explored later in section 3, queer theorists are critical of identity politics and challenge more mainstream gay and lesbian activism for being exclusionary and privileging normative sexual subjects. Nonetheless, despite the influence of black and women of colour activists on queer critiques of identity, there is very little engagement on how racial identities intersect with the construction of sexual and gender subjects. José Muñoz makes a clear statement about this when he writes in *Disidentifications*: ‘Most of the cornerstones of queer theory that are canonized in gay and lesbian studies classrooms, publications, and conferences are decidedly directed towards analysing white lesbian and gay men. The lack of inclusion is most certainly not the main problem with the treatment of race. A soft multicultural inclusion of race and ethnicity does not, on its own, lead to a progressive identity discourse....’⁴⁹ Muñoz is not the only one to critique queer theory’s lack of engagement with race. Reid Pharr challenges queer theorising for its lack of engagement with cross-racial sexual desires and the racism embedded within the production of sexuality.⁵⁰ Similarly, Siobhan Somerville points to the gaps in the analyses that emerge from queer theory’s lack of engagement with race. In *Queering the Colour Line: Race and the Invention of Homosexuality in American Culture*, Somerville argues that in America both whiteness and heterosexuality is the norm, creating an impossibility of existence for non-white sexually diverse subjects.⁵¹ The erasure that happens through the lack of queer engagement with race is highlighted by Gregory Conerly, who asked “are you black first or are you Queer yet?”⁵² Gloria Anzaldúa explains that queer is often used as a false unifying umbrella that may nevertheless be useful when rallying against outsiders, homogenises and erases racial, ethnic and class differences.⁵³ By missing the effect that the

⁴⁸ Lorde (n 47); see also Cherríe Morgana and Gloria Anzaldúa ed. *This bridge called my back: Writings by radical women of colour* (Kitchen Table:Women of Colour Press 1983).

⁴⁹ José Esteban Muñoz *Disidentifications: Queers of Color and the Performance of Politics* (University of Minnesota Press 1999) 10-11.

⁵⁰ Robert F. Reid-Parr *Black Gay Man: Essays* (Foreword by Samuel R. Delany (New York University Press 2001) 85-98.

⁵¹ Siobhan B. Somerville *Queering the Colour Line: Race and the Invention of Homosexuality in American Culture* (Duke University Press 2000) 8.

⁵² Gregory Conerly ‘Are Your Black First or Are You Queer?’ D. Simms ed. *The Greatest Taboo: Homosexuality in Black Communities* (Alyson Books, 2000) 7, 8.

⁵³ Gloria Anzaldúa ‘To(o) queer the writer – Loca escritora y chicana’ in AnaLouise Keating ed. *The Gloria Anzaldúa Reader* (Duke University Press 2009) 163.

social construction of race has on sexuality, gender, and vice versa, much queer theorising implicitly erases non-white subjects and their experiences from the analysis. Queer theories' erasure of non-white subjects and lack of engagement with the intersection between race and sexuality (which is explored further in chapter 4) significantly calls into question the theories' ability to diversify human rights law on its own.

Another limitation of existing queer theory is that the analysis of sexual and gender diversity outside the West has been overlooked.⁵⁴ Queer studies have, as discussed above, been developed in the U.S. and showed little interest in cross-cultural variations, expressions and representations of same-sex desire and gender diversity.⁵⁵ As a result, non-Western sexual and gender diversity tends to be ignored or appropriated and imagined through Euromerican lenses.⁵⁶ By remaining narrowly Eurocentric in focus, queer theory is unable to give any insights into the regulation of sexuality and gender outside the West. This is not to say that queer critique might not be useful, as explored in chapter 4, to analyse sexual and gender-based oppression outside the West, as due to colonialism, Western prescriptions of sexuality and gender were imposed throughout the world. However, queer theory does not give any insight into the effect of the latter on the local populations around the world nor on the existence and conditions of possibility of other non-Western sexual and gender and diversity. Therefore, when applied to international human rights law there are limits to queer theories' ability to identify the boundaries and limits of legal sexual and gender categories applied to non-white and non-Western individuals and groups. Therefore, there is a need for queer analysis to become contextualised to inquire 'queer' through localised questions of experiences, identity, culture, and history.⁵⁷ I argue that postcolonial theory, as explored in the following chapters, brings to queer theory the deconstruction of race and imperialism in a global context.⁵⁸ By using insights from both theories this thesis aims at achieving not only queer theories' commitment to diversity and liberation of all (not just white and Western) sexually and gender diverse subjects, but also pushing the limits of international human rights

⁵⁴ William J. Spurling 'Broadening Postcolonial Studies/Decolonising Queer Studies' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 185.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Spurling (n 54).

⁵⁸ Ibid.

law to become less exclusionary and more universal. To do so, the following sections explore specific queer insights that inform the queer postcolonial approach established in chapter 4 and which are applied to the IE's human rights interpretations in chapters 6 and 7.

4. Queer insights

In this section I examine specific theoretical insights that inform the queer postcolonial approaches identified in chapter 4 and which are applied to international human rights interpretations by the IE in chapters 6 and 7.

4.1 Sex/Gender Binary and the Performance of Identity

If one of the key concerns of queer theory is the construction of sexual and gender categories, a central form of classification of individuals is through binary sex. In this section I explore queer critique of the binary sex and gender system, pointing to its limits and exclusions, as well as pointing to queer alternatives which are as discussed in section 2 as central to achieving more inclusive human rights law. Furthermore, the queer critique of sex/gender forms part of the analytical insights of queer postcolonial approaches central to the analysis in chapters 6 and 7.

The hierarchal division of individuals into women and men constitutes one of the oldest systems of classification of people in the West.⁵⁹ In order to challenge the subordination of women within this system, in the 1970s feminists began to question the biological foundations of gender differences, asking to what extent biology and culture determined sex roles.⁶⁰ In doing so a distinction was made between sex as the biological differences between female and male regarding genitalia, hormones and procreative functions, and gender as the cultural creation of the classification of men as masculine and women as feminine.⁶¹ For feminists in the 1970s and 80s gender was a means of opposing the already existing biological determinism and its control over women's bodies and capacities.⁶² This distinction between

⁵⁹ Gonzalez-Salzberg (n 6) 14; Oyèrónké Oyěwùmí *Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997) 1-31.

⁶⁰ Jemima Repo *The Biopolitics of Gender* (OUP 2016), 74-104.

⁶¹ Gonzalez-Salzberg (n 6) 14.

⁶² Repo (n 60) 3.

sex and gender is not unique to feminist theorising but permeates much of contemporary medical scientific discourse on gender formation.⁶³ Recalling the discussion in section 1, medical discourse has played a significant role in defining people as normal and abnormal, and the sex/gender binary has played an important role in the pathologisation of gender diverse people. While the pathologisation of gender diverse people is explored further in chapters 4 and 7, it is worth noting that Western medical professionals used the sex/gender binary to perform ‘normalising’ surgeries on intersex individuals and to ‘correct’ gender non-conforming behaviour in children through numerous means.⁶⁴ The continued impact of this binary on the rights of gender diverse people can be seen in, for example, the widespread use of medical diagnosis as a requirement for having one’s gender diversity legally recognised.⁶⁵ Another example is the heated debate around the Reform Gender Recognition Act: Government Consultation (2018) in the UK, where the proposed legal protection for trans and gender diverse people was met with great opposition from some gender-critical feminists.⁶⁶ These feminists oppose changing the process of medical recognition of gender diversity with that of self-identification in part based on the idea that only cis-women, that is women identified as biologically female at birth, can be ‘real women’.⁶⁷ Here the sex/gender binary is invoked to deny gender diverse people’s rights based sex regardless of their gender identity. Queer theory intervenes in these discourses proposing a different analysis of gender altogether that is not restricted by the sex/gender binary.

Central to queer theories’ approach to gender is Judith Butler’s analysis in *Gender Trouble*.⁶⁸ Judith Butler questioned the distinction between sex and gender, rendering visible some of the paradoxes and underpinning assumptions of the split between the two.⁶⁹ According to Butler, if gender is culturally constructed there is no reason why it should follow from sex in

⁶³ Ibid, 49-74.

⁶⁴ Limor Meoded-Danon and Niza Yanay ‘Intersexuality: On Secret Bodies and Secrecy [2016] 17:1 Studies in Gender and Sexuality 57.

⁶⁵ UNOCHR ‘Born Free and Equal’ (2019) UN Doc. HR/PUB/12/06/Rev.1, 67, <<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>> accessed 7 of March 2022.

⁶⁶ Aleardo Zanghellini ‘Philosophical Problems with the Gender-Critical Feminist Arguments Against Trans Inclusion’ [2020] 10.2 Sage Open 1.

⁶⁷ Ibid.

⁶⁸ Butler (n 1).

⁶⁹ Ibid.

a particular (binary) way.⁷⁰ Even if we assume the existence of only two binary sexes there is no reason to assume that genders should also remain two if the latter is in fact culturally constructed.⁷¹ In essence the presumption of socially constructed gender, even when theorised as free floating and separate from biology as possible, implicitly retains the binary male/female construction restricted by sex.⁷² Instead, Butler suggests that sex in itself is a gender category that has its own genealogical history of construction.⁷³ Part of this history is the structural fixation of sex in nature, that is in the 'pre-discursive' which obscures its cultural construction and underpinnings and renders 'sex' invisible to critical analysis.⁷⁴ In *Gender Trouble* Butler offers an analysis into sex as the result, not the cause, of the cultural construction of gender.⁷⁵ According to Butler the discourses that regulate gender establish the possibilities of sex which is regulated through hegemonic cultural discourses that are conditioned by the binary structures of universal rationality i.e. the existence of a male with masculine attributes and a female with feminine attributes.⁷⁶ By understanding women as a unified category that derives from the essence of female sex or reproductive organs, feminism is unable to grapple with those discursive structures that impose the binary gender hegemony as defined by sex.⁷⁷ Instead of corresponding to a pre-existing reality, Butler argues that the unity of gender is the result of compulsory heterosexuality.⁷⁸ For heterosexuality to maintain its privileged position, heterosexual desire requires the existence of two binary, stable and opposite genders".⁷⁹ Consequently, the preservation of heterosexual privilege "requires that certain identities cannot exist – that is, those in which gender does not follow from sex and those in which the practices of desire do not 'follow' from gender."⁸⁰ This means that the current discursive regulation of heterosexuality is dependent on naturalising the binary distinctions between genders in sex.

⁷⁰ Butler (n 1) 9.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid 10.

⁷⁵ Ibid 11.

⁷⁶ Butler (n 1) 12-13.

⁷⁷ Ibid 43-103.

⁷⁸ Ibid.

⁷⁹ Butler (n 1) 24.

⁸⁰ Ibid.

Butler provides us with an understanding of gender as a performative construction, that is instead of being the result of an interior essence it responds to the repetition of gender meanings on the body.⁸¹ It is through the repetition of gender meanings on the body over time that gender achieves the appearance of being naturalised or essentialised in the individual.⁸² Furthermore, this performance of gender is not voluntary but rather subjected to a rigid regulatory system based on hierarchal differences and prohibitions.⁸³ Thus, gender performance is the compulsory repetition of pre-existing oppressive norms.⁸⁴ Against this rigid framework, queer theory approaches gender and sex as indistinguishable.⁸⁵ Only when gender and sex are considered culturally constructed, can both be re-conceived outside the limiting binary framework within which they exist.⁸⁶ Notwithstanding the queer insights into the limitations of the sex/gender binary, both categories continue to play a role in the classification of individuals across the world as well as in the restriction and denial of gender diversity.⁸⁷ Therefore, the queer deconstruction of the gender/sex binary will be important to the analysis of the recognition of gender diverse subjects in the report by the IE in chapter 7.

4.2 Queer theories' approaches to sexuality

In this section I explore several insights from queer theory that inform the analysis in subsequent chapters. Firstly, I examine queer theories' approach to sexual identities as informed by Foucault's History of Sexuality. Foucault's analysis of the emergence of modern sexual categories and the function these play in regulating individual behaviour in modernity is not only key to queer theory, but Foucault's theorisation also serves as a starting point for bridging some of the queer postcolonial insights discussed in chapter 4. From the discussion of Foucault's views on the emergence of modern homosexual identities, the discussion moves to the queer deconstruction of sexual categories, underscoring that Western sexual categories of homosexual and heterosexual are constructed based on a range of assumptions

⁸¹ Butler (n 1) 185.

⁸² Ibid 186.

⁸³ Gonzalez-Salzberg (n 6) 15-16;

⁸⁴ Ibid;

⁸⁵ Gonzalez-Salzberg (n 6) 15.

⁸⁶ Ibid 16.

⁸⁷ See for example acts of violence and discrimination against gender diverse reported by the IE UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27.

that are inapplicable to a great range of people. Further, queer theorists have shown that the binary relation between the hetero and homo categories only serves to secure the superiority of heterosexuality to the detriment of sexual and gender diversity. By effectively fixing sexuality in gender and in the individual, modern sexual categories such as lesbian and gay or heterosexual cannot account for the great range of sexual and gender diversity that exists outside the limited parameters of gender. Secondly, I discuss queer analysis of the regulation of sexuality beyond the individual, that is, not so much in the fixation of sexuality in identity but rather the regulation of sexuality through heteronormativity. In this section I point to the way that in heteronormative societies everybody is measured and evaluated through the rules of heterosexuality that encompass more than just a sexual preference for the opposite sex. In this section I also explore the regulation of sexuality through the good/bad sex binary, outlining how only marital reproductive monogamous heterosexuality is rewarded with health, respectability, and legal, social, and institutional support. Queer theory challenges these structures of oppression of sexual diversity and instead celebrates it through the representation of transgressive sexual practices. The last section of this chapter discusses queer theories' rejection of assimilation and 'homonormativity' as a strategy for achieving freedom from oppression for sexually and gender diverse people, as it reinforces rather than challenges homonormativity and the oppressive regulation of sexuality. All these queer insights play an important role in the following chapters by informing the deconstructive analysis of the IE, identifying the boundaries of sexual and gender categories used in the reports and the influence of heteronormativity and homonormativity in the human rights interpretations.

4.2 a) Queer theory and the artificiality of modern sexual identities

One of the key considerations of queer theory is that all identities should be understood as socially constructed and historically contingent. Foucault interrogated modern homosexual identity, giving an account of not only of its development but, similar to Butler on gender identity, explaining how it achieved an element of naturality fixed in the body, masking its discursive production.⁸⁸ According to Foucault, modern homosexual identity appears as a

⁸⁸ Michel Foucault *The History of Sexuality, Volume 1. An Introduction* (Translated from French by Robert Hurley, Phanteon Books 1978).

result of psychiatric interventions that categorised sexual practices as expressions of a particular type of person instead of as types of [disapproved] behaviour, as it had been understood previously.⁸⁹ Psychiatrists from the 17th century onwards sought to establish the ‘truth’ about the person from the acts of confession of their patients’ sexual desires and practices.⁹⁰ Homosexuality appeared as reflecting some kind of internal essence of a person to be discovered and classified, so that everything the person did was affected by their [homo] sexuality.⁹¹ As Foucault states “the sodomite had been a temporary aberration the homosexual was now a species.”⁹² Foucault theorised that the appearance of the homosexual reflects changes in the regulation of citizens by modern Western power regimes.⁹³ In pre-industrial societies, the power of the sovereign was limited to deciding life or death of the citizens.⁹⁴ In industrial societies, the success of the economy largely depends on the productiveness of the workforce, hence the emergence of bio-power.⁹⁵ Bio-power describes modern power mechanisms that developed in response to a need to ensure a productive workforce in light of the more indirect relationship between the sovereign and growing urban population.⁹⁶ Thus, biopower is a diffuse form of power that operates through multiple and overlapping networks, rather than a direct hierarchal relationship between the ruler and the ruled.⁹⁷ In this system power is more persuasive as it is operating through multiple discourses and institutions that monitor citizens’ conformity with social norms.⁹⁸ Subjects learn to discipline their own bodies to achieve a certain level of normality and conformity, benefitting the economic system by being productive and purchasing citizens.⁹⁹ The emergence of the psychiatric knowledge mentioned above intervened in the process of the normalisation of citizens bodies by linking sexuality to individual normality [heterosexuality] or abnormality

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid 43.

⁹³ Ibid.

⁹⁴ Ibid 136-139.

⁹⁵ Majia Holmer Nadesan *Governmentality, Biopower and Everyday Life* (Routledge 2008) 21-23; Foucault (n 2) 139-145.

⁹⁶ Majia Holmer Nadesan *Governmentality, Biopower and Everyday Life* (Routledge 2008) 3, 21-23.

⁹⁷ Johanna Oksala ‘From Biopower to Governmentality’ in Christopher Falzon, Timothy O’Leary and Jana Sawicki (eds) *A Companion to Foucault* (Blackwell 2013) 320; Michel Foucault “*Society Must Be Defended*” *Lectures at the Collège de France 1975-1976* (English series ed. Arnold I Davidson, Translated by David Macey, Picador 2003) 38-40; Foucault (n 2) 139-145.

⁹⁸ Majia Holmer Nadesan *Governmentality, Biopower and Everyday Life* (Routledge 2008) 22;

⁹⁹ Foucault (n 88) 139-145

[homosexuality]. Therefore, heterosexuality needs the construction of a homosexual identity category to secure its own privilege. Heterosexuality secures itself by establishing ontological boundaries that will protect it from its contaminated homosexual other.¹⁰⁰ Homosexuality paradoxically stands for what heterosexuality is not. Much as the feminine is to the masculine, the homo in relation to the hetero operates as an indispensable interior exclusion, an outside that marks the articulation of the possible inside.¹⁰¹ Heterosexuality needs homosexuality to secure its stability and compulsory nature.¹⁰² Citing Harold Beaver, Sedgwick writes; “the qualities predicated of ‘homosexuality’ (as a dependent term) are in fact a condition of ‘heterosexuality’; [so] that ‘heterosexuality’ far from possessing a privileged status, must in itself be treated as a dependent term.”¹⁰³ Heterosexuality is always threatened by its homosexual other. Therefore there is an insistent social pressure to conform to (hetero)sexuality and erasing the existence of homosexuality.¹⁰⁴ Rather than being separate and exclusive categorisations, in their construction hetero- and homo- are constitutive of each other but situated in a hierarchical relationship where the former is always considered superior to the latter. However, when deconstructed, the artificial nature of both sexual identity categories becomes apparent.

Eve Sedgwick has outlined some of the key assumptions that underpin modern sexual identity constructs:

Your biological (i.e. chromosomal) sex; male or female

Your self-perceived gender assignment; male or female (supposed to be the same as your biological sex)

The preponderance of your traits of personality and appearance; masculine or feminine (supposed to correspond to your sex and gender)

The biological sex of your preferred partner

¹⁰⁰ Diana Fuss, *Inside/Out* in Diana Fuss (eds) *Inside/Out Lesbian Theories, Gay Theories* (Routledge 1991) 1,2.

¹⁰¹ *Ibid* 1, 3.

¹⁰² *Ibid*. 1.

¹⁰³ Eve Kosofsky Sedgwick *Epistemology of the Closet* (New Preface 2008 ed. University of California Press 2008) 10.

¹⁰⁴ Fuss (n 100) 1.

The gender assignment of your preferred partner (supposed to be the same as her/his biological sex)

The masculinity or femininity of your preferred partner (supposed to be the opposite of your own)

Your self-conception as gay or straight (supposed to correspond to whether your preferred partner is your sex or the opposite)

Your preferred partner's self-perception as gay or straight (supposed to be the same as yours)

Your procreative choice (supposed to be yes if straight, no if gay)

Your preferred sexual act(s) (supposed to be insertive if you are male or masculine, and receptive if you are female or feminine)

Your most eroticised sexual organs (supposed to correspond to the procreative capabilities of your sex, and to your insertive/receptive assignment)

Your sexual fantasies (supposed to be highly congruent with your sexual practices but stronger in intensity)

Your main locus of emotional bonds (supposed to reside in your preferred sexual partner)

Your enjoyment of power in sexual relations (supposed to be low if you are female or feminine, high if male or masculine)

The people from who you learn about your own gender and sex (supposed to correspond to yourself in both respects)

Your community of cultural and political identification (supposed to correspond to your own identity)¹⁰⁵

Considering the list above, the artificiality of essentialised identity categories is rendered visible, as most of these assumptions are true only to varying degrees and for many people are not true at all.¹⁰⁶ Firstly, the biological and pre-discursive nature of gender categories have already been challenged above by Butler. Even in the case that one wanted to argue for a pre-discursive biological reality, there are individuals born with 'biologically' indeterminate sex

¹⁰⁵ Eve Kosofsky Sedgwick *Tendencies* (Routledge 1994) 6-7.

¹⁰⁶ *Ibid*, 7.

chromosomes. Biologist Anne Fausto Sterling explains that there are at least 5 [biological] variations of sex chromosomes that challenge the ideology of two binary sexes.¹⁰⁷ However, the knowledge of these intersexed bodies is erased by the medical community, which for the last century performed 'normalising' surgeries on these bodies.¹⁰⁸ Thus, even from a biological perspective, the division between the sexes does not hold up to scrutiny. Secondly, there is an underlying presumption that everybody 'has a sexuality', that this sexuality means the same to everybody i.e. constitutes an important aspect of their identity, that it can be fixed in certain erogenous zones and acts, and that your sexuality does not change over time. Sexuality means very different things to different people. For some people preference for a certain object, act, role zone or scenario is long-lasting and durable, so it can only be experienced as innate, but for others it appears late, accidentally, or in a discretionary manner. Some people are intensely marked by autoeroticism while others are allocentric. Some people's erotic experience is deeply embedded in gender meanings and differentials while others are not. These are of course only some examples that challenge primary meanings underpinning the binary, essentialised understanding of sexual identity. Having established the artificiality of sexual identity categories, as Sedgwick states:

it is a rather amazing fact that, of the very many dimensions along the line which the genital activity of one person can be differentiated from each other (dimensions that include preference for certain acts, certain zones or sensations, certain physical types, certain frequency, certain symbolic investments, certain relations of age or power, a certain species, a certain number of participants etc. etc.), precisely one, gender of the object choice, emerged from the turn of the century, and has remained as the dimension, denoted by the now ubiquitous category of 'sexual orientation'.¹⁰⁹

The importance placed on sexual identity categories in Western modernity means that the language of sexuality permeates other social structures and language so that the

¹⁰⁷ Anne Fausto- Sterling 'Why male and female are not enough' [1993] *The sciences* 20; Anne Fausto-Sterling *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books 2000) 78-79.

¹⁰⁸ Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books 2000) 45.

¹⁰⁹ Sedgwick (103) 8.

hetero/homo definition is inherent in other organisational binaries, such as for example public/private, secrecy/disclosure, knowledge/ignorance, majority/minority, masculine/feminine, health/illness, among many others.¹¹⁰ Deconstructing these associated binaries constitutes an important technique to challenge the compulsory nature of heterosexuality, challenging the assumption that it is the 'default' or 'natural' sexuality.

4.2 b) Heteronormativity

Warner popularised the term in his 1991 essay 'Introduction: Fear of a Queer Planet', stating that queer politics "has begun to challenge the pervasive and often invisible heteronormativity of modern societies."¹¹¹ The origin of heteronormativity can be found in lesbian feminist thought on the oppressive nature of heterosexuality. Monique Wittig argued that categories of sex (physical, psychological and social) were constructed by the totalitarian regime of heterosexuality that ensured obedience through violent sanction of nonconformity.¹¹² Obedience to sex and gender norms is ensured according to Wittig through social structures enforcing straightness, while at the same time rendering non-straightness unintelligible. In 'Compulsory Heterosexuality and Lesbian Existence' Adrienne Rich explained that lesbian existence is either considered deviant or completely erased in epistemology, due to the fact that heterosexuality is presumed explicitly or implicitly to be the 'most common' sexual preference in women.¹¹³ Rich argued that women are coerced into heterosexuality and patriarchal gender relations through the privileges that come with heterosexuality and the associated punishments of transgression or deviation of heterosexuality.¹¹⁴ Rich pointed to the need to examine heterosexuality as a form of social power rather than as the default sexuality.¹¹⁵ The term heteronormativity marks a shift in

¹¹⁰ Ibid, 11.

¹¹¹ Michael Warner 'Introduction: Fear of a Queer Planet' [1991] 93 *Social Text*, 3, 16.

¹¹² Monique Wittig 'The Straight Mind' [1980] 1 *Feminist Issue* 103.

¹¹³ Adrienne Rich 'Compulsory Heterosexuality and Lesbian Existence' [1980] 5.4 *Sings: Journal of women in culture and society* 631.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

approach, emphasising the productive nature of heterosexuality and its complicity in processes of normalisation as described by Foucault and discussed above.¹¹⁶

Nonetheless, it is not only heterosexuality, as in desire for the opposite sex, that is privileged but rather a specific type of heterosexuality that is celebrated through heteronormativity. In the essay 'Thinking Sex', Gayle Rubin theorised that sexuality is regulated through multiple dimensions that oppress not only gays and lesbians but also sex workers, sadomasochists, trans people and others engaging in 'unacceptable' sexual practice.¹¹⁷ Rubin explains that sex [in the West] is consistently understood as dangerous, destructive and negative.¹¹⁸ Sex becomes inherently sinful and assumed 'wrong' until proven otherwise.¹¹⁹ The most acceptable excuses are marriage, reproduction and love.¹²⁰ Erotic capacity, expression, intelligence and curiosity are sanctioned and require pretexts inapplicable in relation to other pleasures such as the enjoyment of food or fiction.¹²¹ Law has intervened in this regulation of sexuality by subjecting certain sexual practices, in particular consensual anal penetration [in the context of Europe and America] to criminalisation punishable by death, and in more modern times to lengthy prison sentences.¹²² Outside the law, sex is also a marked category, with small differences in behaviour often perceived by others and society as a threat, provoking rage, anxiety and terror.¹²³ Thus, sex acts are classified according to a hierarchal system of sexual value which has important implications for the individuals and groups engaging in sex practices depending on where their practices are situated in the hierarchy.¹²⁴ Individuals that engage in the most valued sexual practice, that is marital reproductive heterosexuality, are rewarded with clarified mental health, respectability, legality, social and institutional support, and marital benefits.¹²⁵ Those whose sexual practices fall on the lower end of the scale such as bar dykes, promiscuous gay men, transsexuals, fetishists,

¹¹⁶Maria do Mar Varela Castro, Nikita Dhawan and Antke Engel eds. *Heteronormativity and Hegemony: Revising 'the Political' in Queer Politics* (Routledge 2016) 28.

¹¹⁷ Gayle Rubin 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Carol S. Vance (eds) *PLEASURE and DANGER: Exploring Female Sexuality* (Routledge 1985) 267.

¹¹⁸ Ibid 278.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Rubin (n 117).

¹²⁵ Ibid.

sadomasochists and sex workers are assumed to be mentally ill, and considered disreputable and criminal.¹²⁶

In contemporary [Western] societies it is medicine and psychiatry that are responsible for these classifications, absorbing some of old religious sexual stigma in their approaches.¹²⁷ Medicine and psychiatry multiplied the categories of sexual misconduct, and through diagnostic manuals maintained an elaborate scheme of sexual sanctions that goes far beyond traditional condemnation of sodomy and adultery.¹²⁸ In these manuals sexual practices such as fetishism, sadism and exhibitionism are classified as mental disorders in need of treatment and cures.¹²⁹ Similarly, popular culture is permeated with ideas that erotic variability is dangerous, unhealthy, depraved, and a menace to everything from small children to national security.¹³⁰ Embedded in the sex hierarchy is the classification of sexual practices as either good or bad. The 'good' sexual practices are those considered by medicine, religion, culture, law, and society as safe, healthy, mature, legal and politically correct. Good sex is heterosexual, married, monogamous, procreative, non-commercial, in pairs, in relationships, same generation, in private, does not involve pornography, and involves using only bodies and vanilla (heterosexual) intercourse with no kinkiness or BDSM.¹³¹ Bad sex is homosexual, unmarried, promiscuous, non-procreative, commercial, alone and in groups, casual, cross-generational, in public, and involves pornography or with manufactured objects and sadomasochism.¹³² The classification of a certain sexual practice is historically contingent and can change over time, but the overall assumption continues to be same, namely that some sexual practices are inherently good, and others are bad.¹³³ Furthermore, monogamous, heterosexual acts which occur only in marriage-like coupledness, are vanilla and reproductive, sit at the top of the sex hierarchy and are supported through structural and institutionalised heteronormativity.

¹²⁶ Rubin (n 117).

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

Sedgwick explains that scholars have a tendency to [only] problematise homosexuality as a sexual category in need of interrogation, compared to heterosexuality which is left unexamined.¹³⁴ Sedgwick argues that the lack of critical interrogation of heterosexuality allows it to mask itself from being understood as a hegemonic system of power.¹³⁵ If heterosexuality is not historicised it becomes impossible to challenge the construction of heterosexuality as the normal, natural and default sexuality.¹³⁶ In fact, Sedgwick theorises that heterosexuality does not function as a sexuality at all.¹³⁷ Rather it is hidden by institutional pseudonyms such as inheritance, marriage, dynasty, family, domesticity, and population.¹³⁸ The term heteronormativity renders legible the compelling character of heterosexuality as it exists and reinforces itself as the norm in culture, society and politics.¹³⁹ Queer theory reveals that in a heteronormative society, heterosexuality is expected, not merely assumed, of all its members.¹⁴⁰ The latter does not mean that everybody is straight, but straight or not, one and all will be measured, judged, and evaluated from the perspective of heterosexuality.¹⁴¹ Heteronormativity ensures and privileges those behaviours, practices, and relationships that more closely approximate the ideal heterosexual relationship, rather than merely controlling sexual practice.¹⁴² For example marriage, adoption and pension regulations have tended to be available only to those in heterosexual relationships.¹⁴³ Heteronormativity not only imposes certain explicit and implicit rules of thoughts and behaviour, but also precludes or makes extremely difficult the expression of other ways of being and living.¹⁴⁴ Deconstructing both sexual and 'non-sexualised' discourses constitute key interventions of queer theorists exposing the multiple and complex ways that heterosexuality is reinforced as the norm in society.

¹³⁴ Sedgwick (n 105) 9-10

¹³⁵ Ibid.

¹³⁶ Sedgwick (n 105).

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Samuel A. Chambers, 'An Incalculable Effect': Subversions of Heteronormativity' [2007] 55 Political Studies 656, 666.

¹⁴⁰ Ibid. 665.

¹⁴¹ Samuel A. Chambers 'Telepistemology of the Closet; or The Queer Politics of Six Feet Under' [2003] 26(1) The Journal of American Culture, 24, 26.

¹⁴² Samuel A. Chambers, 'An Incalculable Effect': Subversions of Heteronormativity' [2007] 55 Political Studies 656, 666.

¹⁴³ Ibid.

¹⁴⁴ Chambers (n 139).

Challenging heteronormativity and the oppressive regulation of sexuality through the sex hierarchy and good/bad sex binary, queer theory does deconstruct texts but also represents transgressive sexual practices. Access and experience of alternative pleasures figure as an important subversive strategy in queer theory. Writers such as Pat Califia and Carol Queen narrate their experience of engaging sexual practices that go beyond the boundaries of acceptable sexual behaviour as defined by the sex hierarchy discussed above.¹⁴⁵ For Pat Califia it is engaging in BDSM sex parties and for Queen it is engaging in different gender performances during sex.¹⁴⁶ Both authors describe their experiences as subversive and challenging the traps of sexual normativity and essentialised identities.¹⁴⁷ Queer theory not only challenges sexual normativity but celebrates sexual diversity through active representation of subversive sexual practices.

4.2 c) Homonormativity and the queer rejection of assimilationist strategies

As queer activists challenged lesbian and gay assimilationist strategies, queer theory has adopted the term homonormativity to theorise about the lesbian and gays that embrace heteronormative structures.¹⁴⁸ One of the most salient critiques of homonormativity is found in Michael Warner's analysis in *The Trouble with Normal*.¹⁴⁹ Warner critically analysed the move towards securing marriage and family rights by lesbian and gay mainstream and its corollary repressive effect on traditional 'gay areas' in New York city.¹⁵⁰ Warner examines different New York city laws that have effectively achieved the dispersal of adult business, discretion in advertising, and visibility of adult business, and forced these businesses to the city limits, from residential areas to remote ones.¹⁵¹ While not specifically targeting gay areas, these laws have effectively achieved the dissolution of areas where gay clubs and gay adult

¹⁴⁵ Patrick Califa 'Gay Men, Lesbian and Sex: Doing It Together' in Annabelle Willox and Ian Morland eds. *Queer Theory* (Palgrave MacMillan 2005) 22; Carol Queen 'The Leather Daddy and the Femme' in Annabelle Willox and Ian Morland eds. *Queer Theory* (Palgrave MacMillan 2005) 40.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Lisa Duggan, *The Twilight of Equality? Neoliberalism, Cultural Politics and the Attack on Democracy* (Beacon Press 2003) 48-50.

¹⁴⁹ Michael Warner *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Paperback edition Harvard University Press 2000).

¹⁵⁰ Warner (n149).

¹⁵¹ Ibid.

businesses existed, and where lesbian and gay cruising used to happen.¹⁵² The different legal regulations examined by Warner effectively share the aim of having sex less noticeable in the course of everyday urban life.¹⁵³ According to Warner the move towards pushing sex back to a fictitious 'private' sphere derives from a failure to understand public culture of sex to be something to value, something whose accessibility should be protected.¹⁵⁴ By pushing sexuality back into the private, it furthers isolation and shame, elements that are among the most common used by sexual politics to oppress non-heterosexual desires and expressions.¹⁵⁵ Unfortunately, the restriction of a public sex culture is strengthened by much of the mainstream lesbian and gay due to their unwillingness to defend their own sexual culture and its worldmaking, preferring to focus on marriage rights and achieving heterosexual respectability.

While Warner did not apply the term homonormativity, he nonetheless critiqued the aspiration of many gay and lesbians to be included in heteronormative structures, in particular marriage.¹⁵⁶ Warner analysed trends in gay and lesbian activism that aimed at fighting the stigma of being gay or lesbian through the repression of sexual shame. "We are gay we say, but we have nothing to do with sex".¹⁵⁷ He saw this as an attempt by the gay and lesbian movement to try to 'clean' itself and that cleanliness in this sense is equivalent to desexualising politics in order to transform it into something that "you could take home to Mom".¹⁵⁸ Building on Warner's insights, Diana Richardson examined how there has been a shift from considering lesbian or gay as social, rather than sexual, categories.¹⁵⁹ Richardson contends that this shift has translated itself into a normative focus on the "desirability and necessity of marriage-style coupledom".¹⁶⁰ Richardson suggests that these changes have contributed to the creation and recognition of the 'normal gay', who, according to Seidman, is "[e]xpected to be gender conventional, link sex to love and a marriage-like relationship,

¹⁵² Warner (n149).

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid, 81-147.

¹⁵⁷ Ibid, 40.

¹⁵⁸ Ibid, 42.

¹⁵⁹ Diana Richardson, 'Locating Sexualities from here to Normality' [2004] 7(4) *Sexualities* 397.

¹⁶⁰ Ibid, 393.

defend family values, personify economic individualism, and display national pride.”¹⁶¹ The link between sexual normativity and economic individualism has been explored by Lisa Duggan who considered homonormativity to be intimately linked to neoliberal politics.¹⁶² Duggan explains that there has been an important shift towards a gay political mainstream that promotes rationality and universal forms of economic expansion.¹⁶³ She critiques that lack of vision of a collective critical queer engagement. She writes “instead we have been administrated a kind of a political sedative – we get marriage and the military, then we go home and cook dinner, forever.”¹⁶⁴

In sum queer theorists reject assimilatory and homonormative strategies as they are critical of these in achieving real freedom for sexual and gender diversity. As discussed in section 1 of this chapter, the formulation of alternatives to the dominant forms of regulating sexuality by queer theorists constitutes an important tool to ensure that human rights law does not become complicit in forced [hetero] normalisation of sexual and gender diversity.

Conclusion

In this chapter I have explored queer theory as one of the critical perspectives informing the queer postcolonial analysis of the interpretation of human rights by the IE in chapters 6 and 7. This chapter started by giving a working definition of queer theory, identifying the construction of sexual and gender categories as well as the discursive, structural, institutional, cultural, and socio-political privileging of heterosexuality as key areas of concern and intervention. Section 1 also identified discourse analysis using deconstruction as a key method of queer theory. From there the chapter moved to consider queer theory in the context of international human rights law. The analysis in section 2 emphasised that the

¹⁶¹ Steven Seidman *Beyond the Closet: The transformation of gay and lesbian life* (Routledge 2002) 133; Christina Santos, ‘Are we there yet? Queer sexual encounters, legal recognition and homonormativity’ [2013] 22.1 *Journal of Gender Studies* 59.

¹⁶² See in general Lisa Duggan, ‘The New Homonormativity: The Sexual Politics of Neoliberalism in Dana D. Nelson and Russ Castronovo (eds) *Materializing Democracy: Toward a Revitalized Cultural Politics* (Duke University Press 2002) 175-194.

¹⁶³ *Ibid*, 177.

¹⁶⁴ Lisa Duggan, ‘The New Homonormativity: The Sexual Politics of Neoliberalism in Dana D. Nelson and Russ Castronovo (eds) *Materializing Democracy: Toward a Revitalized Cultural Politics* (Duke University Press 2002) 198. Christina Santos, ‘Are we there yet? Queer sexual encounters, legal recognition and homonormativity’ [2013] 22.1 *Journal of Gender Studies* 59.

subject of protection in international human rights law is perceived as both gendered and sexual in ways that have often been exclusionary to a range of sexually and gender diverse people. Therefore, queer deconstruction of human rights law allows for the interrogation of the construction of sexual and gender subjects, which will be critical to the analysis of the IE to come in chapters 6 and 7. However, as analysed in section 3 of this chapter, queer theory has not sufficiently explored the intersection between race and sexuality and gender categories, nor has queer analysis concerned itself with non-Western sexual and gender diversity. Consequently, the last section of this chapter explored key queer insights that together with postcolonial theory inform queer postcolonial approaches discussed in chapter 4 and applied to the IE in chapters 6 and 7.

In section 4 a range of queer theoretical insights informing the forthcoming analysis in chapters 4, 6, and 7 were discussed. The section began with an analysis of the queer rejection of the binary sex/ gender system. This discussion underscored the restrictive nature of the sex/gender binary, pointing to the importance of the queer challenge to ensure the protection of gender diversity. From there in section 4 I considered queer theories' approach to sexuality. The analysis started considering the restrictive nature of modern Western sexual identities and their complicity in ensuring heterosexual privilege. From there the chapter focused on the queer critique of heteronormativity underscoring the system's oppression of sexual diversity. Lastly, section 4 considered the rejection of assimilatory strategies by queer theorists. As pointed to throughout section 4, these queer insights play an important role in the following chapters. In chapter 6 and 7 they are applied to investigate the construction of sexual and gender subjects in the reports and to identify influence of heteronormative structures in the human rights interpretations by the IE.

In the next chapter I explore postcolonial theory, considering key analytical insights that, together with those of queer theory discussed in this chapter, inform the queer postcolonial approaches discussed in chapter 4 and applied to international human rights law in chapters 6 and 7.

Chapter 3. Postcolonial theory

Introduction

This chapter examines postcolonial theory as one of the critical perspectives that, together with queer theory, informs the analysis of international human rights in this thesis. To this end the chapter is oriented towards giving an understanding of postcolonial theory, both in relation to queer theory and as a critique of international human rights law. This chapter begins exploring the definition of postcolonial theory, underscoring its multiple and complex framework and target of analysis. Section 1 aims at defining postcolonial theory, starting with explaining that postcolonial theory is primarily concerned with European colonialism (1492 and 1945) and its effects on the present.¹ Furthermore, the analysis identifies some key areas of postcolonial interventions including the critique of Western knowledge and its cultural complicity in colonialism and imperialism, the relationship between the colonised and coloniser and the effects of that relationship on the present such as postcolonial nationalism and contemporary forms of European and United States imperialism. Lastly in section 1 I explore some areas of contention in terms of terminology and location of postcolonial theory.

Having defined postcolonial theory, the second part of this chapter explores postcolonial theory in the context of the analysis of sexual and gender diversity. In this section I discuss how postcolonial theory has been guilty of ignoring both the intersection between sexuality, gender and race and also the existence of non-Western sexual and gender diversity. Despite this, the section concludes, as will be explored further in chapter 4, that postcolonial theory can challenge the inherent Western centrism in queer theory and support the representation of non-Western sexual and gender diversity. Moreover, as section 3 explores, postcolonial theory can further explore Western centrism as it exists in international human rights law. In this section I explore some of the historical underpinnings of international human rights, concluding that their construction is based on a fundamentally European cultural interpretation of rights, which continues to dominate due to the contemporary economic and cultural hegemony of the West. Therefore, postcolonial critique can give important insights

¹ Robert C.J. Young *Postcolonialism: An historical introduction* (Blackwell 2001) 4.

into the exclusion and marginalisation of the non-West within international human rights law, as well as identifying non-Western centric alternatives. Despite the latter, postcolonial theory is less established in the critique of law than in other disciplines, so in the last part of section 3 I explore postcolonial theory and its convergence with other critical race approaches. In this section I also offer a brief reflection of the importance of these critical approaches in light of the 2020 uprising against racial injustice and violence.

In the last section of this chapter I explore specific insights from postcolonial theory that inform the discussions in chapter 4 on queer postcolonial approaches and underpin the analysis in chapters 6 and 7. The discussion starts by considering postcolonial theory and offers a critique of the complicity of Western epistemology and knowledge in supporting European imperialism and establishing the cultural domination of the West.² This section focuses more specifically on Edward Said's analysis in *Orientalism* (1978)³, considered foundational to postcolonial theory in general as well as the use of (Foucauldian) discourse analysis within the discipline.⁴ From Said's analysis we learn that Western knowledges are often embedded with structures of signification that are both productive of racial hierarchies and inequality but also marginalising and exclusionary towards non-Western forms of thought and knowledge.⁵ To remedy ethnocentrism in Western knowledge, one tool proposed by postcolonial theory, which is further discussed in Section 4, is the 'provincialisation of knowledge' defined by Dipesh Chakrabarty.⁶ As this section further explores, provincialisation refers to doing genealogical analysis of knowledge to identify a specific history and location, challenging the conflation between Western cultural hegemony and the universal. By recognising the specific points of conflation between the West and the universal, provincialisation allows for the re-location of the West as a particular geographical entity and open for non-Western culture and thought in the interpretation of the universal. In section 4.3 I explore the postcolonial challenge to essentialist racialised identities through the work

² Young (n 1) 385-386; Robert J.C Young *White Mythologies: Writing History and the West* (Second ed. Routledge 2004) 166.

³ Edward W. Said *Orientalism* (Reprinted with new preface Penguin Books 2003).

⁴ Young (n 1) 383; Leela Gandhi *Postcolonial Theory: A Critical introduction* (Columbia University Press 2019) 65.

⁵ Edward W. Said *Culture and Imperialism* (Vintage Books 1993) xix.

⁶ Dipesh Chakrabarty *Provincializing Europe: postcolonial thought and historical difference* (Reissue with new preface by the author, Princeton University Press 2008).

of Fanon and Bhabha. The discussion begins by considering Fanon's analysis of colonial stereotypes which created an inferiority complex compelling colonial population to assimilate themselves to the colonisers. Following this, the analysis moves to Bhabha who builds and re-works some of Fanon's theories, arriving at the concept of hybrid identities which exists in-between dominant fixed racial identities. It is in these hybrid identities that Bhabha recognises opportunities for change and challenges to the oppressive status quo. From these non-homogenous hybrid groups, Bhabha has also found potential for reinterpretation of human rights. Thus, in the last part of section 4.3 I explore Bhabha's alternative concept of rights, discussing how Bhabha's theories could help displace the centrality of the West in international human rights law. Lastly, in section 4, I explore the subaltern as a positioning that challenges the historical and contemporary erasure of non-Western sexual and gender diversity. The section gives a brief overview of the figure of the subaltern in postcolonial theory as it has been recognised by the Subaltern Studies Group (SSG). A more in depth focus will be given to Spivak, who in 1985 asked 'Can the Subaltern Speak?'⁷ Spivak offers important insights into how privilege and power operate to allow [privileged and powerful] individuals and groups to create knowledge about the subaltern while at the same time erasing the subaltern's voice.⁸ By being oriented in their analysis towards the subaltern figures, postcolonial theorists point us towards the exploration of how certain (non-Western) subjects are discursively excluded from 'speaking' and rather are 'spoken for' rendering their voices and experiences invisible in dominant narratives.

1. Defining Postcolonial Theory

Since the 1980s, postcolonial theory has emerged as a meeting point and battleground for a variety of disciplines and theories.⁹ Indeed, postcolonial theory is not in a strict sense a 'theory' as described by Foucault as 'deduction on the basis of a number of axioms of an

⁷Gayatri Chakravorty Spivak 'Can the Subaltern Speak? Speculations on Widow Sacrifice' [1985] *Marxism and the Interpretation of Culture* 271.

⁸ Gayatri Chakravorty Spivak, 'The New Subaltern: A silent Interview' in Vinayak Chaturvedi ed. *Mapping Subaltern Studies and the Postcolonial* (Verso: London 2000) 324.

⁹ Gandhi (n 4) 3; Young (n 1) 67.

abstract model applicable to an indefinite number of empirical descriptions'.¹⁰ Rather, postcolonial theory engages with a range of disciplines and theoretical approaches including anthropology, feminism, Marxism, poststructuralism, and psychoanalysis, and has been inspired by a diverse group of anti-colonial thinkers.¹¹ Thus, postcolonial theory involves multiple approaches with a range of different priorities and positions refusing totalising forms and producing a fragmented and multiple theoretical language.¹² Notwithstanding this fluidity and heterogeneity, postcolonial theory shares some common concerns and sites of intervention.¹³

Postcolonial theory critically engages with European colonialism and its effects on the present.¹⁴ In this sense, postcolonial theory is united by a political and moral approach towards the history and legacy of Western colonialism.¹⁵ It presupposes that the history of European expansion, and the occupation of most of the landmass between 1492 and 1945, marks a process that was both specific and problematic.¹⁶ This history is marked by 'histories of slavery, untold, unnumbered deaths from oppression and neglect, forced migration and diaspora of millions of peoples, the appropriation of territories, institutionalisation of racism and the destruction of cultures and the superimposition of other cultures'.¹⁷ Furthermore, not only does the entire world now operate within the economic system primarily developed and controlled by the West, but the West continues to dominate in terms of political, economic, military, and cultural power that gives this history continued significance.¹⁸ Therefore while in first place, decolonisation was a celebrated moment of arrival, charged with the rhetoric of independence and self-invention and hopes for a new world.¹⁹ It very rapidly became apparent that the conclusion of formal colonialism did not end the foundational economic, cultural, and political damage inflicted by colonial occupation.²⁰ As some postcolonial critics

¹⁰ Foucault *Archaeology of Knowledge* (Translated by Alan Sheridan, Routledge 2002) 128 cited in Robert C.J. Young *Postcolonialism: An historical introduction* (Blackwell 2001) 64.

¹¹ Young (n 1) 67.

¹² Ibid 69.

¹³ Ibid.

¹⁴ Young (n 1); Gandhi (n 4).

¹⁵ Young (n 1) 4.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid 5.

¹⁹ Gandhi (n 4) 4.

²⁰ Ibid.

such as Said and Memmi have argued, the colonial aftermath has not achieved the end of colonialism.²¹ Postcolonial theory analyses European colonial history as it determines the configurations and power structures of the present and its effect on those that suffer the most.²²

Part of this analysis of the present is, as Robert Young identifies, postcolonial inquiry into ‘the extent to which European history, but also European culture and knowledge, was part of and instrumental in the practice of colonisation and its continuing aftermath’.²³ In this critique postcolonial theorists draw inspiration from the work of anti-colonial critics, often using poststructuralist discourse analysis and deconstruction as tools to challenge Western political, intellectual, and academic hegemony.²⁴ Leela Gandhi explains that the work by anti-colonial critics such as Fanon and Gandhi should be recognised as ‘theoretical events’ in their own right, as they resist and challenge Western domination.²⁵ Anti-colonial writers like Du Bois, Césaire, Fanon, Memmi and Abdel-Malek challenged the empire and called for independence and self-government, while also trying to understand it (colonialism and imperialism) as a social force that produced inequality, hierarchies and structures of domination.²⁶ Indeed, some of the theoretical insights from Fanon underpin some of the analysis in this thesis in chapters 4, 6 and 7. The anti-colonial challenge included critiquing and challenging some of the assumptions of European knowledge when it came to their representation of the colonised but also more generally.²⁷ For example, these anti-colonial critics explored how Western epistemological ideas such as ‘rationality’ are always defined according to a binary structure against what it is not.²⁸ So ‘rational’ is defined by the notion of ‘irrational’. As these anti-colonial critics explore, notions such as irrationality were often imposed on the colonised population, denying them agency and intellectual value. Through this analysis, the anti-colonial critics laid the groundwork for postcolonial theory’s critique of Western knowledge and cultural structures.

²¹ Gandhi (n 4) 47.

²² Young (n 1) 4.

²³ Ibid 69.

²⁴ Ibid 65.

²⁵ Gandhi (n 4) 18.

²⁶ Julian Go *Postcolonial Thought and Social Theory* (OUP 2016) 21-22.

²⁷ Ibid 22-24.

²⁸ Ibid 30.

As postcolonial theory emerged in the 1980s, it evolved within a distinct poststructuralist environment providing postcolonial theory with a set of theoretical tools to critically analyse Western knowledges.²⁹ Indeed Edward Said's *Orientalism*, commonly regarded as the catalyst of postcolonial theory, draws upon a range of Foucauldian paradigms.³⁰ While neither Foucault nor Derrida addressed the problem of colonialism directly, it is the poststructuralist challenge to the universal validity of Western culture and epistemology that underpins postcolonial theory.³¹ In particular, postcolonial theory has inherited from poststructuralism a very specific understanding of Western domination as the symptoms of the alliance between power and knowledge.³² Thus, postcolonial theory understands knowledge as being the result of an already established discursive field that produces regimes of truth rather than merely describing reality.³³ Central to this pre-established discursive field of Western knowledge are two epistemological concepts critiqued by postcolonial theorists, namely humanism and the Cartesian subject.³⁴ While the term humanism has a long and complex history of engagements and meanings³⁵ it can be taken to broadly refer to two ideas: that underlying the diversity of human experience it is possible to discern a universal and given human nature, and secondly that this nature can be discovered by rational thought.³⁶ The Cartesian subject made humanism possible as it centred the thinking human subject as the knower responsible for creating and building knowledge.³⁷ Furthermore, the values of humanism are central to the ways in which Western Anglo-European culture understands its own history, in terms of individual achievement, rational thought and the authority of science.³⁸ Postcolonial theory challenges the claims of Western knowledge to objectivity, neutrality and universality, contesting the privileges and authorities of the canonical knowledge system.³⁹ Furthermore, postcolonial theorists draw on poststructuralist insights to examine how Western knowledge normalises its own history and narratives, while at the

²⁹ Gandhi (n 4) 24.

³⁰ Ibid.

³¹ Gandhi (n 4) 26-27.

³² Ibid 25.

³³ Robert J.C Young *White Mythologies: Writing History and the West* (Second ed. Routledge 2004) 158-180.

³⁴ Gandhi (n 4) 23-41.

³⁵ Tony Davis *Humanism* (Taylor and Francis Group 1996) 3.

³⁶ Gandhi (n 4) -41; Mary Klages *Literary Theory: A Guide for the Perplexed* (Bloomsbury Publishing 2007) 10-12.

³⁷ Ibid.

³⁸ Mary Klages *Literary Theory: A Guide for the Perplexed* (Bloomsbury Publishing 2007) 11.

³⁹ Gandhi (n 4) 23-41, 42.

same consistently precluding non-Western thought from being considered 'knowledge proper'.⁴⁰ Reasserting the epistemological value and agency of non-European knowledges that have been disqualified as science by Europeans is an important aspect of postcolonial theory.⁴¹ Equally cultural traditions developed outside the West are important postcolonial tools to challenge the political and cultural hegemony of the West imposed on its 'other' through imperialism.⁴²

In dismantling the effects of European colonialism, postcolonial theorists explore the relationship between the colonised and the coloniser and its effect on contemporary relations.⁴³ The postcolonial inquiry into this relationships seeks to understand the duality of both hate and desire for the coloniser in the colonised population and vice versa.⁴⁴ Postcolonial theory explores this relationship in particular as it relates to colonial and now postcolonial subjects' complicity in their own oppression through the desire for and idealisation of the West.⁴⁵ Part of this exploration involves the analysis of the impact of colonial education and superimposition of European culture, as well as the continued devaluation and cancelling of non-Western cultures today and its psychological effects on non-Western as well as Western peoples.⁴⁶ Furthermore, postcolonial theory critically analyses the different types of relationships that exist between the coloniser and the colonised, as well as within these groups and categories and their impact on contemporary relations.⁴⁷ In fact there were many people within the West who did not belong to the imperial elite and were subjected to exploitation and abuse instrumental to the accumulation of private wealth.⁴⁸ Thus, in the critique of Western economic exploitation as it has been perpetuated through the international economics system today, postcolonial theory recognises that colonialism always operated internally as well as externally.⁴⁹ Similarly,

⁴⁰ Gandhi (n 4) 42; Robert J.C Young *White Mythologies: Writing History and the West* (Second ed. Routledge 2004) 158-180.

⁴¹ Young (n 1) 65.

⁴² Ibid.

⁴³ Gandhi (n 4) 23-41.

⁴⁴ Ibid 11-14.

⁴⁵ Ibid 11.

⁴⁶ Ibid 11-12.

⁴⁷ Young (n 1) 9.

⁴⁸ Ibid 9-10.

⁴⁹ Ibid 9.

⁴⁹ Ibid 9-10.

postcolonial theory contends that with the emergence of 'new' decolonised states, 'new' forms of oppression emerged. Therefore postcolonial theory inquires about the replication of colonial hierarchies as well as about creation of new hierarchies within postcolonial states.⁵⁰ One of the problems identified by postcolonial theory is that independence power was often passed to a native bourgeois elite that was produced during colonialism and took on board many Western presuppositions.⁵¹ In particular, postcolonial theory analyses the transformation of anti-colonial nationalism against the oppressor towards an anti-democratic nationalism based on a gendered (male) and class (bourgeois) domination.⁵² Consequently, postcolonial theory explores the hierarchal and exploitative relationship between different peoples within post-colonial nations as well.⁵³ Lastly, postcolonial theory is preoccupied not only with how the end of formal colonialism brought new forms of oppression within national states but also with how it brought with it new forms of postcolonial domination.⁵⁴ In particular, the effects of United States imperialism, which has since the 1940s taken many forms including military, political, economic, and cultural, are subjects of postcolonial inquiry.⁵⁵

In light of the above, postcolonial critique can be understood as examining forces of oppression and domination in our contemporary world as it derives from and relates to the politics of European colonialism and its contemporary effects, the impacts of United States imperialism and anti-colonial and nationalist struggles.⁵⁶ Furthermore, postcolonial inquiry is always guided by the relationship of history to the present, contesting contemporary hierarchies of oppression and exploitation defined by considerations of race, ethnicity, nationalism, class and gender.⁵⁷ Lastly, postcolonial theory is concerned with transformation and resistance of the conditions that continue to disempower both materially but also intellectually and culturally, as well as excluding and degrading peoples and societies outside the centre of imperial and former colonial powers.⁵⁸ This transformation and resistance take

⁵⁰ Young (n 1) 61.

⁵¹ Ibid 59.

⁵² Ibid 61; Chakrabarty (n 6) 9.

⁵³ Ibid.

⁵⁴ Young (n 1) 59.

⁵⁵ McClintock (n 2)

⁵⁶ Young (n 1) 11.

⁵⁷ Ibid.

⁵⁸ Ibid 69.

several forms, including the decentring of the intellectual dominance of Euramerica through critical postcolonial analysis of Western knowledge and epistemology, and representation of non-Western knowledge and cultural formations.⁵⁹ However, both the scope of the term postcolonial as well as the location of postcolonial theorists in Western academia is often called into questions and critique. While these debates are greater than there is space to explore here in this chapter, it is worth noting some of the primary concerns.

1.2 Terminology and location of postcolonial theory: contention and critique

As outlined above, postcolonial theory is heterogenous and multiple both in terms of focus, disciplinary and theoretical approaches. Disagreements about usage and methodology are often reflective in the debates about terminology and the temporal nature of the term 'post-colonial'.⁶⁰ Anne McClintock suggest that the term 'post-colonial' risks reducing the multiplicity and complexity of the experiences of colonialism, decolonisation, and imperialism to a singular narrative, rather than describing the many critical engagements with forces of oppression and domination underpinning postcolonial theory.⁶¹ One reason is that the notion 'post' in postcolonial implies linear progression of time where we move from the 'pre-colonial' to the 'colonial' and 'post' colonial, potentially reducing history to colonialism, so it appears that every culture has only existed in a chronological relation to Europe.⁶² The next problem is that the term is not reflective of the great heterogeneity of experiences of colonialism and decolonisation, nor does the term colonialism in itself distinguish between the variety of forms of global domination.⁶³ In particular the term does not cover the emergence of new oppressive powers such as the US and huge multinationals to direct the flows of capital, commodities, arms and information.⁶⁴ Nonetheless, the term is useful 'in indicating a general process with some shared features around the globe.'⁶⁵ However,

⁵⁹ Young (n 1) 65.

⁶⁰ Gandhi (n 4) 3.

⁶¹ Anne McClintock 'The Angel of Progress: Pitfalls of the Term 'Post-Colonialism'' [1992] 31/32 *Social Text* 84.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ John C. Hawley 'Introduction' in John C. Hawley ed. *Postcolonial, Queer: Theoretical Intersections* (State University of New York Press 2001) 2-3.

theorists should be cautious of uprooting the analysis from specific localities around the world.⁶⁶ As Robert Young suggests, postcolonial analysis and critique is (and must) always (be) reshaped, resituated, and redirected to a specific contingent location of the postcolonial movement and inquiry of oppression and domination.⁶⁷

A second area of contention among postcolonial theorists and critics is the location of postcolonial theory within Western academic institutions. Leela Gandhi explains that the use of poststructuralism has also allowed postcolonial theory to gain a privileged foothold within the metropolitan academic mainstream which has given rise to at least two key points of contention.⁶⁸ To begin, Gayatri Spivak points us towards the risk of re-marginalisation that can happen when postcolonial theorists within the metropolitan Western academy seek to 'identify and 'confirm' marginalised 'cultures', thereby perpetuating the rigid distinction between the 'centre' and the 'margin'.⁶⁹ Furthermore, commentators are concerned with postcolonial theory's preoccupations with epistemology, knowledges and the formation of subjectivities rather than the social and economic predicaments of the lived experiences of postcolonial peoples.⁷⁰ This critique is often extended to the postcolonial intellectuals themselves, most situated within the Western academy, and their ability to theorise and represent lived postcolonial realities.⁷¹ Despite the merits of some of these critiques, postcolonial theory can still play an important role in challenging inequality and exploitation around the world. As Gandhi explains, challenging the production of knowledge postcolonial theory allows us to think differently, to literally 'think a way out of the epistemological violence of the colonial (and imperial) encounter and its effects.'⁷²

⁶⁶ Hawley (n 65).

⁶⁷ Young (n 1) 11.

⁶⁸ Gandhi (n 4) 25.

⁶⁹ Gayatri Chakravorty Spivak *Outside the Teaching Machine* (Routledge Classics 2009) 62.

⁷⁰ Arif Dirlik 'The postcolonial aura: Third World Criticism in the Age of Global Capitalism [1994] 20.2 Critical Inquiry 328; Aijaz Ahmad 'The politics of literary post coloniality [1995] 36.3 Race and Class 1.

⁷¹ Gandhi (n 4) 42-63.

⁷² Ibid 63.

2. Postcolonial Theory, sexual and gender diversity

As discussed in the focus on queer theory in chapter 2, postcolonial theory is guilty of overlooking the intersection between sexuality, gender and race and the existence of non-Western sexual and gender diversity. While there is postcolonial critique of the use of sexuality to exploit and oppress local populations on behalf of the colonisers, the analysis has rarely extended to colonialism's effect on the erasure of same-sex practices and gender diversity. While postcolonial theorists have problematised the sexual exploitation of native men by male colonisers, there has been little analysis of the existence of same-sex desire in the local populations. For example, in *White Skin Black Masks*, Fanon analysed how the colonising West deployed sexuality in the construction of racial difference to deny power and agency to the native populations.⁷³ While Fanon touched upon Western male same-sex practices with the natives, he famously denied the existence of homosexuality in the colonised population, implicitly circumscribing the latter to the West.⁷⁴ Another example is Edward Said, whose theorising is explored further below, who has come close to constructing sexuality as only a metaphor for 'other' more important colonial dynamics.⁷⁵ However, as will be explored further in chapter 4, the erasure of local same sex desires and gender diversity played an important role in the schemes of empire, and has important consequences for contemporary regulation of sexuality and gender diversity. Postcolonial theory has often failed at engaging with the way homophobia and heterosexism has shaped hegemonic power both in the past and today.⁷⁶

Despite this lack of problematisation of local sexual and gender diversity, there has been some postcolonial critiques of Western patriarchal heteronormativity.⁷⁷ As will be discussed in chapter 4, Fanon mentioned above in section 1, were highly critical of the imposition of Western heteropatriarchal family structures in the colonies and their subsequent adoption

⁷³ Greg Thomas *The Sexual Demon of Colonial Power: Pan-African Embodiment and Erotic Schemes of Empire* (Indiana University Press 2007) 51- 75.

⁷⁴ Frantz Fanon *Black Skin, White Masks* (translated by Charles Lam Markmann, new edition, Pluto Press 2008) 139.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Greg Thomas *The Sexual Demon of Colonial Power: Pan-African Embodiment and Erotic Schemes of Empire* (Indiana University Press 2007) 51- 75.

by the local population.⁷⁸ However, this critique did extend to the effects of heteropatriarchy on local expressions of same-sex practices and gender diversity.⁷⁹ Furthermore, the use of and celebration of non-Western sexualities vis-à-vis Western sexuality in postcolonial theory has not extended to non-Western (same sex) sexualities or gender diversity.⁸⁰ Thus, while postcolonial theory aims to recover and represent non-Western experiences, knowledge, and cultural formations, this has rarely extended to sexually and gender diverse communities. Despite postcolonial theories, general silence towards non-Western sexually and gender diverse subjects, postcolonial analysis might support the challenge to the Western-centrism in queer theory. Postcolonial theory has at its centre the investigation of the exclusion and marginalisation of non-Western peoples as well as recovering non-Western voices from which alternatives can begin to emerge. Against the privileging of Euromerican viewpoints in the analysis of sexuality and gender, applying postcolonial theories through a queer lens can help displace the dominant narratives that render non-Western sexually and gender diverse people invisible.⁸¹ Chapter 4 further explores the bridging of queer and postcolonial theories, identifying key analytical insights that will be applied to the human rights interpretations by the IE.

3. Postcolonial Theory and International Human Rights Law

As suggested in chapter 2, postcolonial theory can offer indispensable support to queer critique and analysis in the context of international human rights law by challenging the Western centrism of both disciplines (that is queer theory and international human rights law). Notably, while postcolonial theory has arguably been more established in disciplines other than law,⁸² law has been in the forefront of what is the core subject of postcolonial critique, namely the West's relation with its 'other'.⁸³ Law played an important role in the colonial process in which colonising laws were imposed in the territories of annexed

⁷⁸ Greg Thomas *The Sexual Demon of Colonial Power: Pan-African Embodiment and Erotic Schemes of Empire* (Indiana University Press 2007) 51- 75.

⁷⁹ Gurav Desai 'Out in Africa' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 139, 146.

⁸⁰ Desai (n 79) 139.

⁸¹ William Spurling 'Broadening Postcolonial Studies/Decolonizing Queer Studies: Emerging "Queer" Identities and Cultures in Southern Africa' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 185-186.

⁸² Roy Alpana, 'Postcolonial Theory and Law: A Critical Introduction' [2008] 29 *Adel. L Rev.* 315.

⁸³ *Ibid.*

cultures.⁸⁴ Furthermore, the development of international law, that is, the law that governs the relationship between sovereign states, of which international human rights law forms part, largely corresponds with the periods of colonisation.⁸⁵ Therefore, the narratives of international law that emerged from the end of the fifteenth century to the nineteenth century emerged from European intellectuals claiming to be speaking on behalf of the whole world.⁸⁶ These intellectuals, including influential international lawyers from those times, such as Emmerich Vattel, when defining the 'law of nations' (in 1758) merely filled the category 'universal' with a particular understanding that was part of European Enlightenment.⁸⁷ As explored above, the European enlightenment was complicit in excluding and marginalising non-Western peoples from universal categories such as 'rationality'.⁸⁸

When (modern) international law appeared in the late nineteenth century it was reconceptualised as emanating from the 'civilised world', reaffirming the centrality of the West in its definition.⁸⁹ Furthermore, during the period between the First and Second World Wars, while the 'civilising missions' in international law were abandoned, most international intellectuals simply generalised the European experiences into international law.⁹⁰ The historical origins of international human rights law follow some of the same trajectory of international law in general, with much of the same European intelligentsia preoccupied with the definition of the 'rights of man' which primarily excluded colonised populations.⁹¹ While the modern human rights regime does not maintain such a distinction between people, it is still founded upon some of the ideas and theories that emerged from the first human rights formulations.⁹² This means that despite its aspiration to universality, international human rights law is based on certain cultural interpretations of human rights that are fundamentally European.⁹³ Furthermore, the West continues to dominate economically and culturally,

⁸⁴ Alpana (82).

⁸⁵ Malcom D. Evans *International Law* (third ed. OUP 2010) 50; Anthony Pagden 'Human Rights, Natural Rights and Europe's Imperial legacy' [2003] 31.2 Political Theory 171.

⁸⁶ Malcom D. Evans *International Law* (third ed. OUP 2010) 50.

⁸⁷ Ibid.

⁸⁸ Gandhi (n 4) 32; Young (n 33) 158-180; Go (n 26) 30.

⁸⁹ Malcom D. Evans *International Law* (third ed. OUP 2010) 50-51.

⁹⁰ Ibid.

⁹¹ Anthony Pagden 'Human Rights, Natural Rights and Europe's Imperial legacy' [2003] 31.2 Political Theory 171.

⁹² Ibid.

⁹³ Ibid.

leaving a Western centric queer theory and international human rights law unable to grapple with the inequalities and oppression emerging from old colonial and new imperial structures of oppression. Postcolonial critique, in the context of international human rights law, allows for the exploration of Eurocentrism and imperialism in legal doctrine and together with queer theory its effect on the construction of the sexual and gender subject of rights.

Section 4 in this chapter outlines the specific postcolonial insights that will be used together with queer theory in the critique of human rights law in chapters 6 and 7. Like queer theory, postcolonial theory offers both critical insights and alternatives from which a revised, less Eurocentric human rights law can emerge. Postcolonial critique of human rights law can offer insights into exclusion of non-Western thought, understandings and experiences from this legal regime as well as interrogating the construction of ‘otherness’ in legal interpretations. Therefore, postcolonial inquiry not only questions the underpinning assumptions of law, but it provides an alternative forum in which the law’s classifications and philosophical foundations might be understood and rewritten from the others’ perspective.⁹⁴ An example of postcolonial revision of human rights is explored in more depth in section 4.3 discussing postcolonial theorist Homi Bhabha’s alternative ‘cultural (human) rights’.

3.1 International human rights law: convergence between postcolonial theory and critical race approaches and anti-racists movements

As mentioned, postcolonial theory has arguably not been as established as a critique of international human rights law as in other disciplines.⁹⁵ Nonetheless, postcolonial theorists’ share both influences and concerns with other critical theorists engaged in anti-racist and anti-imperial work, some of whom have engaged in greater depth with law.⁹⁶ For example critical race theory emerged in 1970s America within the legal context with lawyers, legal scholars and activists coming together to challenge racial oppression in all forms.⁹⁷ Similar to postcolonial theory, critical race theory (CRT) has been influenced by Marxism and

⁹⁴Alpana (n 82).

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Richard Delgado, Jean Stefancic and Angela Harris *Critical Race Theory: An Introduction* (3rd ed. New York University Press 2017) 4.

poststructuralism and the work of anti-colonial activists such as Du Bois.⁹⁸ Furthermore CRT is concerned with the relationship between race and power and the material effects of institutionalised racism in the US.⁹⁹ In common with postcolonial theory, critical race theory questions the very foundations of Western epistemology and knowledge, such as Enlightenment rationalism and understand racism to be structurally embedded in everyday life.¹⁰⁰ Challenging the ideas of legal objectivity and neutrality, critical race theorists are concerned with the inability of formal conceptions of equality to remedy all the consequences emanating from racist structures.¹⁰¹ Other areas of intervention of critical race theory are considering the lack of interest of white people in advancing real equality for people of colour as racism benefits the former groups, and also how racialization and shifting stereotypes impact the material circumstances of each racialised group at different times.¹⁰² Similar to postcolonial theory, as explored further in section 4, critical race theory part from the idea that racial categories are socially constructed rather than biologically founded. However, this anti-essentialist approach coexists with the emphasis in critical race theory that because their experience of oppression will at times be intersectional, people of colour are uniquely situated in speaking about racism and to shed light on its effect to other people.¹⁰³ The latter includes speaking about racism and the legal system, and applying the critical race theorists' own unique perspective to assess the law.¹⁰⁴

Whilst critical race theory developed in relation to the national circumstances and legal system in the US, Third World Approaches to Law (TWAIL) emerged earlier in the international sphere as an anti-racist and anti-imperialist critique of international law.¹⁰⁵ The TWAIL movement encompasses a range of scholars and legal practitioners who, as postcolonial theorists, aim at analysing and deconstructing the destructive consequences of colonialism in

⁹⁸ Delgado, Stefancic and Harris (n 97) 5.

⁹⁹ Ibid.

¹⁰⁰ Richard Delgado, Jean Stefancic and Angela Harris *Critical Race Theory: An Introduction* (3rd ed. New York University Press 2017) 9.

¹⁰¹ Ibid 8.

¹⁰² Ibid 9.

¹⁰³ Usha Natarajan, John Reynolds, Amar Bhatia & Sujith Xavier 'Introduction: TWAIL- on praxis and the intellectual' [2016] 37:11 Third World Quarterly 1946. Ref Usha

¹⁰⁴ Ibid.

¹⁰⁵ James Thuo Gathii 'Writing Race and Identity in a Global Context: What CRT and TWAIL can learn from each other' [2021] 67.6 UCLA Law Review 1610.

the context of international law.¹⁰⁶ Thus, while CRT is concerned with the Whiteness as a normative reference point that has defined not only the subordination and oppression of people of colour but also the superiority of whites, TWAIL's focus is on how, as discussed above in section 3, European colonialism constructed an imperial international law.¹⁰⁷ TWAIL scholars deconstruct international legal doctrines such as sovereignty, to trace how they shape and support imperialism in the contemporary legal order.¹⁰⁸ A central TWAIL insight is that international law reproduces racial structuring along the European/non-European axis, that is along the civilised/uncivilised binary emerging from European colonisation.¹⁰⁹ This approach in TWAIL, in particular as it is applied in international human rights law, intersects with insights from postcolonial theory. For example, TWAIL theorist Makau Mutua's 'Savages, Victims and Saviors' (SVS) paradigm¹¹⁰ overlaps with some of the concerns by queer postcolonial theorists explored in chapter 4. In 'Savages, Victims and Saviors: The Metaphor of Human Rights' Mutua theorises that international human rights law is marked by a subtext that pits 'savages' against 'victims' and the 'saviors'.¹¹¹ Each of these categories not only depict certain images but are largely constructed around the West/non-west axis. The savages (barbaric illiberal and/or authoritarian states) and the victims (helpless innocents) are both non-Western, while the savior is the United Nations, Western governments, and Western NGOs representing a set of 'set of culturally based norms and practices that inhere in liberal thought and philosophy.'¹¹² As will be discussed further in chapter 4, queer postcolonial approaches are concerned with the influence of the SVS paradigm in the context of international law's protection of sexual and gender diversity. While the theorists explored in chapter 4 do not explicitly use SVS, they point to and critique the operation of this structure within the international discourse on sexual and gender diversity. Thus, postcolonial theory interrelates to TWAIL and CRT as well as other critical race projects like the decolonial movements by indigenous scholars writing about the continued colonisation and re-

¹⁰⁶ Natarajan, Reynolds, Bhatia and Xavier (n 103).

¹⁰⁷ Gathii (n 105).

¹⁰⁸ Gathii (n 105).

¹⁰⁹ Ibid.

¹¹⁰ Makau Mutua 'Savages, Victims and Saviours: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law 201.

¹¹¹ Ibid.

¹¹² Makau Mutua 'Savages, Victims and Saviours: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law 201, 204.

colonisation of the countries where their ancestors have always lived.¹¹³ These projects have in common fighting the multiple, complex, and diverse forms of oppression and inequality emerging from the institutionalisation of racism through colonialism and contemporary imperialism and their material consequences. The significance and the urgent nature of the fight against racial injustices in all forms that are central to these critical approaches is reflected in the 2020 uprising of individuals and movements against racial injustice all over the world.

In 2020 Darnella Frazier recorded and uploaded to social media the murder of George Floyd by a Minneapolis police officer, igniting a global protest movement under the banner Black Lives Matter (BLM), demanding justice for Floyd and other victims of police violence.¹¹⁴ Demonstrations emerged in Brussels, London, Seoul, Sydney, Rio de Janeiro and elsewhere against the murder of George Floyd, systemic racism and police brutality in the midst of a pandemic.¹¹⁵ Protesters further expanded the calls against racial injustice to include the calls for Western states to acknowledge and face their colonial histories. For example, in Britain protesters toppled the statue of slave trader Edward Colston in Bristol,¹¹⁶ while Germany was prompted to return colonial treasures to Nigeria.¹¹⁷ However, the demand for Western accountability is not well received by many, with many statues of imperialist and slave traders standing in Britain, and France's President, Emanuel Macron refusing to issue an official apology for the colonial abuse and exploitation in America.¹¹⁸

Kevin Gaines identifies the connection between the BLM movement and earlier anti-racist and anti-colonial struggles happening over the world throughout the 1950s and 1970s both

¹¹³ Patricia Noxolo 'Decolonial theory in a time of re-colonisation of UK research' [2017] 42.3 Transactions 342.

¹¹⁴ Kevin K. Gaines 'Reflections on Ben Okri, Geonawan Mohamad, and the 2020 Global Uprisings' [2021] 12.1 Journal of Transnational American Studies 9.

¹¹⁵ Jen Kirby "'Black Lives Matter' has become a global rallying cry against racism and police brutality' *Vox* (12 June 2020) <<https://www.vox.com/2020/6/12/21285244/black-lives-matter-global-protests-george-floyd-uk-belgium>> accessed 14 February 2022.

¹¹⁶ Damian Gayle 'BLM protesters cleared over toppling of Edward Colston statue' *The Guardian* (5 January 2022) <<https://www.theguardian.com/uk-news/2022/jan/05/four-cleared-of-toppling-edward-colston-statute>> accessed 14 February 2022.

¹¹⁷ Jennifer Hassan and Rick Noack 'How George Floyd's killing sparked a global reckoning' *The Washington Post* (25 of May 2021) <<https://www.washingtonpost.com/world/2021/05/25/george-floyd-anniversary-global-change/>> accessed 14 of February 2022.

¹¹⁸ Ibid.

inside and outside the US, pointing to the interrelationship between the critical approaches discussed above and the BLM movement.¹¹⁹ At the same time, this interconnection between these different anti-racist struggles points to the continuity and impact of the structures of racial oppression and inequality emanating from colonialism and imperialism. The latter can be seen in the way that the BLM protests led to the consideration of the systemic racism in the US at the UN Human Rights Council.¹²⁰ The Council, which is explored further in chapter 5, is composed of State representatives and has the power to establish human rights monitoring mechanisms, including investigative procedures into violations of human rights.¹²¹ On June 17th 2020 the Human Rights Council held an urgent debate on racially inspired human rights violations, systemic racism, and police violence.¹²² Burkina Faso submitted, on behalf of the African Group with the support of Iran and Palestine, a draft resolution to the Council asking for the establishment of an international commission of inquiry into ‘circumstances relating to the systemic racism, alleged violations of international human rights law and abuses against Africans and people of African descent in the United States of America and other parts of the world...’¹²³ Historically, no such commission has been established for a country in the Global North (with the exception of Israel).¹²⁴ However, the Council failed to set up a commission and ended up adopting a resolution with few references to the US.¹²⁵ This result was identified as being due to the actions of members from Western States and Other Group

¹¹⁹ Kevin K. Gaines ‘Reflections on Ben Okri, Geonawan Mohamad, and the 2020 Global Uprisings’ [2021] 12.1 *Journal of Transnational American Studies* 9.

¹²⁰ OHCHR ‘Human Rights Council holds an urgent debate on current racially inspired human rights violations, systemic racism, police brutality and violence against peaceful protesters’ (17 of June 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25971&LangID=E>> accessed 14 of February 2022.

¹²¹ UNGA ‘Resolution adopted by the General Assembly on 15 March 2006. Human Rights Council’ [2006] UN.Doc. A/RES/60/251.

¹²² OHCHR (n 120).

¹²³ Burkina Faso on behalf of the Group of African States, Iran and Palestine ‘The promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against police brutality and other violation of human rights’ UN Res. A/HRC/43/L.50 Human Rights Council 43rd session 16 of June 2020.

¹²⁴ Sejal Parmar ‘The Internationalisation of Black Lives Matter at the Human Rights Council’ (*EJIL: TALK!*, 26 of June 2020) <<https://www.ejiltalk.org/the-internationalisation-of-black-lives-matter-at-the-human-rights-council/>> accessed 14 of February 2022; International Service for Human Rights ‘HRC43 I Call on the Human Rights Council to adopt resolution on systemic racism and police violence in the U.S.’ (*International Service for Human Rights* 18th of June 2020) <<https://ishr.ch/latest-updates/hrc43-i-call-human-rights-council-adopt-resolution-systemic-racism-and-police-violence-us/>> accessed 14 of February 2020.

¹²⁵ UNHRC ‘Resolution adopted by the Human Rights Council on 19 June 2020. Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers’ UN.Doc. A/HRC/RES/43/1.

towards ensuring an outcome that was generic, pointing to the continued complicity of the West in maintaining and perpetuating racist structures.¹²⁶ Families of victims of police brutality supported by NGOs and States continue to call on the HRC to ensure effective accountability for anti-black racism and police brutality in the US and globally.¹²⁷ Considering the insights from postcolonial theory and TWAIL about the privileging of the West through international law and international institutions, the result of the Human Rights Council debates speaks to the significance of continuing to challenge racial injustice under international human rights law, which is an aim of this thesis through the use of postcolonial theory.

4. Insights from Postcolonial Theory

In this section I explore specific insights from postcolonial theory as they inform the queer postcolonial approaches discussed in chapter 4 and the analysis of international human rights law in chapters 6 and 7.

4.1. Postcolonial Discourse Analysis: Edward Said's Critique in Orientalism (1978)

While postcolonial theory is critically complex, extensive and varied, it is Edward Said's critique in *Orientalism* (1978) of the cultural politics of academic knowledge that founded postcolonial studies as an academic discipline.¹²⁸ Said appeared, more than anybody else at the time, to use poststructuralism in the critique of colonialism.¹²⁹ His approach was not unique in the sense that more intellectuals used both anti-colonial critique and other academic approaches such as poststructuralism and Marxism at the time. However, Said moved the analysis of colonial and imperial discourse and the struggle against it to the

¹²⁶ Parmar (n 124).

¹²⁷ International Service for Human Rights 'HRC47 I Call for UN inquiry into police violence and systematic racism in the United States' (*International Service for Human Rights* 25th of June 2021) <<https://ishr.ch/latest-updates/hrc47-call-for-un-inquiry-into-police-violence-and-systemic-racism-in-the-united-states/>> accessed 14 of February 2022.

¹²⁸ Young (n 1) 383.

¹²⁹ Ibid.

question of discourse, to the problems of language.¹³⁰ Robert Young explains that Said's *Orientalism* has always been seen as both theoretically and politically problematic, yet postcolonial theory has defined itself through the great range of objections, reworkings and counterarguments against Said's work.¹³¹ Nonetheless, according to Young it was the idea that Orientalism (the study of the East (orient) in Western academic disciplines, by philosophers, political theorists, novelists, economists, imperial administrators, and others)¹³² was a 'discourse in the general sense that allows for a conceptual paradigm through which the cultural forms of colonial and imperial ideologies could be analysed that made Said's *Orientalism* so successful'.¹³³ Underscoring the significance of Said's book, Spivak explains that;

Said's book was... the study of the construction of an object, for investigation and control. The study of colonial discourse, directly released by work such as Said's, has... blossomed into a garden where the marginal can speak and be spoken, even spoken for. It is an important (and beleaguered) part of the discipline now.¹³⁴

So while *Orientalism* has not been without its critics, the book has 'changed the drift of scholarship in several disciplines, found readers in a number of languages, crept into the most unlikely footnotes...'.¹³⁵

In *Orientalism*, Said contends that analysis of Western ethnocentrism should begin with the question of representation.¹³⁶ Said explains that:

....Orientalism can be discussed and analysed as the corporate institution for dealing with the Orient—dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in

¹³⁰ Young (n 1) 384.

¹³¹ Ibid.

¹³² Edward W. Said *Orientalism* (Reprinted with new preface Penguin Books 2003) 2-3.

¹³³ Young (n 1) 384.

¹³⁴ Gayatri Chakravorty Spivak *Outside the Teaching Machine* (Routledge Classics 2009) 62.

¹³⁵ Tim Brennan 'Places of mind, occupied lands: Edward Said and philology' in Michael Sprinkler *Edward Said a Critical Reader* (Blackwell 1992) 78 quoted in, Leela Gandhi *Postcolonial Theory: A Critical Introduction* (Columbia University Press 2019) 66.

¹³⁶ Said (n 132) 3; Young (n 33) 166.

short, Orientalism as a Western style for dominating, restructuring, and having authority over the Orient. I have found it useful here to employ Michel Foucault's notion of a discourse, as described by him in *The Archaeology of Knowledge* and in *Discipline and Punish*, to identify Orientalism. My contention is that without examining Orientalism as a discourse one cannot possibly understand the enormously systematic discipline by which European culture was able to manage—and even produce—the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post Enlightenment period.¹³⁷

Said uses Foucault's idea that knowledge must conform to already established paradigms to be recognised as legitimate, and through the development of discipline according to those pre-established parameters they are in first instance restrictive but then subsequently become in their own way productive of the meaning of 'truth'.¹³⁸ Said explains that we will better understand the persistence of hegemonic systems such as imperial culture, when we recognise the productive nature of the discourse developed by writers and thinkers.¹³⁹

Said demonstrates how Foucault's contention about the productive nature of discourse is also true for the European construction of knowledge about other cultures.¹⁴⁰ According to Said, Orientalism not only influenced the Orientals but also occidental, European or Western peoples. Rather than being just a positive doctrine, Orientalism's essence is the ineradicable distinction between Western superiority and Oriental inferiority, constituting imperialism's necessary ideological form.¹⁴¹ Orientalism, by analytically dividing the East from the West, is the discourse that 'creates' the object that Western imperialism could rule, manage, colonise and exploit.¹⁴² The point is simple enough, to rule and dominate something, it has to be seen as a thing to be ruled and dominated in the first place.¹⁴³ For Said, analysing Orientalism means the analysis of the discursive production of the Orient itself. Rather than seeing Orientalism

¹³⁷ Said (n 132) 3.

¹³⁸ Young (n 1) 385-386.

¹³⁹ Said (n 132) 14.

¹⁴⁰ Young (n 33) 166.

¹⁴¹ Edward W. Said *Culture and Imperialism* (Vintage Books 1993) 9; Go (n 26) 40,

¹⁴² Go (n 26) 40.

¹⁴³ Ibid.

as a representation of something 'real' that exists outside discourse, Said argues that Orientalist texts create the very realities they appear to describe.¹⁴⁴ Said explains; 'it is not the thesis of this book to suggest that there is such a thing as a real or true Orient... On the contrary, I have been arguing that 'the Orient' is itself a constituted entity'.¹⁴⁵ Thus, more than a critique of racist stereotypes, *Orientalism* targets certain forms of thoughts that are productive of imperialism.¹⁴⁶ Said identifies Orientalism not only in scientific and 'objective' though but also in cultural representations. Disciplines like ethnography, historiography, philology, sociology, literary history and cultural forms like the novel are important because they represent the 'power to narrate' and the 'power to block other narratives from forming and emerging, constituting one of the main connections between culture and imperialism'.¹⁴⁷ The key schemas of the Orientalist imperial episteme start with, as identified by the first postcolonial thinkers, a fundamental binary distinction made between 'the Orient' and (most of the time) 'the Occident.'¹⁴⁸ It divides people and places into two supposed separable entities with their own essence, one always being constructed as superior and the other inferior.¹⁴⁹ The imperial episteme and its law of division essentialises peoples and places that are historically and socially determined.¹⁵⁰ However, as mentioned above, it not only creates the Orient but also Europe (or the West) as a contrasting image, idea, personality and experience.¹⁵¹ It further denies the agency of the colonised peoples who are assumed to be passive and without history.¹⁵² In *Culture and Imperialism*, Said explains;

the source of the world's significant action and life is in the West whose representatives seem at liberty to visit their fantasies and philanthropies upon a mind-deadened Third World. In this view, the outlying regions of the world have no life, history or culture to speak of, no independence or integrity worth representing without the West.¹⁵³

¹⁴⁴ Said (n 132) 94.

¹⁴⁵ Ibid 322.

¹⁴⁶ Go (n 26) 40.

¹⁴⁷ Said (n 141) xii.

¹⁴⁸ Said (n 132) 1-3.

¹⁴⁹ Ibid.

¹⁵⁰ Said (n 132) 1-3.

¹⁵¹ Ibid 2.

¹⁵² Said (n 141) xix.

¹⁵³ Ibid.

One of the most significant insights from Said's work was his identification of the different ways academic forms of knowledge are complicit in the operation of other institutions of power, in particular cultural domination and imperialism.¹⁵⁴ Said orients us towards the critique and the identification of the [imperial and Eurocentric] parameters of knowledge, and how it is possible to produce knowledge of any kind within such structures of signification.¹⁵⁵ As explored further in chapter 4, Said's theory of orientalism is significant to queer postcolonial approaches. The construction of knowledge 'about' the other, and the binary hierarchal division between the West and the rest will be applied in the context of sexual and gender discourse and used to analyse the reports in chapters 6 and 7.

4.2 Provincialisation of European Thought and Knowledge

Postcolonial theory is not only critical towards the implicit imperial and ethnocentric underpinnings of canonical knowledge but also challenges the exclusion of non-Western thought and knowledge within that same system. Thus, postcolonial theorists challenge the hegemony of European knowledges in an attempt to reassert the epistemological value and agency of the non-European world.¹⁵⁶ As Dipesh Chakrabarty argues, non-Western thought is consistently precluded from being considered proper knowledge on its own.¹⁵⁷ Chakrabarty points to the lack of reciprocity within the academy between Third-world historians who do refer to works in European history, and historians in Europe who feel no such need towards non-European works of history.¹⁵⁸ The absence of reciprocity is intensified by the fact that European philosophy has never allowed its cultural ignorance to qualify its claims of universality. As Chakrabarty states;

For generations now, philosophers and thinkers shaping the nature of social science have produced theories embracing the entirety of humanity; as we well

¹⁵⁴ Young (n 33) 166.

¹⁵⁵ Young (n 33) 165-167.

¹⁵⁶ Gandhi (n 4) 43.

¹⁵⁷ Chakrabarty (n 6) 1-16.

¹⁵⁸ Ibid 28.

know, these statements have been produced in relative, and sometimes absolute, ignorance of the majority of humankind i.e. those living in non-Western cultures.¹⁵⁹

Chakrabarty critiques historicism because of its insertion of all societies and places into a singular narrative of development based upon an idealised European experience. In these narratives, countries like India appear as inadequate, with their inhabitants always failing in some way or another to be modern enough to count as agents of (European) history.¹⁶⁰ As a result, “Europe works as a silent referent in historical knowledge”¹⁶¹, a template upon which to model the rest of the world.¹⁶² While Chakrabarty’s analysis is in the field of history, postcolonial theory claims that the entire field of humanities is corrupted by a forged universality that disguises the political investments in the production of ‘major’ or ‘dominant’ knowledges.¹⁶³ To remedy the latter, as we have seen to be initiated by the first postcolonial thinkers, postcolonial theory exposes the ostensible claim to neutrality in production of humanist knowledges. However, postcolonial theory, and that as proposed by Chakrabarty, have to investigate in what sense European ideas have become universalised, and at the same time identify how they were drawn from particular intellectual and historical traditions that cannot claim such universality validity at all.¹⁶⁴ The latter necessarily involves providing a genealogical analysis of universal knowledges, situating them within their own historical context and tradition as well as pointing to their complicity, creating and maintaining colonial and imperialist knowledges to the exclusion of the Third-world. Therefore, provincialisation provides us with a tool for reorienting the critical analysis to come in chapters 6 and 7. Provincialisation allows us to identify the West in universal discourse and to trace the structures of exclusion of the rest of the world. By recognising the specific points of conflation between the West and the

¹⁵⁹ Ibid 29.

¹⁶⁰ Chakrabarty (n 6) 32.

¹⁶¹ Ibid 28.

¹⁶² Ibid.

¹⁶³ Gandhi (n 4) 44.

¹⁶⁴ Chakrabarty (n 6) xiii.

universal, the analysis can begin to re-locate the West as a particular geographical entity and diversify the universal by considering the rest of the world.

4.3 Deconstructing racial identities, hybridity and Bhabha's alternative human rights

Just as the critical analysis of sexual and gender identities constitutes a significant part of queer theory, the deconstruction of racial categories forms an important part of postcolonial theory. Challenging the essentialisation of racial identities, postcolonial theorists explain that colonialism produced racial categories and the unequal relationship between the coloniser and the colonised.¹⁶⁵ In this section I explore work by Fanon and Bhabha, as their analyses inform some of the discussion in chapter 4 and therefore underpin the analysis in chapters 6 and 7. Fanon explored how colonial stereotypes (especially those created by medical-psychiatric knowledge) result in creating an inferiority complex in the colonised that compels them to assimilate themselves to the colonised. As explored in chapter 4, this process of assimilation extends to the adoption of Western heteropatriarchal norms. Bhabha builds on and challenges Fanon's theorisations, arriving at the concept of hybridity which informs parts of queer postcolonial approaches to the potential held by the re-negotiation of Western sexual identities by non-Western peoples.

In *Black Skin White Masks*, Fanon begins by explaining that both the black and the white man are trapped by their race, with white men considering themselves superior and black men wanting to prove to white men that they are equal.¹⁶⁶ As a critical intervention in psychoanalysis, Fanon considers that black men have an inferiority complex that is the outcome of a dual process; one is economic, and another is the internalisation of inferiority.¹⁶⁷ To Fanon, Western psychiatric knowledge was complicit in creating this hierarchal relationship between the coloniser and the colonised. While working at the largest psychiatric hospital in Algeria, he observed how psychiatric categorisations resonated with dominant discourses dividing the coloniser and the colonised along the lines of 'primitive' and 'civilised'

¹⁶⁵ Go (n 26) 22-25.

¹⁶⁶ Frantz Fanon *Black Skin, White Masks* (translated by Charles Lam Markmann, new edition, Pluto Press 2008) 3.

¹⁶⁷ *Ibid* 4.

mentalities.¹⁶⁸ At the psychiatric hospital the Algerian, Maghrebi and Muslim could only be understood in psychiatry according to theories about their pathological culture.¹⁶⁹ For example the Algerian people were 'credulous and suggestible... prone to outbursts of homicidal rage, fanatical, possessively jealous and fatalistic' while the Muslim native was childlike, stubborn and credulous.¹⁷⁰ White people, on the other hand, were considered based on their individuality and according to psychiatric categorisations created for them, as Fanon states; '...Freud, and Adler and even the cosmic Jung did not think of the Negro at all in their investigations.'¹⁷¹ For Fanon, Western psychiatric knowledge cannot access the Other because the Other was always a projection of white colonial imagination.¹⁷² Non-whites are excluded from accessing medical/psychiatric subjectivity as they are always defined through either the stereotypical colonial view of them or by their absorption into Western diagnostic terms. In contrast to Freud, who argued that individual factors are to be considered in psychoanalysis, Fanon argues that the black man's alienation is not an individual question but a social [structural] one, deriving directly from the 'civilising missions' by European colonisers.¹⁷³

Fanon describes how the black man, and all colonised peoples, are trapped by a double bind: one is the relationship with other black men, and the other is the one with white men.¹⁷⁴ The latter division is the direct result of colonialist subjugation of non-white peoples, through which black men become compelled to assimilate themselves.¹⁷⁵ Therefore, for example, the middle class in the Antilles never speak Creole, only French, except to their servants. In school, their children are taught to scorn the dialect.¹⁷⁶ The adoption of the French language, as well as the attempted assimilation into the white man's world, distances the black man from his roots and his upbringing.¹⁷⁷ However, the assimilation is never successfully completed,

¹⁶⁸ Frantz Fanon *The Wretched of the Earth* (Translated by Richard Philcox, Commentary by Jean-Paul Sartre and Homi K. Bhabha, Grove Press 2004) 219-233.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Fanon (n 166) 117.

¹⁷² Diana Fuss 'Interior Colonies: Frantz Fanon and the Politics of Identification' [1994] 24.2 *diacritics* 20.

¹⁷³ Ibid 4.

¹⁷⁴ Kelly Oliver *The Colonization of Psychic Space: A Psychoanalytic Theory of Oppression* (University of Minnesota Press 2004) 31-33; Fanon (n 9) 85.

¹⁷⁵ Fanon (n 166) 114.

¹⁷⁶ Ibid 17.

¹⁷⁷ Frantz Fanon 'Culture and Racism' in Frantz Fanon *Toward the African Revolution: Political Essays* (Translated from French by Haakon Chevalier, Grove Press 1964) 38.

because as Fanon explains, there is nothing the black man or woman can do, such as learning the white man's language or having an intimate relationship with a white person, to stop being black in the white man's or woman's eyes.¹⁷⁸ Furthermore, just as the colonial relationship creates the inferiority of the colonised, it also creates the superiority of the colonisers. Therefore, while the colonial relationship allows white people to see themselves as superior, this superiority requires non-white people to be created as their inferior.¹⁷⁹ This dynamic of objectification and assimilation of the colonised theorised by Fanon is further explored in chapter 4, as it informs the analysis of colonial stereotypes in contemporary sexual and gender discourse.

Bhabha engages with Fanon's theorising, finding the possibility of resistance and subversion rather than only (detrimental) assimilation. To Bhabha an important feature of colonial discourse on racial identities is its dependence on a concept of 'fixity' in the ideological construction of otherness.¹⁸⁰ This fixity is, however, always underpinned by a process of ambivalence whereby what is already known must be anxiously repeated.¹⁸¹ For Bhabha, this ambivalence is the force that ensures the repeatability in changing historical context and discursive conjectures.¹⁸² As a consequence, colonial discourse should be read not as an image of positive or negative but as a "*process of subjectification* that is made possible through stereotypical discourse".¹⁸³ Being a false representation of reality, the stereotype is a simplification that binds both the colonised and coloniser in an anxious repetition of image of the ideal racialised subject.¹⁸⁴ The racial stereotype is anxiously (albeit involuntarily) performed (repeated) by the racialised subject rather than corresponding to any pre-discursive fixed 'natural' racial essence. Therefore, while the stereotype is a false representation of a reality justifying the existence of racial hierarchies, as an image [the stereotype] is never as fixed as it appears. For Bhabha, the repetition of the white stereotype by the non-white population calls attention to this inherent ambivalence of racial stereotypes

¹⁷⁸ Fanon (177) 39.

¹⁷⁹ Ibid 10.

¹⁸⁰ Homi K. Bhabha 'The Other Question- the Stereotype and Colonial Discourse' [1983] 24.6 Screen 18.

¹⁸¹ Homi K. Bhabha *The Location of Culture* (Routledge 1994) 66.

¹⁸² Bhabha (n 180).

¹⁸³ Bhabha (n 181) 67.

¹⁸⁴ Bhabha (n 180).

challenging the colonial authority's constitution of two fixed and opposite racial categories.¹⁸⁵ To Bhabha, this repetition by colonial subjects of white racial stereotypes constitutes a type of ironic mimicry, that ruptures the certainty of colonial discourse as the colonised become almost the same (white) but not quite.¹⁸⁶ For Bhabha, mimicry is not the familiar exercise of the dependent colonial relationship as considered by Fanon.¹⁸⁷ Rather, mimicry disrupts the authority of colonial discourse as the mimicking subject can [only] emerge as 'wrong' because their existence confuses and challenges the colonial naturalisation of racial stereotypes.¹⁸⁸ Thus, mimicry does not result in the repudiation of racial differences, but rather challenges the colonial representation of the latter by rendering visible their artificiality.¹⁸⁹ For Bhabha, mimicry becomes a kind of agency, that implies a loss of control for the coloniser, an inevitable process of counter-domination produced by the mimicry resulting in the [racial] identity of the coloniser and the colonised being curiously undone.¹⁹⁰

Later, Bhabha replaces mimicry, defined as the displacement of authority discourse, with the concept of hybridity.¹⁹¹ For Bhabha, hybridity not only encompasses the challenge to colonial authority through different repetition (mimicry), but also describes how other (non-colonial) knowledges to enter the process of transformation and disavowal of colonial authority.¹⁹² With hybridity, Bhabha reconsiders mimicry as not only a form of resistance that is disquieting for the colonised authority but as an active form of intervention and challenge to colonial rule.¹⁹³ Hybridity denotes the process of negotiation between different authorities (both imperial and also nationalistic) that seek to fix racial, social differences and hierarchies that emerge in different historical contexts, creating opportunities for transformation.¹⁹⁴ For Bhabha, the possibility for real change lies in the indeterminate zones of hybrid negotiations. Bhabha's hybrid subjects form the basis for a strategy or discourse and open a space of negotiation where power is unequal, but create infinite possibilities of contestation and

¹⁸⁵ Bhabha (n 181) 4.

¹⁸⁶ Ibid 86, 89.

¹⁸⁷ Ibid 88.

¹⁸⁸ Ibid 86-89.

¹⁸⁹ Bhabha (n 181) 86-91.

¹⁹⁰ Young (n 33) 188.

¹⁹¹ Ibid.

¹⁹² Ibid 189.

¹⁹³ Ibid 189-190.

¹⁹⁴ Bhabha (n 181) 2, 22-23.

agency.¹⁹⁵ Such negotiations are not based on assimilation identifications or collaboration. Rather they make possible agency in between different subject-positions that refuse the binary representation of conflicting groups.¹⁹⁶ Bhabha returns to Gramsci and the subaltern to articulate the border from where minority agency and political advocacy should be found.¹⁹⁷ He imagines these groups or movements as non-homogenous alliances that get together as a challenge to the status quo without being homogenising or demonising in formulating their oppositions.¹⁹⁸ For Bhabha, this non-homogenous group is the starting point for a re-imagining of 'cultural rights' in international human rights law.

As mentioned above in section 3, Bhabha has explored international human rights law from the perspective of postcolonial alternatives to existing interpretations of cultural rights. Bhabha proposes an ethical discourse of cultural rights that draws on Hannah Arendt and is inspired by Amartya Sen's theory of rights, as proposed in *The Idea of Justice*.¹⁹⁹ Following Arendt's framework on mutual human recognition in the language-game, he argues that rights of dialogue and interpretation should belong in the heart of any theory of justice.²⁰⁰ Sen's theory of justice is based on these same premises of dialogue and process rather than final judgements.²⁰¹ Between Arendt and Sen, Bhabha finds the possibilities of rights being deeply grounded in specific cultural communities, local vocabularies and particular historical struggles.²⁰² Bhabha that takes the basic right holder as a heterogeneous group of un-specified people rather than individuals or groups with a specific identity.²⁰³ Further, these groups are

¹⁹⁵ Homi K. Bhabha 'Cultures in Between' in David Bennet (ed.) *Multicultural States Rethinking Difference and Identity* (Routledge 1998) 29.

¹⁹⁶ Ibid.

¹⁹⁷ Homi K. Bhabha 'Democracy de-racialised' [2003] 50.1 *Diogenes* 27; Homi K. Bhabha 'Foreword' in Prina Werbner and Tariq Modood ed. *Debating Cultural Hybridity: Multicultural Identities and the Politics of Anti-Racism* (Ebook edition, Zed Books 2015); Davjd Huddart 'Hybridity and Cultural Rights: Inventing Global Citizenship' in Joel Kuortti and Jopi Nyman ed. *Reconstructing Hybridity: Post-Colonial Studies in Transition* (Rodopi 2007) 21, 38-39.

¹⁹⁸ Homi Bhabha 'Cultures in Between' in David Bennet (ed.) *Multicultural States Rethinking Difference and Identity* (Routledge 1998) 29. Davjd Huddart 'Hybridity and Cultural Rights: Inventing Global Citizenship' in Joel Kuortti and Jopi Nyman ed. *Reconstructing Hybridity: Post-Colonial Studies in Transition* (Rodopi 2007) 21, 38-39.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰⁰ Ibid.

²⁰¹ Homi Bhabha, 'On Writing and Rights: Some thoughts on the Culture of Human Rights' in Matthew J. Gibney (ed.) *Globalizing Rights: The Oxford Amnesty Lectures 1999*, (OUP 1999) 162-183.

²⁰² Ibid.

²⁰³ Ibid.

understood to hold a specific agency that allows them to interact and discuss the meaning and application of human rights, and formulate and propose new human rights legislation.²⁰⁴ Moreover Bhabha envisions this ethical discourse of cultural rights to be an effective challenge to current discourses rooted in cultural opposition in an 'end-game' between Western rights and other cultural values in a clash of civilisations.²⁰⁵ For Bhabha, the universality of human rights lies in recognising the value of others and their communities rather than exclusively with the individual in itself.²⁰⁶

Bhabha's suggestions have implications for international human rights law. More specifically the proposed reinterpretation can help displace the Western centrism critiqued in section 3 in multiple ways. To begin locating the objective of human rights in creating dialogue between groups in solidarity, instead of giving final judgments, allows for more inclusive interpretations of international human rights law. As discussed above, international human rights law is based on certain cultural interpretations that are fundamentally European, and as the West continues to dominate in the international sphere, the final judgements will necessarily support the existing status quo. Moreover, as discussed throughout this chapter, because of colonialism, a hierarchy exists between 'cultures' whereby the West's 'culture' is considered superior, with the rest of the world being considered inferior. By replacing the need for competition between 'cultures' to give the final human rights judgement with dialogue and solidarity, the centrality of Europe and the West can be dismantled by giving voices to those historically excluded from the conversation. Furthermore, the diversification within human rights law is supported by Bhabha's challenge to categories and the celebration of difference rather than individuality. First, the notion of individuality in human rights is linked to a specific type of interpretation of the self-interested individual as the fundamental unit of society which is fundamentally European.²⁰⁷ This approach stands in contrast with more communitarian approaches found outside the West, where the individual has less of a central role.²⁰⁸ Therefore by exchanging the superimposed value of the individual with solidarity

²⁰⁴ Bhabha (201).

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Dianne Otto 'Rethinking Universals: Opening Up Transformative Possibilities in International Human Rights Law' [1997] 18 Aust. YBIL 1.

²⁰⁸ Ibid.

between different communities, Bhabha's suggestion both challenges the centrality of the West and opens up for non-Western people to participate in the construction of international human rights norms based on their own knowledge and understandings. In addition, the rejection of categories in favour of non-homogenous groups opens international human rights law to be less privileging and exclusionary. The reliance on categories to define the individual rights holder is explored further in chapters 6 and 7. However, the categorical identification of people for the purpose of rights protection often results in individuals and groups being excluded from human rights protection. As pointed to in chapters 2 and in section 3 above, the categorising of individuals established for the purpose of human rights protection means that people are often conceptualised in terms of gender, sexuality and race which privilege certain subjects over others. By removing the need for categorisation altogether, Bhabha opens international human rights law up to become universal rather than privileging an ideal individual subject of human rights. Lastly, Bhabha allocates agency to non-specific groups to come together and participate in the process of reformulation of international human rights. Allocating agency in this way challenges the often top-down approach to international human rights law where the content of the rights is decided without the participation of those that these rights are supposed to benefit. In sum, Bhabha's reformulation of human rights allows for the displacement of the West in human rights interpretations while allowing for the participation of non-Western peoples, giving an alternative way to reach the human rights law aspiration of universality.

4.4 Recovering the subaltern voices

In this section I analyse the subaltern subject as a challenge to the historical and contemporary erasure of non-Western sexual and gender diversity, which will be discussed and analysed in the forthcoming chapters. Ratna Kapur explains that the subaltern subject is in postcolonial theory a peripheral subject that challenges the normative context within a specific historical, cultural, and political context, revealing the continuity between colonial discourse and the present.²⁰⁹ The idea of the subaltern entered into postcolonial theory

²⁰⁹ Ratna Kapur *Erotic Justice, postcolonialism, subjects and rights* (Glasshouse Press 2005) 3.

through the Subaltern Studies Group.²¹⁰ This group was created by a group of Indian historians who critiqued the elitism of Indian historiography. Indian history was dominated by English historians or Indian nationalist historiography, both which are fundamentally elitist at the core, ignoring the contributions of the people, on their own, independent from the elite.²¹¹ The Subaltern Studies Group underscored how the history of India did not challenge but instead extended the imperial episteme, figuring as just another form of Orientalising and stereotyping discourse. Further existing narratives focused on either the colonial administration or the anti-colonial nationalistic Indian elite and thus failed to acknowledge the subaltern as the maker of their history.²¹² The Subaltern Studies Group (SSG) critiqued the politics of production of knowledge, challenging the bourgeoisie's monopoly in defining history. As a consequence, the aims of the subaltern studies school were to recover the repressed voices and experiences of the colonised peasantry and to uncover the knowledge of people who had been excluded from conventional historical representations.²¹³

The SSG appropriated the term 'subaltern' from Marxist philosopher Antonio Gramsci.²¹⁴ Gramsci used the subaltern instead of class to theorise subordinate groups, and considered both ideology and economics as important factors in the domination by the ruling classes.²¹⁵ Gramsci also saw the subaltern groups as a cultural force that should be studied for their consciousness, ideology, and expressions.²¹⁶ The SSG adopted and reshaped Gramsci's subaltern in the specificity of the Indian historical context.²¹⁷ As pointed out by Ranajit Guha, the father of the SSG, the location of the subaltern/elite divide needs to be established in

²¹⁰ El Habib Louai 'Retracting the concept of the subaltern from Gramsci to Spivak: Historical developments and new applications' [2012] 4(1) *African Journal of History and Culture* 4; Dipesh Chakrabarty 'Subaltern Studies and Postcolonial Historiography' [2000] 1.1 *Nepantla: Views from the South* 9, 13-14.

²¹¹ Ranajit Guha, 'On Some Aspects of the Historiography of Colonial India' in Ranajit Guha and Gayatri Chakravorty Spivak ed. *Selected Subaltern Studies* (OUP 1988) 39.

²¹² Ranajit Guha ed. *Subaltern Studies III: Writings on Indian History and Society* (OUP 1984) vii; Dipesh Chakrabarty 'Subaltern Studies and Postcolonial Historiography' [2000] 1.1 *Nepantla: Views from the South* 9, 13-14.

²¹³ Go (n 26) 45.

²¹⁴ Dipesh Chakrabarty 'Subaltern Studies and Postcolonial Historiography' [2000] 1.1 *Nepantla: Views from the South* 9, 13-14.

²¹⁵ David Arnold, 'Gramsci and Peasant Subalternity in India' in Vinayak Chaturvedi ed. *Mapping Subaltern Studies and the Postcolonial* (Verso: London 2000) 24.

²¹⁶ David Arnold, 'Gramsci and Peasant Subalternity in India' in Vinayak Chaturvedi ed. *Mapping Subaltern Studies and the Postcolonial* (Verso: London 2000) 24.

²¹⁷ Ranajit Guha, David Arnold, David Hardiman, *Subaltern Studies Vol.8 Writings on South Asian History and Society* (OUP 1994) vii.

each specific region and historical context. More than Gramsci, the SSG assigned more autonomy to the subaltern groups, insisting on the fact that there have been subaltern groups that were never affected by dominant ideologies. Further, the subaltern group understands the hegemony of the ruling class as an all-encompassing structure, but insists on seeing the relationship of domination as a process where hegemonic and non-hegemonic forces engage. The SSG consider the subaltern as the bottom layer of society that has not necessarily been put together by capital logic alone. Guha explains that the subaltern is in *a position of subjugation* regardless of whether the subordination took the form of “class, caste, age, gender and office or in any other way.” The subaltern, both persons and groups, are excluded from upward, and in a sense outward, social mobility. Nonetheless, the subaltern political project is to challenge dominant middle-class representations of the subaltern classes and recover the latter’s political agency.

Spivak has continuously challenged the concept of the subaltern of the SSG. Spivak first challenged paternalistic and male centred subaltern discourse, highlighting how women’s histories have been excluded from the considerations of the subaltern.²¹⁸ Further, Spivak has considered the limited possibility of “recovering the voices” of the subalterns as, in particular, the female subaltern who “cannot speak”.²¹⁹ Spivak later explained that it was not so much that she did not have a voice, but rather that she was not heard due to the subaltern position she was in.²²⁰ On the other hand, Spivak suggests a need for reallocation of the subaltern so that she can be understood in terms of the operations of power and resistance in the world today.²²¹ Spivak considers that the subaltern is no longer excluded within dominant discourse but rather has become an object (noticeably not subject) of intervention by global institutions and civil society.²²² On the one hand, the subaltern is subjected to intervention by international economic law through the regulation of global trade and patent schemes.²²³ On the other hand, global civil society includes the subaltern within their discursive frames.

²¹⁸ Gayatri Chakravorty Spivak ‘Can the Subaltern Speak? Speculations on Widow Sacrifice’ [1985] *Marxism and the Interpretation of Culture* 271.

²¹⁹ *Ibid.*

²²⁰ Gayatri Chakravorty Spivak ‘Can the Subaltern Speak? In Patrick Williams and Laura Chrisman ed. *Colonial Discourse and Postcolonial Theory: A Reader* (1st ed. Routledge 1994) 66.

²²¹ Gayatri Chakravorty Spivak, ‘The New Subaltern: A silent Interview’ in Vinayak Chaturvedi ed. *Mapping Subaltern Studies and the Postcolonial* (Verso: London 2000) 324.

²²² *Ibid.*

²²³ *Ibid.*

Spivak discusses the way that global feminism constructs the woman according to certain parameters: unacknowledged biological determinism, assumptions of a sex-gender system, and object choice scenario as defined by women's elite, with the subaltern woman existing outside these common womanly traits.²²⁴ While global feminism includes subaltern women in its consideration, Spivak considers this inclusion as rarefied, distant from the lives and concerns of ordinary people, and inherently exploiting. Ideas such as democratisation, development, and minority rights figure as important tools in the exploitation of the subaltern. Spivak asserts that these concepts are important as they "form the code name for the political restructuring entailed by the transformation of the state capitalism and their colonies to tributary economies as rationalised global financialization carries with it the aura of civilising missions accompanying a transformative project of imperialism to development."²²⁵ Thus, (Western) feminism positions does not interrogate the inherent Eurocentrism underpinnings of international law and institutions which continue to silence, marginalise and exclude non-Western women (and other subalterns). Similarly, as explored in the next chapter, non-Western sexually and gender diverse people are at risk of being erased in contemporary international discourse, perpetuating the historical erasure and exclusion of these groups.

Conclusion

In this chapter I have explored postcolonial theory, one of the critical perspectives informing the queer postcolonial analysis of the interpretation of human rights by the IE in chapters 6 and 7. This chapter started by giving a definition of postcolonial theory. In this section I explored postcolonial theory's concern with European expansion and colonisation of most of the world between 1492 and 1945 and the analysis of its continued impact on structures of oppression and inequality today. The postcolonial critique of European culture, knowledge and epistemology and the corollary exclusion and marginalisation of non-Western knowledges and understandings was discussed in section 1. Further areas of postcolonial concern discussed in that section was the celebration of non-Western culture and understandings, the relationship between the colonised and the coloniser, the critique of

²²⁴ Spivak (n 221).

²²⁵ Ibid.

postcolonial nationalistic elite, and concern with new imperial powers such as the US. Furthermore, a brief consideration was given to some of the main areas of contention in postcolonial theory. In section 2 I discussed postcolonial theory in relation to the analysis of sexuality and gender diversity. This section considered the lack of engagement with the intersection between race, sexuality, and gender, as well as with non-Western sexual and gender diversity by postcolonial theorists. The analysis in this section concluded that postcolonial theory can be useful in challenging Western centrism in queer theory as well as in international human rights law which was discussed further in section 3. In section 3, I analysed the Eurocentric history of human rights law, highlighting the potential of postcolonial analysis in this discipline. Moreover, in this section I considered postcolonial theory and other critical race approaches, and contemporary anti-racist movements underscoring their interrelationship.

In the last section of this chapter, I examined specific insights of postcolonial theory which informs the forthcoming analysis in chapters 4, 6 and 7. The discussion began by considering Said's analysis of Orientalism as a critique that allows for the identification of the different ways Western knowledge creates negative stereotypes of the non-West, completely denying the latter of any agency. Furthermore, in doing so, Western knowledge creates a binary hierarchical division between the West and the rest, which is significant to some of the analysis to come in chapter 4. Subsequently, I explored provincialisation, proposed by Dipesh Chakrabarty as a tool to identify the conflation between the universal and the West to start challenging the exclusion of the non-West in this equation. Section 4.3 examined the postcolonial challenge to essentialist racial categories and the identification of the potential that lies within hybrid or 'in-between' individuals and groups. In this section hybridity was examined as part of Bhabha's non-homogenous group approach to international human rights law. From the analysis of Bhabha's alternative human rights, I concluded that the use of the latter could displace Western centrism in international human rights law. Lastly in section 4 I explored the subaltern as a positioning that challenges both the historical and contemporary erasure of non-Western sexual and gender diversity in dominant discourse. In the next chapter I build on the insights discussed in this and the previous chapter on queer theory to examine queer postcolonial approaches.

Chapter 4. Queer Postcolonial Approaches

Introduction

In this chapter I explore what I have termed for the purpose of this thesis 'queer postcolonial approaches'. These approaches draw on queer and postcolonial theories to explore the intersection of imperialism, race, sexuality and gender in the exclusion and oppression of non-Western sexually and gender diverse subjects. The insights emerging from the analysis of these approaches in this chapter inform the critical analysis of chapters 6 and 7. To begin, this chapter recalls some of the analysis of chapter 2 and 3 to better situate the analysis of this chapter. In section 1, I briefly outline some of the key interventions of queer and postcolonial critique in the context of international human rights law, as discussed in the previous chapters. Subsequently, section 1 discusses in more depth the existing boundaries within queer theory and postcolonial theory in the analysis of oppression of non-Western sexual and gender diversity. In addition, the last part of section 1, lays the foundations for the analysis of queer postcolonial insights to come in section 2, by outlining how these approaches bridge the gap between the two theories in the context of international human rights law.

Section 2 of this chapter explores insights from queer postcolonial approaches into the numerous ways that non-Western sexual and gender diversity is excluded, marginalised, and oppressed. The analysis begins by considering orientalism as it informs and underpins global sexual and gender discourse. Drawing on insights from postcolonial critique of the objectification of the non-West in Western knowledge, the analysis explores how sexual discourse is underpinned by the civilising/uncivilised binary rendering non-Western sexual and gender diversity invisible. From there, I move to explore the reproduction of colonial heteropatriarchal scripts through contemporary institutions and forms of government. This section analyses how sexuality, gender, race, and imperialism were inextricably linked through the regulation of heteropatriarchy in the colonies. Building on that discussion, section 2.2 a) identifies how white heteropatriarchy creates a system of racialised oppression and inequality in the contemporary West. Subsequently, in section 2.2b) explores how the institution of heteropatriarchy in the colonies underpins contemporary postcolonial oppression of non-Western sexual and gender diversity. The last insights from queer

postcolonial approaches discussed in section 2.3 delve deeper into some of the epistemological boundaries of Western knowledge to consider and represent non-Western sexual and gender diversity.

A central element in queer and postcolonial analysis of international human rights law discussed in chapters 2 and 3 is the need to find alternative starting points from which to revise and reformulate human rights. Section 3 of this chapter explore how queer postcolonial analysis of non-Western sexually and gender diverse communities, or representation of these, constitutes a starting point for such revisions. Through these analyses, queer postcolonial approaches transcend the limits of existing discourses that render non-Western sexual and gender diversity invisible. Section 3 begins by considering queer postcolonial analysis of how non-Western sexually and gender diverse communities sometime utilise different tools, including those from Western sexual activism, to challenge local heteronormativity. However, instead of seeing this use of Western tools as a mere co-option of Western sexual scripts, queer postcolonial approaches theorise it as a challenge to both Western centrism and to oppressive local sexual and gender norms. The second part of section 3 considers representation of non-Western female same-sex eroticism and gender diversity as a key tool in challenging heteropatriarchal nationalism. Building on the queer postcolonial contest to heteropatriarchal nationalism, section 3.3 considers how non-Western sexual and gender diversity can reframe nationalism in a less oppressive way, questioning contemporary Western centrism in the protection of sexual and gender diversity.

Drawing on the different insights of queer postcolonial approaches, the last section of this chapter examines intersectionality used in international human rights law to diversify the analysis of oppression. Intersectionality was first proposed by Kimberlé Crenshaw to examine the multiple forms of exclusion and oppression of black women in the US. From Crenshaw's original use of the word, intersectionality has become a key tool used in numerous disciplines including law to theorise multiple forms of oppression. This part of the chapter outlines the approach proposed by Crenshaw while pointing out its limits from a queer postcolonial perspective. Despite boundaries, I propose to see Crenshaw's analysis as geopolitically and subjectively specific and therefore different to queer postcolonial approaches. Rather than being incompatible, it is argued that in the global context queer postcolonial approaches

needs incorporating into intersectional analysis. The chapter concludes by recapping the key insights of this chapter into the oppression, marginalisation and exclusion of non-Western queers, outlining the significance of these to the forthcoming analysis in chapters 5, 6 and 7.

1 Bridging queer theory and postcolonial theory in the context of international human rights law

In this section I revisit some of the discussions from chapters 2 and 3 to situate this chapter's analysis of insights from queer postcolonial approaches that will be critically applied to international human rights law in chapters 6 and 7. Going back to chapter 2, queer analysis in the context of international human rights law offers insights into the construction of sexual and gendered legal subjects, identifying the influence of dominant sexual and gender norms and the marginalisation of certain sexual and gender subjects and their exclusion from protection. Moreover, queer theory offers ethical commitments such as diversity, personal autonomy, compassion, love, and freedom from sexual and gender norms that can support a revision of human rights that protect sexually and gender diverse people from being forced into dominant [hetero] normative standards and lifestyles. As explored in chapter 3, postcolonial theory, when applied to international human rights law, offer insights into the construction of these rights based on Western cultural prescriptions to the exclusion of the rest of the non-Western world, as well as the operation of colonial and imperial structures such as orientalism. Furthermore, postcolonial theory offers alternatives such as Bhabha's ethical discourse on cultural rights, which displaces the Western centrism in human rights law by focusing on dialogue and solidarity rather than competition and final judgments. Both theories offer insights into, albeit from different perspectives, the multiple ways international human rights law can reinforce the exclusion, oppression, and marginalisation of sexual and gender diversity (queer theory) or non-Western diversity (postcolonial theory). In doing so, both theories point to the boundaries of international human rights' aspiration for universality, as well as providing alternatives to reconsider human rights in a more diverse and less heteronormative and Western-centric way.

Discussions in both chapters 2 and 3 highlighted how neither queer nor postcolonial theories have engaged in much depth with the intersection of race, imperialism, sexuality, and gender in their analysis, nor with the existence of non-Western sexual and gender diversity. Therefore, both theories have missed the inextricable link between sexuality, gender, and race. This link, which was forged in colonial times and will be explored further throughout this chapter, continues to influence contemporary discourses rendering non-Western sexually and gender diverse individuals and groups invisible. Notably, both queer and postcolonial theory analyse Western sexual discourse as it emerged from and during colonialism. As discussed in chapter 2, queer theory relies on Foucault's *History of Sexuality* in queer theorising of modern sexual identities.¹ As discussed in chapter 2, Foucault argued that sexual [identity] is a particular form of modernity that serves regimes of self-discipline and normalisation to the development of 'biopower'.² A great deal of Foucault's analysis is centred on challenging the Freudian thesis of Victorian prudery.³ Freud argued that 'civilisation is built upon the renunciation of [sexual] instinct'⁴, the latter being understood to exist as pre-discursive reality in need of response and repression by the law.⁵ Foucault challenged Freud's thesis by rejecting the idea of a pre-discursive sexual reality. Instead, sexual desires and the classification of people according to these are functions of multiple discourse of modernity. Foucault examined a number of discourses implicated in Victorian regulation of sexuality, such as medical exams, psychiatric investigation, pedagogical reports, and family interventions.⁶ However, he did not say much about what kind of desires were produced in the 19th century, nor what people did with them.⁷ The latter is important as the colonies and the colonial population figure as a key object in the discursive reality of production of Western desires as well as their repression. The lack of engagement with the

¹ Murat Aydemir 'Introduction' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 17.

² Ann Laura Stoler *Race and the education of desire: Foucault's History of Sexuality and the colonial order of things* (Duke University Press 1995) 165.

³ Ibid 165.

⁴ Sigmund Freud *Civilisation and Its Discontents* (W.W. Norton 1961) 49; Anne McClintock *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (Routledge 1995) 71.

⁵ Stoler (n 2) 165-166.

⁶ Ibid 166.

⁷ Ibid.

content of the desires produced has precluded the analysis of how colonialism and race figures in the development of sexual desire and Western sexual categories.⁸

Postcolonial theorists on the other hand have followed a primarily Freudian approach to sexuality, sometimes tangled in with a Foucauldian critique of colonial racism.⁹ Said is a primary example in this, since his analysis of Orientalism is supremely Foucauldian but his notion of projection that is the Orient as the 'West's' surrogate self is Freudian in nature.¹⁰ To Said, the Orient exists as a project upon which the West projects its own psychosexual needs, those that in Freudian terms have been, or should be, 'repressed' by civilisation.¹¹ Taking the descriptions of European sexual conduct from colonial scripts themselves, sexuality becomes an imperial political project to fulfil repressed Western psychoanalytic instinct.¹² To Said, Orientalism is a 'male power fantasy' in which the Orient is gendered as feminine so it could be penetrated, silenced, possessed, and controlled.¹³ By conflating Orientalism with masculinity Said completely disregards the spectre of the homoerotic masculinity playing a powerful role in the colonial project's regulation and repression of sexual and gender diversity.¹⁴ As many colonial scripts were notably homoerotic in nature, Fanon is often invoked to exemplify postcolonial attitudes to sexuality because of his association of white racism with homosexuality.¹⁵ In *Black Skin White Masks*, Fanon argued that [at least in the Western psychoanalytical sense] there were no homosexuals in the Martinique population.¹⁶ In *Black Skin White Masks* Fanon continues by acknowledging local expressions of transvestitism and cross dressing, but insisted they lead normal sex lives and 'could take a punch like any 'he-man'.¹⁷ Homosexuality becomes associated on the one hand with racism

⁸ Robert F. Reid-Parr *Black Gay Man: Essays* (Foreword by Samuel R. Delany (New York University Press 2001) 85-98.

⁹ Stoler (n 2) 168.

¹⁰ *ibid* 169.

¹¹ Joseph Boone 'Vacation Cruises; Or The Homoerotics of Orientalism' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 43, 44.

¹² Stoler (n 2) 171.

¹³ Edward Said *Orientalism* (Penguin Classics 2003) 40-45, 137-138, Chari (n 2) 277, 278.

¹⁴ Hema Chari 'Colonial Fantasies and Postcolonial Identities' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 277, 278.

¹⁵ Gurav Desai 'Out in Africa' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 139, 146.

¹⁶ Frantz Fanon *black skin white masks* (translated by Charles Lam Markmann, new edition, Pluto Press 2008) footnote 44, 139.

¹⁷ Desai (n 15) 139.

and colonial oppression and on the other with effeminacy.¹⁸ By circumscribing the existence of same-sex desire and gender diversity to the West, Fanon fails to engage with the institutionalisation of misogyny and homophobia embedded within Western sexual scripts.¹⁹

Considering these boundaries within both queer and postcolonial analysis, several of the insights discussed below re-explore Western sexual discourse from the perspective of non-Western sexual and gender diversity. Thus, queer postcolonial approaches include in the analysis how race and the colonial population figured in the Victorian regulation of sexuality, while at the same time reconsidering how misogyny and homophobia formed a key aspect of colonial regulation. In doing so, queer postcolonial approaches identify the inextricable link between sexuality, gender and race forged during colonialism and which continue to impact contemporary discourses. Section 2, using insights from queer and postcolonial theory discussed in previous chapters consider the effects of this link between race, gender and sexuality on the marginalisation of non-Western sexually and gender diverse people. Applied to the context of international human rights law, queer postcolonial approaches provide further insights into the nature of the boundaries of protection for non-Western sexually and gender diverse people. To begin where queer theory offers insight into the construction of sexual and gender legal subjects based on dominant sexual norms. Queer postcolonial approaches examine how legal sexual and gender subjects are constructed not only according certain sexual and gender scripts but also to racialised ones. Where postcolonial theory gives insights into the construction of human rights based on Western cultural scripts queer postcolonial approaches analyse how sexuality and gender play a role in marginalising and excluding the non-West from consideration. Lastly, queer postcolonial approaches bring together both theories, calling for the diversification of the analysis of sexual and gender oppression in international law. As section 3 explores by centring non-Western people in the analysis, queer postcolonial approaches challenge the erasure of these groups within hegemonic discourses, identifying points of revision for international human rights law. The following section explore this bridging through the scholarship by theorists using both theories, forming what I term for the purpose of this thesis queer postcolonial approaches.

¹⁸ Desai (n 15) 139.

¹⁹ Ibid.

2. Queer postcolonial Insights

2.1 Orientalism and the influence of the civilised/uncivilised binary in international discourse on sexual and gender diversity

As briefly discussed in the section above, in the deconstruction of modern Western sexual categories, queer theory has overlooked how colonialism and the colonial population underpinned the development of Western sexual and gender knowledge. However, as analysed by postcolonial theory, Western knowledge is structured according to the self/other binary, whereby Western identities and categories are created against the non-West.²⁰ In this binary ‘the other’ non-Western is constructed based on stereotypical views of their cultural difference which is used to justify their inferiority to the West, such as being ‘uncivilised, abnormal, deviant, childlike’.²¹ This objectification of the native populations completely erased any of the subjective experiences of the colonised themselves creating vast amounts of ‘knowledge’ about the other corresponding to white Western prejudice.²² At the same time, as queer theory discusses, Western sexual categories emerged from the medicalisation of sexuality that linked the latter to identity.²³ Because the non-West has not had sufficient subjectivity to be considered individuals in Western knowledge production, these sexual categories emerged not only as underpinned by certain considerations about sexuality and gender, as critiqued by queer theory, but also of race. Therefore, when Fanon explained that there were no ‘homosexuals’ in the Martinique population,²⁴ he might have been correct, in that categories of the Western medicalised version of same-sex desires did not exist, rather than because there was no same-sex desire or sexual diversity in the Martinique population. Instead in Western knowledge any expression of same-sex desire or other sexual diversity of

²⁰ Edward W. Said *Orientalism* (Reprinted with new preface Penguin Books 2003) 1-3.

²¹ Leela Gandhi *Postcolonial Theory: A Critical introduction* (Columbia University Press 2019) 32.

²² Said (n 20) 3. Homi K. Bhabha *The Location of Culture* (Routledge 1994) 45; Homi K. Bhabha ‘The Other Question- the Stereotype and Colonial Discourse’ [1983] 24.6 Screen 18.

²³ Michel Foucault *The History of Sexuality, Volume 1. An Introduction* (Translated from French by Robert Hurley, Phanteon Books 1978) 43.

²⁴ Frantz Fanon *black skin white masks* (translated by Charles Lam Markmann, new edition, Pluto Press 2008) footnote 44, 139.

the non-Western people was constructed according to Western cultural stereotypes for the purpose of colonial rule and exploitation.²⁵ There, Western sexual categories, and non-Western sexualities exist in a binary relation to each other, where non-Western sexual and gender diversity cannot be understood outside either Western categories or a stereotyped view of their cultural differences.²⁶ Recalling the analysis in chapter 3, international human rights law is underpinned by certain European cultural constructions and reproduces the civilised/uncivilised binary briefly pointed to above.²⁷ Queer postcolonial approaches reconsider the analysis of orientalism and the civilised/uncivilised binary in contemporary international discourse on the protection of sexual and gender diversity. In doing so, queer postcolonial approaches give insights into how the civilised/uncivilised binary operates to erase non-Western sexual diversity from the conversations and therefore potentially from human rights protection.

As colonial structures are embedded within epistemology and knowledge through the universalisation of Western paradigms, non-Western sexual and gender diversity are trapped within complex and contradictory expressions of the latter.²⁸ In contemporary international sexual and gender discourse, the non-West is seen as uncivilised due to the lack of acceptance of a limited amount of LGBT Western sexual identities.²⁹ Because the non-West is constructed as inherently heteronormative and homophobic, non-Western sexual and gender diversity can only exist if they are assimilated into Western sexual identities.³⁰ On the other hand, sexuality played an important role in colonial oppression in different ways. In particular, as will be explored further below, patriarchal heteronormativity played such an important role

²⁵ Robert J.C Young *White Mythologies: Writing History and the West* (Second ed. Routledge 2004) 166; Dipesh Chakrabarty *Provincializing Europe: postcolonial thought and historical difference* (Reissue with new preface by the author, Princeton University Press 2008) 28-32.

²⁶ Fanon (n 24) 114; Homi K. Bhabha *The Location of Culture* (Routledge 1994) 45.

²⁷ Anthony Pagden 'Human Rights, Natural Rights and Europe's Imperial legacy' [2003] 31.2 *Political Theory* 171.

²⁸ Amar Wahab 'Homosexuality/Homophobia is Un-African? Mapping Transnational Discourse in the Context of Uganda's Anti-Homosexuality Bill/Act' [2016] 63.5 *Journal of Homosexuality* 685. Momin Rahman 'Queer Rights and the Triangulation of Western Exceptionalism' [2014] 13:3 *Journal of Human Rights* 274; Rahul Rao *Third World Protests: Between Home and the World* (OUP 2010) 173-195.

²⁹ Ayedmir (n 1) 11; Momin Rahman 'Queer Rights and the Triangulation of Western Exceptionalism' [2014] 13:3 *Journal of Human Rights* 274; Rahul Rao *Third World Protests: Between Home and the World* (OUP 2010) 173-195; Leticia Sabsay 'The emergence of the other sexual citizen: orientalism and the modernisation of sexuality' [2012] 16.5-6 *Citizenship Studies* 605.

³⁰ Wahab (n 28) Rahman (n 29); Rao (n 29).

in colonial oppression that adherence to this institution constituted a key part of the division between good and bad natives.³¹ Consequently, contemporary nationalistic discourse in the non-West is often an expression of the internalisation of colonial erasure of sexual diversity, whereby sexual diversity is seen as a threat to nation building.³² Within both discourses non-Western sexual and gender diversity is completely erased, left unable to speak and be heard, constituting new sexual and gendered subalterns.

In the introduction to *Indiscretions: At the Intersection of Queer and Postcolonial Theory*, Murat Aydemir examines the operation of orientalist discourses in contemporary global politics. Aydemir analyses the response by a prominent Dutch gay activist, van Dalen, to the execution of the two Iranian boys Mahmoud Asgari and Ayez Marhoni, for having sex with each other or alternatively for raping a 13-year-old boy.³³ van Dalen condemns the execution, stating that 'the boys' only crime was their sexual orientation' and that '[Iran's] barbarian and medieval practices have to stop immediately'.³⁴ In his statement van Dalen effectively renews the dichotomy between the civilised and the barbarian, the modern and archaic in the context of international 'gay' rights.³⁵ This cosmopolitan inclusion of non-Western sexual subjects under the banner of Western gay communities is necessarily followed by the discursive productive of another other, namely the barbaric heterosexual Iranians.³⁶ Furthermore, van Dalen is aligned in his politics with anti-Islamic and anti-immigration politics that construct Islam as a 'backward' culture homogenising the different histories, geo-economic developments and experiences of immigrants from Turkey, Morocco, Somalia, Ghana against the 'modern' West that accepts lesbian and gay rights.³⁷ van Dalen inscribes both sexual subjectivity and homophobia onto the other without any regard for these groups and individuals themselves, following in line with Western orientalist traditions.³⁸ At the same

³¹ Chari (n 14).

³² Aniko Imre 'Lesbian Representation and Postcolonial Allegory' in Murat Aydemir (eds) *Indiscretions: At the Intersections of Queer and Postcolonial Theory* (Rodopi 2011) 185; Gayatri Gopinath *Impossible Desires: Queer Diaspora and South Asian Public Cultures* (Duke University Press 2005).

³³ Aydemir (n 1) 11.

³⁴ Ibid 11.

³⁵ Scott Long 'Unbearable witness: how Western activists (mis) recognize sexuality in Iran' [2009] 15.1 Contemporary Politics 119; Aydemir (n 3) 13.

³⁶ Aydemir (n 1) 13.

³⁷ Aydemir (n 1) 12.

³⁸ Ibid 13.

time, van Dalen renews the old colonial narratives whereby the West is called upon to bring civilisation and modernity to the Iranian and other Muslim states.³⁹

The kind of discourse based on sexuality that van Dalen promotes is not unique to the Netherlands. Many Western states brand themselves 'gay friendly' and post-homophobic, tolerant of sexual and gender diversity, while at the same time portraying non-Western countries as 'lagging behind'.⁴⁰ Jasbir Puar coined the term homonationalism to describe how the inclusion of ideal gay subjects (mainly white middle-class cis-gender gay men) in Western nationalistic narratives and imagery is predicated upon the increased surveillance of the West's racialised others.⁴¹ Pinkwashing is another term used to describe this process whereby the West utilises the temporal acceptance of 'gay rights' to distract from national politics criminalising 'unwanted' subjects such as the Muslim immigrants in van Dalen's narrative above.⁴² These practices of homonationalism and pinkwashing depend on racialising homophobia, that is, constructing the non-West as exceptionally homophobic on the basis of their 'culture' naturalising the binary division between the tolerant modern West and the hateful, intolerant racial other.⁴³

Aydemir underscores that these discourses allow 'Western countries to legitimate overriding dialogue and negotiation facilitating violent intervention under the flag of sexual freedom'.⁴⁴ Furthermore, these discourses allow for the inclusion of non-Western individuals into the universal (Western) gay 'brotherhood' because of their assumed sexuality. In doing so these discourses revitalise the self-other binary inherent in colonial discourses discussed earlier. In

³⁹Aydemir (n 1) 11.

⁴⁰ Amar Wahab "The Darker Fruit"? Homonationalism, racialised homophobia, and neoliberal tourism in St Lucian-US contact zone' [2021] 23:1 International Feminist Journal of Politics 80.

⁴¹ Jasbir Puar *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007) 2; Amar Wahab "The Darker Fruit"? Homonationalism, racialised homophobia, and neoliberal tourism in St Lucian-US contact zone' [2021] 23:1 International Feminist Journal of Politics 80.

⁴² Jasbir Puar, Amit Rai, 'Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots' [2002] 72 Social Text 117; Jasbir Puar 'Rethinking homonationalism' [2013] 45.02 International Journal of Middle East Studies 336; Amar Wahab "The Darker Fruit"? Homonationalism, racialised homophobia, and neoliberal tourism in St Lucian-US contact zone' [2021] 23:1 International Feminist Journal of Politics 80; Fatima El-Tayed "Gays who cannot properly be gay': Queer Muslims in the neoliberal European city' 2012] 19 (1) European Journal of Women's Studies 79.

⁴³ Amar Wahab "The Darker Fruit"? Homonationalism, racialised homophobia, and neoliberal tourism in St Lucian-US contact zone' [2021] 23:1 International Feminist Journal of Politics 80.

⁴⁴ Aydemir (n 1) 14.

a liberal imperial turn the self-other binary grants individuality to those who can be considered both Western and modern because of their sexuality, while the other can never become either Western or modern due to their culture.⁴⁵ Through the strategic disarticulation of sex and culture, modern individuality hinges on sexuality and the exercise of desire against the confines of family, religion, community and tradition.⁴⁶ Culture, on the other hand, designates an external determination of the subject, precluding the existence or emergence of any free, autonomous individuality within it.⁴⁷ Thus, individualised sexual subjects can only exist in the liberal Western modern essentialised version or not at all.

By rendering inaudible the voices of non-Western sexually and gender diverse individuals and groups, another facet of Western civilising discourse has thrived without much critique.⁴⁸ Embedded in the Europeans' civilising missions was an inherent ambivalence towards the sexual possibilities in the colonies. The sexual 'promise' and 'threat' that appeared in Orientalism and much of Western travel writing is the exposure abroad to what has come to be loosely known as male homosexual practice in the West.⁴⁹ According to Joseph Boone, the possibility of this sexual contact with and between men underwrites and at times explains the historical appeal of orientalism as an occidental mode of male perception, appropriation and control.⁵⁰ Understanding colonialism as a primarily male project between men, Joseph Boone uses the term homoeroticism to describe how male homoerotic fantasies become a powerful colonial tool in the subordination of men by men.⁵¹ Thus, homoeroticist narratives inscribing abominable homosexuality on the [often colonised Egyptians and Arabs] other served competing colonial interest, including some connected to Western white male anxieties around their own sexualities.⁵² In colonial travel writing, the Arab orient was constructed as a place of homosexual availability and also of social non-interference,

⁴⁵ Aydemir (n 1) 14.

⁴⁶ Ibid.

⁴⁷ Aydemir (n 1)14-15.

⁴⁸ Kobena Mercer and Isaac Julian 'Race, Sexual Politics and Black Masculinity' quoted in Jarrod Hayes 'Queer Resistance to (Neo-) colonialism in Algeria' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 79, 84.

⁴⁹ Joseph Boone 'Vacation Cruises; Or The Homoerotics of Orientalism' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 43, 44.

⁵⁰ Ibid.

⁵¹ Chari (n 14).

⁵² Boone (n 49) 43.

attracting Western men with same-sex desires, as it constituted a safe space of exploration in comparison to the generalised homophobia of many Western states.⁵³ In these accounts the 'other' is not only inscribed in Western understandings of sexual identity but also there is a presumption of equivalence of relationship between the two men participating, without any consideration of the factors of colonialism, economics and general exploitation of the local populations.⁵⁴

Contemporary homoeroticism re-orientates the discourse from availability to the salvation of the homosexual others by Western gay men. One of the commonplace viewpoints on homosexuality in the 'Islamic world' is that Arab and/or Muslim men find homosexual encounters more available and desirable with foreigners (especially Western tourists).⁵⁵ For example Jerry Zairt writes:

Western gay men, like Western technology, filled a need in rapidly developing Iran... [Iranians] had lived deprived for centuries, but now they were suddenly made aware of their frustrations. Westerners had combined sexual, economic and political appeal for Iranians. Because Western gay men provided the often-needed secrecy (being an outsider who did not know the language and could not blab to friends and family) and availability (after all, somebody had to take the scorned feminine role), they fitted nicely. If they had light hair and skin, all the better, for these features were high in demand.⁵⁶

Here, Zairt not only projects a racist aesthetic hierarchy onto the psychic of the Iranians' but the West brings progress and modernity, all through the civilising mission of homosexual intercourse.⁵⁷ As seen in the rendering of Aydemir's analysis above, the colonial narratives of civilisation, barbarism, self-other relations are re-organised in contemporary narratives whereby the West is again bringing sexual civilisation to the other through homosexuality.

⁵³ Boone (n 49) 43.

⁵⁴ Ibid.

⁵⁵ Jarrod Hayes 'Queer Resistance to (Neo-) colonialism in Algeria' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 79, 84.

⁵⁶ Quoted in Jarrod Hayes 'Queer Resistance to (Neo-) colonialism in Algeria' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 79, 88.

⁵⁷ Hayes (n 55) 79, 88.

The premise remains the same whereby Western understandings of sexual identity are inscribed on the other, exposing the historical continuity of colonial narrative underpinning the contemporary globalisation of gay and lesbian identities. At the same time, the existence of local sexual and gender diversity cannot be understood as existing purely because of Western interference. Thus, from this queer postcolonial analysis, it is possible to identify the continued influence of the civilised/uncivilised binary and the multiple ways it renders non-Western sexual and gender diversity invisible in contemporary discourse.

2.2 Patriarchal heteronormativity: colonial anxieties, racialisation of sexual difference and heteropatriarchal nationalism

A key area of analysis in postcolonial theory, as outlined in chapter 3, is the reproduction of colonial structures of oppression through contemporary institutions and forms of government. In doing so, as discussed in chapter 3 and above, postcolonial theory often uses Foucault's theorisations, as does queer theory when analysing contemporary forms of sexual and gender-based oppression. The first part of this section considers Laura Ann Stoler's revisions of Foucault's theorising to consider the intersection between racial oppression and sexual and gender-based oppression. From this analysis I identify how categories of race, sexuality and gender became inextricably linked through the history of colonialism underpinning the discursive construction of Western heteronormativity. Building on this analysis, I briefly outline Rodrick Fergusson's analysis of the use of heteronormativity to promote racial inequality in the US. Having located heteronormativity as a central part of colonial oppression, and its continued influence on the creation of racial inequalities in the West, section 2 of this chapter moves to its continued impact in former colonies. In this section I explore how patriarchal heteronormativity was enforced in the colonies and has been adopted by nationalistic elites to the detriment of sexual and gender diversity. From these analyses this section ends by summarising key queer postcolonial insights that emerge to inform the critique of international human rights law in chapters 6 and 7.

a) Colonial Bourgeois Heteronormativity and the Conflation of Sexuality, Race and Class

Drawing on Foucault's theorisations on racism in his 1976 lectures at the Collège de France, Stoler has re-examined his *History of Sexuality* in light of the role race and empire had in the making of Europe's bourgeois world.⁵⁸ Firstly, Stoler points to Foucault's conceptualisation of racism as a state's indispensable defence of society against itself. This resonant and recurrent theme in the racial discourse of the colony and metropole was critical to how European colonial communities expressed the 'defence' of their privileged members.⁵⁹ The colonial states' regulatory mechanisms were not only directed at the colonised but also forcefully at the 'internal' enemies within the heterogenous category of Europeans themselves. In the nineteenth century, biopower comes to legitimise increased intervention in the ethics of conduct, geared to the management of 'how to live.'⁶⁰ In late colonial order, such interventions operated on European colonials in gender forms that were class-specific and racially coded. Management and knowledge of home environments, childrearing practices, and sexual arrangements of European colonials were based on the notion that the domestic domain harboured potential threats both to the 'defence of society' and to the future 'security' of the [European] population and the [colonial] state.⁶¹ Stoler is interested in how the management of [bourgeois] life middle-class distinctions were made not only in contrast to a European-based working class, but through a racialised notion of civility that rendered the colonial convergence of, and conflict between, class and race evident. The relationship between biopower and colonial taxonomies entails tracing discourses on morality and sexuality through empire and back to the making of the interior frontiers of European nation states. For Stoler, bourgeois sexuality and racialised sexuality should not be treated as distinct

⁵⁸ Stoler (n 2) 95.

⁵⁹ Stoler (n 2) 97.

⁶⁰ Ibid.

⁶¹ Ibid.

kinds, but as dependent constructs in a unified field. Colonialism was not only about the importation of middle-class sensibilities to the colonies, but about the making of them.⁶²

Bourgeois sexuality was constructed against a number of subjects; the immoral European working class, the native other, as well as the ambiguous colonial population of mixed-blood origin.⁶³ If whiteness was part of the moral rearmament of the bourgeois society, the nature of that contingent relationship between European racial and class anxieties in the colonies has impacted the bourgeois cultivation of the self in Europe.⁶⁴ What sustained racial membership was middle-class morality, nationalist sentiments, bourgeois sensibilities, normalised sexuality, and a carefully circumscribed 'milieu' in school and home⁶⁵ Being 'European' was supposed to be self-evident, but it was also a quality that only the qualified were equipped to define.⁶⁶ Claims to racial superiority depended on middle-class respectability for the entire European population.⁶⁷ It was in the domestic domain, not the public sphere, where essential dispositions of manliness, bourgeois morality, and racial attributes could be dangerously undone or securely made.⁶⁸ Lack of self-discipline was a risk to the body politic. In prescribing the medical and moral care of adult and child bodies, the requirements for a cosy and well-protected European home, and the attributes of a 'modern white mother' whose native servants were kept in check, tied bourgeois domesticity to European identities and thus racial orderings to bourgeois rule.⁶⁹ The micro-management of the domestic life might be seen less as an affirmation of bourgeois hegemony than as a contested and transgressive side of it.⁷⁰ What becomes apparent in these critiques is that the heteronormative patriarchy of the West operates to forcibly normalise or alternatively marginalise all types of alternative sexuality and family structures in specific racialised ways. Furthermore, the operation of heteronormativity as a structure supporting and justifying racial inequality continues to operate today in Western countries.

⁶² Stoler (n 2) 99.

⁶³ Ibid 100.

⁶⁴ Ibid 105.

⁶⁵ Ibid.

⁶⁶ Stoler (n 2) 105.

⁶⁷ Ibid 106.

⁶⁸ Ibid 108.

⁶⁹ Stoler (n 4) 106.

⁷⁰ Ibid 110.

Fergusson, using both queer and anti-racists insights, has furthered this analysis to uncover the complex way heteronormativity is used to perpetuate pathologisation and socio-economic exclusions of black people in America.⁷¹ In *Aberrations in Black: Toward a Queer of Colour Critique*, Fergusson explores how heteronormativity has, throughout different historical periods, been used to justify the economic inequality of African Americans in the US. Situating the domestic life and family as the site of ideological and material debate, as the Victorians did in the colonies, in the US the heteropatriarchal middle-class families became the standard against which other families were judged.⁷² That demand for a racialised heteronormativity released polymorphous exclusions targeting women, people of colour, and gays and lesbians at the same time that it became a regulatory regime, working to inspire conformity among women, people of colour and homosexuals.⁷³ To resituate the authority of those ideals, questioning concerning material exclusions as they pertain to African Americans was displaced onto African Americans' sexual and familial practices, conceptualising African American racial differences as a violation of the heteronormative demands that underlie liberal values.⁷⁴ Presuming African American violations of those demands became the justification for subordinating African Americans.⁷⁵ As figures of non-heteronormative perversions, straight African Americans were reproductive rather than productive, heterosexual but never heteronormative. The construction of African American sexuality as wild, unstable, and undomesticated locates African American sexuality within the irrational and therefore outside the bounds of citizenship machinery.⁷⁶ African American sexuality, unlike its heterosexual counterpart, symbolized a rejection of heterosexuality, but neither could claim heteronormativity.⁷⁷ The racialised eroticisation of black heterosexual and homosexual outside the rationalised heteronormative household symbolically aligned black straight and gay persons.⁷⁸ The taxonomy of black nonheteronormativity; common law marriages, out-of-wedlock births, lodgers, single-headed families, non-monogamous sexual relationships, unmarried persons, and homosexual persons and relationships were equated,

⁷¹ Rodrick A. Ferguson *Aberrations in Black: Toward a Queer of Colour Critique* (University of Minnesota Press: Minneapolis 2004) 82.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ferguson (n 71) 87.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

eliding their various meanings because of their failure to conform to a heteropatriarchal household legalised through marriage.⁷⁹ Moreover, this inscribed failure to conform to Western heteropatriarchy has been used by US governments to explain crime and poverty in majority Black neighbourhoods,⁸⁰ rather than the histories of slavery, imperialism and institutionalised racism of the US. From this analysis, heteronormativity can be identified as a structure that not only contributes to the exclusion and oppression of sexually and gender diverse people but also to the unequal treatment of the non-white and non-western people. This therefore renders visible the inextricable link between race, sexuality, and gender in the creation of systems of marginalisation, inequality, and oppression. However, heteronormativity has not only had an impact on the racialisation of sexuality in the West, but continues to impact the regulation of sexuality and gender diversity in former colonies. The following section explores this issue in more depth.

b) Postcolonial Patriarchal Nationalism and Erasure of Sexual and Gender Diversity

While many postcolonial theorists have not explored heteronormativity in terms of sexual and gender diversity, some have been highly critical towards the adoption of Western heterosexual family structures.⁸¹ Fanon considered that assimilationists were miseducated in the colonised image of 'civilisation' which included the realisation of Western sexual normativity.⁸² Fanon argues that the assimilationist suffers from an inferiority complex that compels them to imitate the oppressor and 'deracialise' themselves.⁸³ However, the process of assimilation is never completely successful, and operates more as a form of alienation of the colonised.⁸⁴ For Fanon, sexuality constitutes a key aspect of alienation.⁸⁵ While Fanon is

⁷⁹ Ferguson (n 71) 87.

⁸⁰ Ibid 89.

⁸¹ Greg Thomas *The Sexual Demon of Colonial Power: Pan-African Embodiment and Erotic Schemes of Empire* (Indiana University Press 2007) 51- 75.

⁸² Frantz Fanon 'Culture and Racism' in Frantz Fanon *Toward the African Revolution: Political Essays* (Translated from French by Haakon Chevalier, Grove Press 1964) 39.

⁸³ Ibid 38.

⁸⁴ Ibid.

⁸⁵ Thomas (n 81) 83-89.

often credited with homophobia, Greg Thomas argues that Fanon's approach to sexuality has often been overtly simplified.⁸⁶ Thomas has examined multiple aspects of Fanon's theorisation, including his critique of the colonised elite's assimilation into bourgeois structures, his critique of family structures, presumed Freudian psychoanalysis, and the exclusion of blacks from being subjects of human sexuality in Western narratives⁸⁷. Drawing on these different insights from Fanon's writings, Thomas argues that Fanon was actually highly critical of all sexual imperialism, both heterosexual and homosexual, and advocated for sexual revolution that could go beyond the confines of Western sexuality.⁸⁸ Notable in Fanon's critiques is a rejection of Western heteropatriarchy. Fanon fundamentally rejects the Oedipal complex, arguing the extreme difference between the nuclear family structures presumed in Freud, and later Lacan, and the reality of black lives.⁸⁹ The nuclear family in itself is problematised by Fanon, who considers the civilised white family was only a miniature of the colonial nation, an agent under which the production of white supremacy was ensured.⁹⁰ Fanon also rejects the application of any psychosexual schemas to the colonised population, as these categories presume a universal white subjectivity that can only absorb or reject non-Western subjectivity.⁹¹ Fanon's critique extends to the imposition of, or assimilation to, the Western nuclear family, which he sees as the primary site of production of white supremacy.⁹² Fanon reverses the civilising discourse of white imperialism that imposes binary genders and hetero-patriarchal family structures, by arguing that "a normal negro child, having grown up with a normal family, will become abnormal on the slightest contact with the white world."⁹³

In the critiques of the colonised bourgeoisie, E. Franklin Frazier and Fanon extended their analysis to that of sex, rendering the link between imperialism, race and sexuality visible within the structures of middle-class normativity.⁹⁴ In his analysis of African-American adherence to white middle-class normativity Frazier was highly critical of what he described

⁸⁶ | Thomas (n 81) 83-89.

⁸⁷ Thomas (n 81).

⁸⁸ Ibid 83-89.

⁸⁹ Ibid.

⁹⁰ Fanon (n 24) 109,115, Thomas (n 81) 87.

⁹¹ Fanon (n 24) 111.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Thomas (n 81) 51.

as the “lumpen bourgeoisie”.⁹⁵ According to Frazier, this group of black bourgeois in America can be “characterized by racial subordination, socio economic dependence, systematic political collaboration and a deep-seated inferiority complex and a profound self-hatred coupled with a flagrant ideological imitation of whites and subjection to white values.”⁹⁶ While Frazier was, in contrast to Fanon and many of the other first postcolonial thinkers, in favour of assimilation and not revolution, he did draw a distinction between the “lumpen bourgeoisie” and his ideal middle-class assimilation.⁹⁷ What separated these two groups, the ideal type and the other, was adherence to white erotic norms.⁹⁸ Importantly the lumpen bourgeoisie upheld the American patterns of heteropatriarchal family life and their conventional sex norms.⁹⁹ Frazier was highly critical of the discourses promoted, such as “the making of men and women out of our sexual savages” and the use of sexuality as a mark of civilisation.¹⁰⁰ The control of the master bedroom constituted the primary place of inscription of the violence of culture and civilisation in the West.¹⁰¹ For Frazier, the adherence to sexual normativity was tantamount to accepting violent disavowal of black sexuality, including the rejection of matrilineal family structures outside institutional control that were ‘swapped with patriarchal marriage’.¹⁰² Both Fanon and Frazier highlighted how heteronormativity operate as a structure of violent erasure of non-Western sexuality through forcing adherence to it on non-white populations. Moreover, this assimilation into Western erotic and gender norms by the colonised and non-Western people themselves creates not only alienation but as I explore immediately below, creates new systems of oppression.

The impact of colonial patriarchal heteronormativity in the contemporary oppression of non-Western sexual and gender diversity is an important insight of queer postcolonial approaches. Hema Chari uses the word ‘postcolonial masculinity’ to denote the politics of masculinity that

⁹⁵ Franklin E. Frazier *Black Bourgeois: The Rise of a New Middle Class* (Collier Books: 1962) quoted in Greg Thomas *the Sexual Demon of Colonial Power: Pan-African Embodiment and Erotic Schemes of Europe* (Indiana University Press, Bloomington and Indianapolis 2007) 58.

⁹⁶ Franklin E. Frazier *Black Bourgeois: The Rise of a New Middle Class* (Collier Books: 1962) 11, 24-26, 188, 213-214, 224-229; Greg Thomas *the Sexual Demon of Colonial Power: Pan-African Embodiment and Erotic Schemes of Europe* (Indiana University Press, Bloomington and Indianapolis 2007) 58.

⁹⁷ Thomas (n 81) 74.

⁹⁸ Ibid 60.

⁹⁹ Ibid 52, 60.

¹⁰⁰ Thomas (81) 64.

¹⁰¹ Ibid 66.

¹⁰² Ibid 66.

were practices during the imperial British rule, establishing a particular masculinised ideal that operates in contemporary nationalistic discourse.¹⁰³ The hypermasculine nature of the stereotypical powerful, manly, and virile Englishman was established against a stereotyped version of the weak, effeminate, impotent, and irresolute 'native'.¹⁰⁴ Markers of sexual orientation such as gender-bending, female impersonation and androgyny were consistently charged with femininity and unmanliness.¹⁰⁵ The virile male body, on the other hand, legitimated political and cultural supremacy, a status that could at times incorporate a specific type of native man.¹⁰⁶ In contemporary nationalistic discourse, the link between feminisation, weakness, and homosexuality is used to promote a dominant national image of heterosexuality associated with masculinity and strength.¹⁰⁷ The construction of the 'nation' becomes the site for particular heterosexual anxiety about the inscription of postcolonial masculinity, which in turn discloses homophobic paranoia.¹⁰⁸ In postcolonial contexts where nationalist movements have adopted Western homophobic prescriptions of masculinity the nation is constructed as inherently heterosexual, revealing an epistemological crisis and paranoid homophobic anxiety about what it constitutes to be a postcolonial masculine nation.¹⁰⁹ Hema Chari explains that these discourses represent empirically old and new masculine rights to control decolonised [feminine] lands, recreating the symbolic battle between former coloniser and the emerging nationalist elite over developing nations and the former colonised population.¹¹⁰ The link between power and masculinity is reinvigorated to justify power and control, to erase the possibility of any local expressions of same-sex desire.¹¹¹ The role of women in these contexts is paradoxical as they are constructed as passive and ineffectual but also idealised and worshipped.¹¹² Homophobic nationalistic discourses are riddled with old colonial anxieties and narratives that are both patriarchal and heteronormative in nature, and affect the conditions of the possibility and impossibility of

¹⁰³ Chari (n 14) 282.

¹⁰⁴ Ibid, 282-3.

¹⁰⁵ Ibid 283.

¹⁰⁶ Ibid.

¹⁰⁷ Beth Kramer 'The Double Nature of the Love Triangle: Sedgwick, Greene and Achebe' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 115.

¹⁰⁸ Chari (n 14) 291.

¹⁰⁹ Chari (n 14) 291.

¹¹⁰ Kramer (n 107).

¹¹¹ Kramer (n 107).

¹¹² Ibid.

sexual and gender diversity in postcolonial nations. Further, Chari's analysis displays the different gendered impact of these discourses, a point that has been explored by other queer postcolonial theorists.

Another example of a queer postcolonial examination of the effect of dominant imperial and nationalistic cultures is Gayatri Gopinath's *Impossible Desires: Queer diasporas and south Asian public cultures*.¹¹³ Gopinath locates this negotiation between dominant norms within what she identifies as the specifically queer diaspora.¹¹⁴ Departing from the dominant focus on male same-sex desire, Gopinath considers the examination of expressions and representation by and of non-Western queer women as the most powerful site of challenge to conventional sexual and gender and nationalistic imagery.¹¹⁵ Analysing both the erasure of, and the representations of, queer female homoeroticism in diasporic cinema, Gopinath points to the Hindu nationalistic violence on queer and diasporic cultural production.¹¹⁶ As part of her examination, Gopinath analyses the responses to the film *Fire* by Indian Canadian director Deepa Mehta, depicting the lesbian relationship between two sisters in law in a joint family household in New Delhi.¹¹⁷ In India, screenings of the film were forcibly stopped, film posters burned, and property vandalised because the film's depiction of lesbianism was an 'affront' to Hinduism, and 'not Indian culture.'¹¹⁸ The fact that Mehta was a diasporic filmmaker was repeatedly cited as evidence of her lack of knowledge about the erotic and emotional lives of 'real' Hindu women'.¹¹⁹ This critique not only emanated from right wing Hindu nationalists, but also from moderate to leftist commentators.¹²⁰ Notably, *Fire* is loosely based on the 1941 short story 'The Quilt' by Urdu Writer Ismat Chughatai.¹²¹ 'The Quilt' centres on the story of a sequestered wife and her female maidservant in an upper-class Muslim household. The tale is narrated by a young girl who is both fascinated and alarmed by

¹¹³ Gopinath (n 32).

¹¹⁴ Ibid 10.

¹¹⁵ Ibid.

¹¹⁶ Ibid 130.

¹¹⁷ Gopinath (n 32) 131.

¹¹⁸ Mukhtar Abbas Naqvi (union minister of the Indian state) quoted in Shohini Ghosh 'From the frying pan to the Fire' [1991] 6.50 *Communalism Combat* 16 referred to in Gayatri Gopinath *Impossible Desires: Queer Diaspora and South Asian Public Cultures* (Duke University Press 2005) 131.

¹¹⁹ Gopinath (n 32) 131.

¹²⁰ Ibid.

¹²¹ Ibid 132.

the sounds and smells of the two women under the quilt.¹²² The colonial government in India's response to the novel, mirrored decades later by Hindu nationalists in their response to *Fire*, was to charge the author with obscenity (from which she was later exonerated).¹²³ The obscenity charge was because of the representation of female homoeroticism, despite the story clearly mapping out male homoeroticism as well.¹²⁴ The controversies surrounding both the novel and the movie for their representation of female homoeroticism points to the immense symbolic and discursive weight attached to female desires and practices.¹²⁵ Discursively, women's sexuality is mobilised in the service of imperial, national, and communal projects, rendering female same-sex desire impossible.¹²⁶

From the analysis in this section, several insights from queer postcolonial approaches relevant to the analysis of international human rights law emerge. To begin, in the analysis of the oppression due to heteronormativity, queer postcolonial approaches draw attention to the way that racialised sexual subjects are also marginalised and oppressed by that same system, a point which has been largely left out of queer analysis. Furthermore, in the analysis of the impact of colonial and imperial oppression, queer postcolonial approaches centre the analysis of sexuality and gender. In doing so, queer postcolonial analysis challenges the civilised/uncivilised binary by rendering visible heteropatriarchal oppression as a cause of colonialism, rather than inherent to any non-Western culture.

2.3 The oppressive character of the universalisation of Western sexual and gender knowledge

A key insight of postcolonial theory discussed in chapter 3 is the conflation between Western culture and knowledge, and the universal. In part of this critique, postcolonial theorists engage with the main tenets of Western epistemology, outlining how it marginalises,

¹²² Gopinath (n 32) 132.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

excludes, and erases non-Western knowledge, philosophy, understandings, and experiences. Queer postcolonial approaches bring this analysis to the questions of gender and sexuality, highlighting how at its core, Western epistemology and knowledge erase non-Western sexual and gender diversity.

If we recall from chapter 3, postcolonial theory is highly critical of Western knowledge and key epistemic truths that it builds upon.¹²⁷ The first postcolonial thinkers challenged Descartes' assumption that producers of knowledge could somehow be un-situated and impartial, and that the world could possibly be fully known through the exercise of reason.¹²⁸ Dipesh Chakrabarty even argues that it is not Eurocentrism, but rather its presumption that the Cartesian subject is possible at all that is the cause of the oppressive nature of Western knowledge production.¹²⁹ In the context of sexuality and gender, queer postcolonial critique of the Cartesian subjects takes another dimension by challenging the construction of essentialism.¹³⁰ The Cartesian subject depends on the distinction between the body as *res extensa*, part of the material universe, and the soul as the *res cogitans* or thinking substance, which is according to Descartes entirely independent of matter.¹³¹ This distinction asserts the body as simply an extension, a more or less fortunate presentation of the interior and immaterial self being naturalised as biological against the rational civilised mind.¹³² However, this distinction between body and soul/mind does not exist in cultural, social-philosophy outside the West.¹³³ By tracing the specific location of the Cartesian subject to Western philosophy, it becomes apparent that the body is a cultural construction as opposed to being a universal natural truth.¹³⁴ Through colonialism, European civilisation made the human body explicit, which involves the very objectification of that same body around the world.¹³⁵

¹²⁷ Julian Go *Postcolonial Thought and Social Theory* (OUP 2016) 29-39.

¹²⁸ Ibid 32-35.

¹²⁹ Ibid 52-53.

¹³⁰ Maaïke Bleeker 'Of Passing and Other Cures: Arjan Everdeen's Born in the Wrong Body and the Cultural Construction of Essentialism' in in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 129.

¹³¹ Bleeker (n 130) 132.

¹³² Ibid 129.

¹³³ Ratna Kapur 'In the Aftermath of Critique We Are Not in Epistemic Free Fall: Human Rights, the Subaltern Subject and Non-Liberal Search for Freedom and Happiness' [2014] 25 *Law and Critique* 25.

¹³⁴ Bleeker (n 130) 129,132.

¹³⁵ Ibid.

In the context of colonisation this mind/body dualism functions to strip Europe's others from subjectivity because they were bodies 'similar to nature', incapable of exercising sufficient rationality to occupy the position of the thinking Cartesian subjects¹³⁶ The psychoanalytic subject forms itself around the fantasy of a totalised and mastered body, which is precisely the Cartesian fantasy modern philosophy has inherited.¹³⁷ The anatomical body is understood as the material basis of our existence, in response to which we develop our subjective identity, which creates a mind/body dualism that can become in itself an oppressive structure.¹³⁸ Maaïke Bleeker has examined how the mind/body dualism structures psychiatric interventions that normalise gender diverse individuals.¹³⁹ In psychoanalytic discourse, gender diversity is in itself a problem that needs neutralising through corrective interventions on the body.¹⁴⁰ Here the interior self, the 'soul' or essential personhood is situated against the body as a simple material extension of the interior self.¹⁴¹ This critique is not oriented towards sex changes but rather the what Bleeker calls 'recovery narratives' that embrace social constructivist concepts of identity while at the same time confirming the essentialism of binary female/male sexes.¹⁴² These discourses are mediated by assumptions about the body, self, gender and sexual or racial identity. For example, most psychologists and psychiatrists assume that women who consistently cross-dress wish to actually become a man and are therefore 'born in the wrong body'.¹⁴³ Men who cross-dress are more often thought to be driven by a sexual desire when they cross-dress, and not necessarily by a desire to become women.¹⁴⁴ If the desire is understood to be sexual, the 'the answer' is to be found in the practice of cross-dressing itself.¹⁴⁵ If the desire is understood to be 'cultural' and not sexual, it appears as an indicator of a problem, namely the problem of not being what one actually

¹³⁶ Bleeker (n 130) 129.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Bleeker (n 130) 129.

¹⁴³ Marjorie Garber Vested Interest Cross Dressing and Cultural Anxiety quoted in Maaïke Bleeker 'Of Passing and Other Cures: Arjan Ederveen's Born in the Wrong Body and the Cultural Construction of Essentialism' in in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 129, 131.

¹⁴⁴ Marjorie Garber Vested Interest Cross Dressing and Cultural Anxiety quoted in Maaïke Bleeker 'Of Passing and Other Cures: Arjan Ederveen's Born in the Wrong Body and the Cultural Construction of Essentialism' in in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 129,131.

¹⁴⁵ Bleeker (n 130) 131.

wants to be or thinks that one is.¹⁴⁶ The solution then is to solve the underlying problem, namely becoming the ‘other’ one dreams of or imagines being.¹⁴⁷ The diagnosis plays an important role in constructing the problem in a particular way that allows for a ‘resolution of nature mistakes’ through normalisation of the initial gender transgression.¹⁴⁸ The person then becomes ‘restored’ to fit the discrete ‘category’ that is ‘natural’ i.e. making autonomy match destiny.¹⁴⁹ This rigid framework keeps in place the binary logic that supports essentialism and difference rather than transformation and diversity.¹⁵⁰ In the confirmation of essentialism and normalising interventions there is a lack of transformation of the way we think about gender diversity.¹⁵¹ With the increased possibilities of medical transformation of the body come the regressive implications of how these narratives are understood and explained according to normalising interventions on the body, reaffirming the Cartesian subject’s duality between body and mind.¹⁵² Situating the anatomical body as a consequence and construction of Western modernist discourse, rather than as a universal reality significantly re-orientates the analysis of the construction of legal gender and sexual subjects in international law. By incorporating this critique of Western epistemology and knowledge, queer postcolonial analysis renders visible how non-Western sexual and gender diversity becomes erased when the universal becomes conflated with the West in international law.

3. Revising international human rights law through the analysis of representation of non-Western sexual and gender diversity

A central element in queer and postcolonial analysis of international human rights law is the identification of alternative starting points for human rights interpretations, from where the former can be revised to better protect sexual and gender diversity and displace the Western centrism of the regime. Queer postcolonial approaches bring both theories together to

¹⁴⁶ Bleeker (n 130) 131.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid 129, 133.

¹⁵⁰ Ibid 129, 136.

¹⁵¹ Ibid.

¹⁵² Ibid.

ensure the displacement of Western centrism in the analysis of oppression and protection of sexually and gender diverse subjects under international human rights law. Already in the analysis of insights in sections 2.1-2.4, several tools have been identified to ensure that non-Western sexual and gender diversity are not excluded from international human rights law. To begin, sexual and gender subjects should not be constructed according to Western categories. Moreover, the analysis of oppression must reflect how Western sexual and gender norms affect non-Western people in colonial and imperial ways. Because a significant part of the erasure of non-Western sexual and gender identity happens through the universalisation of Western paradigms, a key part of the queer postcolonial alternative is to localise the analysis of oppression. This means that any analysis of oppressive structures needs to be understood in the context within which it is applied. Some queer postcolonial contributions achieve this contextualisation by starting the analysis from the experiences of sexually and gender diverse people in a particular location, or in the local reactions to aesthetic representation of same-sex desires and gender diversity. The conditions of possibility and impossibility of sexual and gender subjects created by the operation of interconnecting sexual and gender and imperial structures lead to forms of oppression and subversion that cannot be understood within Western centric universal narratives. Notably, it is not only the localisation of the analysis of sexual and gender oppression that is important in queer postcolonial approaches, but also the analysis of representation of non-Western sexual and gender diversity, because it challenges its marginalisation and erasure. These representations of non-Western sexual and gender diversity in the queer postcolonial approaches are discussed below and are central to the revision of international human rights law in chapters 6 and 7.

a) Local re-negotiations of Western sexual categories and activist methods

A key discursive structure of oppression and erasure identified above is the assimilation of any non-Western local expressions of sexual and gender diversity into Western categories and narratives. One way queer postcolonial approaches review and challenge this structure

is through the analysis of non-Western sexually and gender diverse people, their identities and practices even when these groups use Western categories and strategies to challenge heteronormativity locally. While postcolonial theories find challenges to imperialism by retrieving the experiences and understandings of the non-Western world, they also acknowledge the influence of the 'West' on its 'other'.¹⁵³ For example, Bhabha and Spivak follow a similar argument, as they both reject the possibility of completely separating the 'European' and the 'other'.¹⁵⁴ Therefore, while it might be impossible to completely exclude European thought and influence from the postcolonial context and the postcolonial subjects, subversive potential and alternative values and ethics can be found in the positions of the subaltern and hybrid subjects and groups. As Bhabha envisioned for the revision of cultural rights, both the subaltern and hybrids are positions of in-betweenness being both inside and outside structures of hegemonic power. From those that inhabit these positions and locations new forms of cultural meanings develop, blurring the limitations of existing boundaries and calling into question the categorisation of culture and identity.¹⁵⁵ Similarly, queer postcolonial approaches analyse the influence of Western sexual activism on local activism but instead of reducing it to an equivalent seeing it both as a challenge to Western centrism and to oppressive local sexual and gender norms.

In 'Transcending Sexual Nationalism and Colonialism: Cultural Hybridization as Process of Sexual Politics in 90s Taiwan'¹⁵⁶ Chong Kee Tan analyses multiple ways that Taiwanese gays and lesbians have negotiated and transcended the boundaries of sexual nationalism and sexual colonialism.¹⁵⁷ In his analysis Tan proposes a re-definition of Bhabha's notion of hybridity to examine the process of negotiation between local circumstances and imperial sexuality by non-white sexually and gender diverse individuals.¹⁵⁸ Tan examines different spaces where hybridisation has happened in Taiwan, whereby Taiwanese lesbian and gays re-use aspects of Western gay and lesbian activism translated into the unique Taiwanese

¹⁵³ Malreddy Pavan Kumar '(An)other Way of Being Human: 'indigenous' alternatives (s) to postcolonial humanism' [2011] 32.9 Third World Quarterly 1557

¹⁵⁴ Ibid 1557, 1562.

¹⁵⁵ Homi K. Bhabha *The Location of Culture* (Routledge 1994) 36-38.

¹⁵⁶ Chong Kee Tan 'Transcending Sexual Nationalism and Colonialism: Cultural Hybridization as Process of Sexual Politics in 90s Taiwan' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 123.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

context. For example, in the publication of G&L, the first Taiwanese commercial lesbian and gay magazine, many of the articles on fashion and personal care have imported gay consumer culture well known in the US.¹⁵⁹ At the same time, the magazine is well aware of the social reality in which it is published, namely an island nation where most people are largely ignorant of what being gay and lesbian means.¹⁶⁰ Consequently, the magazine features interviews with famous people talking about the experience of coming to terms with their self-identification and their subsequent negotiating with their families, faiths and careers.¹⁶¹ Besides providing consumption models, the magazine also provides role models.¹⁶² Readers of the magazine write into the magazine to tell each other what they want and what they think.¹⁶³ By doing so, they act as discerning consumers themselves who select among the competing cultural constructions of homosexuality to offer those elements that can be combined with family cohesion (very important in Taiwan) and other personal needs.¹⁶⁴ Through this collective negotiation between the readers and the publishers, a unique Taiwanese form of same-sex sexualities appear.¹⁶⁵ While there are elements of Western, Chinese and Japanese gay culture in the model, it cannot be reduced to either or all of these.¹⁶⁶ Thus, even if Western and non-Western individuals and groups employ the same or similar vocabulary, there is no reason to assume that these words or models of sexuality carry the same personal or social significance.¹⁶⁷

Another example of local translation and reformulation of Western influences can be found in Jillana Enteen's contribution to *Postcolonial Queer: Theoretical Intersections*.¹⁶⁸ Enteen examines the different ways in which Western terms and conceptualisations are re-negotiated by Thai women in Bangkok while coexisting with more established identifications for non-heterosexual women.¹⁶⁹ The most common words to describe Thai women who

¹⁵⁹ Tan (156).

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Tan 156.

¹⁶⁸ Jillana Enteen 'Tom, Dii and Anjaree: Women Who Follow Nonconformist Ways' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 99.

¹⁶⁹ Ibid.

engage in romantic and erotic relationship with other women are 'Tom' and 'Dii'. Tom comes from the English word 'tomboy' and Dii from the word 'lady'.¹⁷⁰ While the terms roughly coincide with the English word butch and femme when it comes to positioning, they are neither mere imitations of their English derivatives nor American descriptions of butch/femme dynamics.¹⁷¹ Being Tom encompasses, but is not fixed nor reducible, to having a certain type of aesthetic and clothing, membership in Tom communities, and being the active sex partner. Dii on the other hand can be any woman who, conforming to the mainstream Thai society image of femininity, has a relationship with a Tom. Diis are defined by their relationship with Toms and can at the same time have other partners outside this relationship, whether boyfriends or husbands. Tom and Dii are not static positions, and with the interaction between Thai women and other cultures, new terms have emerged. The first Thai organisation for non-heterosexual women is called Anjaree which in Thai means "women who follow in non-conformist ways".¹⁷² Anjaree's founder, Anjana Suvarananda, is creating new words and forms of identification for Thai women to build community for women loving women. Suvarananda has spent time studying outside Thailand, has had access to Western cultures, and speaks almost fluent English which informs her attempts. She has proposed the term 'yingrakyong' which literally means 'woman-loves-woman'.¹⁷³ While being aligned with Western women-centred organisations and academics, Suvarananda has reformulated this phrase to match her specific desire to build local Thai terminology and culture.¹⁷⁴ She has resisted using the word lesbian as it is seen as vulgar and derogatory by most Thais, including women involved in relationships with other women.¹⁷⁵ Anjaree has opened up a place for another identity and for some is a more inclusive term, while at the same time members still use Tom and Dii in their identifications.¹⁷⁶ Anjaree further provides opportunities for interaction between communities by publishing newsletters, encouraging members to write and respond to each other's writing as well as organising social events where women can meet.¹⁷⁷ While local conditions are Suvarananda's primary focus, her knowledge of external

¹⁷⁰ Enteen (n 168).

¹⁷¹ Ibid 103.

¹⁷² Ibid 99.

¹⁷³ Ibid.

¹⁷⁴ Enteen 168.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

practices informs her actions.¹⁷⁸ Suvarananda and the members of Anjaree are therefore reconfiguring and transcending Western conceptualisations while at the same time being informed by these in their community building as they challenge heteronormativity.

Both examples demonstrate how non-Western sexual and gender diverse subjects exist between national and Western paradigms, drawing on different type of influence to build communities of difference. Through these analyses queer postcolonial approaches contest the homogenising impulse of discourses that construct all sexual and gender diversity according to Western categories. In the context of international human rights law, these representations of non-Western sexual and gender diversity serve as a starting point for re-thinking the construction of legal subjects in a non-heteronormative as well as non-Western manner.

b) Representation of non-Western female same-sex desire as a challenge to patriarchal heteronormativity

As discussed in section 2b, one insight of queer postcolonial approaches is that patriarchal heteronormative nationalism intersects to erase and significantly oppress non-Western female same-sex desire. While neither queer theory nor postcolonial theory as explored in chapters 2 and 3 focus specifically on the oppression of women in the context of their analysis, some queer postcolonial approaches centre non-Western sexually and gender diverse women in their exploration of oppression. In these analyses queer postcolonial approaches give insights into the conditions of possibility and impossibility of same-sex female eroticism in postcolonial states where national identities are constructed in heteropatriarchal terms. In doing so, queer postcolonial approaches draw attention to how nationalistic identities are constructed in oppressive sexual and gendered terms. At the same time, through the analysis of representation of female same-sex eroticism and gender diversity, queer postcolonial

¹⁷⁸ Enteen 168.

approaches shatter the nationalistic illusion of heteropatriarchy, despite the efforts of the latter to erase the former.

Queer postcolonial scholar Anikó Imre uses insights from both Bhabha and de Lauretis in analysing the challenge that representations of non-Western female same-sex eroticism pose to heteropatriarchal nationalist images.¹⁷⁹ In the analysis, Imre examines three films made in postcolonial national contexts, Deepa Metha's *Fire* (1996 India/Canada), María Luisa Bemberg's *Yo la peor de todas (I, the Worst of All* 1990 Argentina) and Károly Makk's *Egy másra nézve (Another Way, 1982 Hungary)*. *I The Worst of All* focuses on the passionate relationship between the Mexican nun-poet Sor Juana Ines de la Cruz and the wife of a Spanish Viceroy in the context of the colonisation of Mexico by Spain and the Inquisition in the 17th century.¹⁸⁰ The relationship between the two women is constructed not as one of exploitation (as for example Said and Fanon theorised) but of desire, shattering the illusion of invisibility of the existence of female same-sex desires in the colonised population. *Another Way* is set just two years after the failed Hungarian uprising against the Soviet-communist invasion in 1958, and follows an affair between lesbian journalist Eva and her married colleague Livia.¹⁸¹ While the affair has tragic consequences for both women (Livia gets shot by her husband, ending up in a wheelchair, and Eva flees to the border where she is also shot) the film shatters the illusion of inexistence of female same-sex desire in Soviet Hungary by showcasing its violent erasure. *Fire* (briefly discussed above in Section 2.2) is about two women in contemporary Delhi who are trapped in abusive and neglected traditional Hindu marriages and who develop a sexual and emotional bond.¹⁸² *Fire* problematises the pressure of familial and religious limits put upon women as they have emerged from British colonialism and are developed and reinforced by the Hindu right.¹⁸³ In these narratives, women should follow the 'female virtues' of chastity, purity and self-sacrifice.¹⁸⁴ The relationship that emerges between the two women in the film challenges these narratives, culminating in the last scene of the film in which when confronted with their relationship one of the women's

¹⁷⁹ Imre (n 32).

¹⁸⁰ Ibid.

¹⁸¹ Ibid

¹⁸² Imre (n 32).

¹⁸³ Ibid.

¹⁸⁴ Ibid.

clothes are set on fire. The burning sari presents a reversed performance of the myth of Sita, Lord Rama's wife who is the epitome of the obedient and loyal wife in Hindu mythology,¹⁸⁵ as Sita had to walk through trial by fire to prove her fidelity to her husband. However, in the case of *Fire* the two women leave to start an uncertain life together.¹⁸⁶

In all the films, the relationship between the two women at the centre of in each film is unmistakably homoerotic.¹⁸⁷ However, lesbian acts tend to remain almost entirely invisible and nameless and have been downplayed by many critics, raising fundamental questions about representation and identity.¹⁸⁸ Unlike Western lesbian films, the nation emerges at the centre of the three films, directing attention to the pressures of colonialism, religious fundamentalism, and women's inequality. Imre's analysis showcases how in the representation of non-Western female same-sex desire the illusions of nationalistic heteropatriarchy are shattered. The following analysis explores how from these and other representations a revised form of nationalism can emerge. Recalling the analysis of Bhabha's cultural rights in chapter 3, a key part of challenging Eurocentrism in international law is allowing for the participation of heterogeneous groups in dialogue and solidarity with each other. In this way the opposition between the universal (Western) and particular (non-Western) is erased, challenging the idea underpinning the orientalist binary discussed in section 2 that only the West can 'save' non-Western sexually and gender diverse people from oppression. Thus, by revising nationalistic scripts through the representation of non-Western queer postcolonial approaches, a revised nationalism and internationalism can emerge which transcends existing oppressing boundaries discussed through this and previous chapters.

c) Revising the nation through the experiences of queer postcolonial subjects

As some of the analyses have rendered visible above, the image of the nation is central to contemporary forms of oppression of non-Western sexual and gender diversity. However, so

¹⁸⁵ Imre (n 32).

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

are Western universalist scripts, as they are underpinned by orientalist structures. Therefore, a revised nationalism can constitute an important starting point to challenge both oppressive nationalistic heteropatriarchy and Western universalism. The potential of pluralistic queer futures through a revised nationalism figures in Lindsey Green-Simms' "Just to See': Fanon, National Consciousness, and the Indiscreet Look in Post-Third Cinema."¹⁸⁹ Green-Simms draws on Halberstam and Fanon to trace an oppositional national consciousness in queer postcolonial cinema.¹⁹⁰ As seen in the discussions above' nationalism seems to pose a dilemma for queer postcolonial theorists as it has become embedded in heteropatriarchal narratives. However, Lindsey Green-Simms argues that there is subversive potential to be found in Fanon's theorisation of national consciousness.¹⁹¹ To Fanon, national governments should 'govern by the people and for the people, for the outcasts and by the outcasts, describing a form of national consciousness serving the interest of the people cast aside by the national bourgeoisie'.¹⁹² Drawing on Halberstam's definition of the transgender gaze, Green-Simms identifies the indiscreet look of transgender characters in postcolonial cinema as the space of creation of such transgressive national consciousness.¹⁹³ Halberstam defines the transgender look, clearly distinguished from the psychoanalytic gaze, as 'the gaze capable of seeing through the present to a future elsewhere.' For Halberstam the transgender character is faced with the complicated task of imagining an alternative future while re-narrating his or her gendered past in order to make sense of the re-gendered present.¹⁹⁴ In the context of the postcolonial, the transgender character must actively create a future while disconnecting from certain elements of its colonial pasts.¹⁹⁵ In this way, the indiscreet look also counters the colonial and racist look that dehumanises and hypersexualises black men and women.¹⁹⁶ Because the colonial structures of looking do not offer any way out for the

¹⁸⁹ Lindsey Green-Simms "Just to See': Fanon, National Consciousness, and the Indiscreet Look in Post-Third Cinema' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 203.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid* 205.

¹⁹⁴ *Ibid.*

¹⁹⁵ Green-Simms (n 189).

¹⁹⁶ *Ibid.*

colonised, the indiscreet look allows access to queer postcolonial subjects transcending the limits of the colonial structures of looking.¹⁹⁷

Green-Simms identifies indiscreet forms of looking in the film *Woubi Cheri* (1998) on gay life on the Ivory Coast and *Quartier Mozart* (1992) a Cameroonian gender-bending comedy.¹⁹⁸ *Woubi Cheri* is a documentary that follows the lives of a community of woubis and yossis (gay, bisexual and transgender) men and women in Abidjan. The film consists of interviews with members of the community, explaining their experiences and the underground subculture they are members of. Although the film tackles serious issues such as homophobia, the undertone is that of celebration.¹⁹⁹ The subjects believe that the proliferation of their sexualities will lead to openings up for future non-homophobic national identities.²⁰⁰ *Quartier Mozart* follows a sassy curious teenage girl Queen, who wants to experience life as one of the neighbourhood boys. With help from the local Mama Tekla who often transform herself into various men, boasting about how she has 'known all sorts of women', Queen is transformed into the neighbourhood stud who seduces the police chief's daughter.²⁰¹ The humour of both films does not obscure the fact that they participate in very real political acts, despite the fact that their political projects may at times seem buried under complex layers of meaning, innuendo, and play.²⁰² In both films, the lewdness and frankness of the indiscreet looks denies the authority of the heteronormative, Eurocentric and patriarchal gaze, imagining national spaces and times where power is pluralised and snatched up by so-called outcasts.²⁰³ The representation of proliferation of sexual subjects constitutes one way in which the exclusionary politics of bourgeois nationalism can be transformed into the type of heterogenous nationalism that works in the interests of Fanon's 'outcast.'²⁰⁴ [Queer postcolonial] art can cast indiscreet looks at the exclusionary normativity of bourgeois nationalism, disrupting, disturbing and productively perverting existing nationalism.²⁰⁵ In the context of international human rights, this revised nationalism can serve to diversify the

¹⁹⁷ Green-Simms (n 189).

¹⁹⁸ Ibid 203.

¹⁹⁹ Ibid 204

²⁰⁰ Ibid 204.

²⁰¹ Ibid.

²⁰² Ibid 219.

²⁰³ Ibid 220.

²⁰⁴ Green-Simms (n 189) 206.

²⁰⁵ Ibid 220.

narrative through opposing the orientalist civilised/uncivilised binary that inform much sexual and gender discourse.

4. Bridging the Analysis of Race, Sexuality and Gender and Human Rights Law:

Intersectionality and the Queer Postcolonial Challenge

Outside queer and postcolonial theories, efforts by black and other non-white feminists have led to the formulation of the concept of intersectionality, which is often used in human rights law to approach multiple forms of oppression.²⁰⁶ Intersectionality was first developed by black feminist Kimberlé Crenshaw to explain how black women and women of colour suffer from diverse forms of oppression, not only by anti-racist activists and feminists but also in anti-discrimination law.²⁰⁷ Drawing on decades of black feminists' writing, Crenshaw critiqued the treatment of race and gender as mutually exclusive categories of experience and analysis.²⁰⁸ Instead, Crenshaw proposed understanding oppression of black women as intersectional, to capture their position of subordination beyond the single focus on gender or race.²⁰⁹ Since Crenshaw's first articulation of intersectionality, the term is now used to describe or theorise multiple forms of oppression beyond gender and race in a number of disciplines including human rights law.²¹⁰ As will be discussed in the following chapters, The Independent Expert on Sexual Orientation and Gender Identity (IE) uses intersectionality in the analysis of sexual and gender based oppression to approach other differences, such as race or class.²¹¹ Intersectionality has been considered to give a clearer and more succinct way

²⁰⁶ Pok Yin S. Chow 'Has intersectionality Reached its limits? Intersectionality at the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' [2016] 16.3 Human Rights Law Review 435; Anastasia Vakulenko 'Gender and international human rights law: the intersectionality agenda' in Sarah Joseph and Adam McBeth *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 196, from 201; Nira Yuval-Davis 'Intersectionality and Feminists Politics' [2006] 13.3 European Journal of Women's Studies 193, from 196.

²⁰⁷ Kimberlé Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U. Chi.Legal.F 140.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Chow (n 206); Vakulenko (n 206); Yuval-Davis (n 206); Lorena Sosa 'Intersectionality at the United Nations' in Lorena Sosa *Intersectionality in the Human Rights Legal Framework on Violence Against Women* (Cambridge University Press 2017) 61-102; Julia S. Jordan-Zachery 'Am I a Black Woman or a Woman Who is Black? A Few Thoughts on the Meaning of Intersectionality' [2007] 3(2) Politics and gender 254.

²¹¹ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc A/HRC/35/36 ¶ 9, 5; UNHRC 'Report of the Independent Expert

of articulating the analysis of linking systems of oppression in activism and analysis.²¹² Queer postcolonial approaches are more critical towards the term's ability to capture oppression of non-white and non-Western queers.²¹³ The following sections discuss intersectional analysis while voicing queer postcolonial concerns with the term and proposing more options to advance the analysis of oppression based on sexuality, gender, and race.

Before going into the analysis of queer postcolonial critique of intersectionality, it is worth considering some of the wider issues with intersectional analyses. Because of the growing use of intersectionality, some commentators have argued that there are inconsistencies and ambiguities in the way intersectionality is understood and applied.²¹⁴ Different understandings and conceptualisations have developed over time, and among those who employ intersectionality there is no clear consensus as to whether it can be described as a theoretical framework in its own right.²¹⁵ Elizabeth Evans has described intersectionality as 'at once both straightforward and complex', as it expresses the intuitive concept of how multiple points of identity shape how oppression is experienced while at the same time being complicated to apply in practice.²¹⁶ More worryingly, the term intersectionality is sometimes employed by researchers to discuss multiple 'oppressions', without attempting to engage with the interconnected nature of socially constructed categories.²¹⁷ In these cases the term is employed without any actual analysis of the multiple forms of oppression that is suggested.²¹⁸ Jordan-Zachary, on the other hand, argues that the value of intersectionality does not lie in its potential to become a fully-fledged theory or standardised methodology.²¹⁹ Rather, intersectionality should be understood as a lens for addressing and, if needed, re-

on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43, ¶ 18, 22-24, 5-6.

²¹² Kathy Davis 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful' [2008] 9(1) *Feminist Theory* 67.

²¹³ Aydemir (n 1) 20-24.

²¹⁴ Jordan-Zachary (n 210); Elizabeth Evans *the Politics of Third Wave Feminism: Neoliberalism, Intersectionality, and the State in Britain and the US* (Palgrave Macmillan 2015) 50.

²¹⁵ Lorena Garcia 'Intersectionality' [2016] 3(1) *Kalfou* 102.

²¹⁶ Evans (n 214) 72.

²¹⁷ Nina Lykke *Intersectional Analysis: Black Box or Useful Critical Feminist Thinking Technology* in Helma Lutz, Maria Teresa Herrera Vivar, Linda Supik (eds) *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Ashgate 2011) 207-221.

²¹⁸ Lykke (n 217).

²¹⁹ Jordan-Zachary (n 210).

orienting the way that problems of inequality are framed.²²⁰ If intersectionality is understood as a way of re-framing the analysis of oppression without being attached to any specific methodology or framework, queer postcolonial approaches are potentially a form of intersectionality in their own right. Nonetheless, some of the underpinning presumptions in intersectional analysis as proposed by Crenshaw seem limiting from a queer postcolonial perspective.

Crenshaw first outlined intersectional analysis in the 1989 article 'Demarginalizing the Intersections of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracists Politics'.²²¹ In this article Crenshaw discusses different ways in which single issue politics marginalise black women within feminist and anti-racist activism as well as in law and policy. Her main argument is that black female experience cannot be captured by analysing their experiences as women or black, as these identity categories privilege the most privileged within the group. Thus, feminism only benefits white women, and anti-racist work black men, as they fail to understand the intersection between race and gender and therefore black female experiences of oppression. Similarly, anti-discrimination doctrine is predicated upon the identification of a specific category from which any experiential variation within the group is excluded. To use one of Crenshaw's examples, in *DeGraffenreid v General Motors*, five black women employees brought a lawsuit alleging employee discrimination of black women in the seniority system. The Court rejected the women's claim that as black women they constituted a category on their own and did not find evidence of discrimination as it could not be proven on sex or race specific grounds. Crenshaw offers numerous other examples throughout the text that illustrate how the experiences of black women are left unaccounted for in activist responses to instances of race and gender discrimination.

To counter the exclusion and marginalisation of black women, Crenshaw proposes intersectional analysis as a bottom-up approach to theorising about their specific experiences.²²² Instead of attempting to fit black women into the category of 'woman' or

²²⁰ Jordan-Zachery (n 210).

²²¹ Crenshaw (n 207).

²²² Ibid.

'black' as the Courts do in anti-discrimination cases, Crenshaw begins her analysis from the specific subject position 'black woman'. The difference that Crenshaw's shift in focus makes to analytical outcomes becomes evident in her critique of two different policy reports, Moynihan's *The Negro Family: The Case for National Action*, and Moyers' televised report *The Vanishing Black Family*, along with Julius Wilson's book *The Truly Disadvantaged*.²²³ These works all address the problem of race and poverty in America and focus on the black family, albeit from different levels of prejudice.²²⁴ Crenshaw's analysis highlights how black women are subjected to different bias and policy interventions than black men.²²⁵ The focus in these reports is that due to a lack of morals and/or for economic reasons, black men leave their families and do not fulfil the role of head of household as they should.²²⁶ Because the focus is on black men, the policy reforms proposes solutions that fit their needs, such as providing more jobs for black men.²²⁷ Black women on the other hand are placed in some kind of nexus where they are pathologised, marginalised and excluded. They are pathologised by being considered unable to comply with the standards of white motherhood.²²⁸ They are marginalised as they are not considered fit to be heads of households, and excluded from the recommendations of economic and social reorganisation because they are single black mothers.²²⁹ By carrying out an intersectional analysis Crenshaw is able to comment on the specific socio-economic experience of black women and the lack of support they receive in social policy. The goal of this exercise for Crenshaw is to include marginalised groups in the analysis of discrimination, oppression, and exclusion, so they are not left behind and re-marginalised.²³⁰

Having briefly outline Crenshaw's intersectional approach, the first concern from a queer postcolonial perspective is the grounding of the analysis in identity categories. Crenshaw's intersectional analysis is very much rooted in the identification of black women as a separate group from which analysis of oppression should start.²³¹ She does not exclude the possibility

²²³ Crenshaw (n 207).

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

of other socially constructed categories being included in the analysis, such as sexuality or class, but the overall focus is still categorical rather than deconstructive.²³² As discussed in chapters 2 and 3, both queer and postcolonial theories are concerned with the deconstruction of identity categories. Some queer postcolonial critics have argued that intersectional analysis reaffirms rather than challenges social categorisations.²³³ Others have asserted that Crenshaw carries out a limited amount of deconstruction by challenging the homogenising of the category 'woman' in feminist theorising and activism.²³⁴ However, deconstruction is not the goal of intersectional analysis, as Crenshaw's states in her 1991 article 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour.'²³⁵ Crenshaw explains that identity categories of social significance can be a 'source of social empowerment and reconstruction.'²³⁶ She concludes that 'emptying' these of meaning through deconstruction is not the ultimate solution to liberation.²³⁷ For Crenshaw, the main problem is not the categories themselves but the elision of intra-group differences in the analysis of material inequality.²³⁸ Davis on the other hand argues that challenging the fixity of social categories, while at the same time rendering visible the material consequences of these, can form part of intersectional analysis.²³⁹ Some queer and postcolonial theorists have suggested a similar approach, that is, referring to social categories in a strategic way while at the same time referring to their illusory nature.²⁴⁰ From a queer postcolonial perspective, one of the main concerns with existing critical approaches is that the focus on identity (deconstruction or otherwise) often overshadows in-depth analysis of structures of oppression such as imperialism or heteronormativity.

²³² Crenshaw (n 207).

²³³ Aydemir (n 1) 20-22.

²³⁴ Avatar Brah and Ann Phoenix 'Ain't I a Woman? Revising Intersectionality [2004] 5(3) *Journal of International Women's Studies* 75.

²³⁵ Kimberlé Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour' [1991] 43.6 *Stanford Law Review* 1242.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ Davis (n 212) 74.

²⁴⁰ Partha Chatterjee 'Reflections on 'Can the Subaltern Speak: subaltern studies after Spivak' in Rosalind C. Morris eds. *Can the Subaltern Speak: Reflections on the History of an Idea* (Columbia University Press 2010) 81, 84.

A key reason for queer postcolonial concern with the overt focus on identity in analysis of oppression is the favouring of Western paradigms in their definition. Here the critique might be similar to Crenshaw's contention that identity categories privilege the most privileged and erase intra-groups differences. Just as white feminism cannot account for the experience of black women, contemporary LGBT+ activism cannot account for non-Western experiences of sexuality and gender diversity. However, in queer postcolonial analysis those intra group differences are not so big *per se* but rather the reflection of a system of oppression that universalises Western imperial structures to the detriment of everybody else. Thus, the solution is not to identify more sub-groups within an already established oppressive discourse, but rather to challenge those structures that continue to oppress sexual and gender diversity. The latter is not incompatible with non-Western individuals or groups' choice to re-define and use Western sexual identities such as lesbian, in other words 'strategic' use of identities. Rather it erases the requirement of being identified or identifying with a specific sexual identity as being considered relevant to the analysis of oppression. The mere identification of sub-groups within contemporary LGBT+ activism does not automatically dispute structures such as imperialism and Eurocentrism.

By focusing on structures of oppression rather than identities, queer postcolonial approaches can account for the productive nature of modern power regimes. Recalling previous discussions within this thesis, the productive nature of modern power regimes refers to the way discourse produce rather than merely reflect the realities they describe. The psychiatric knowledge critiqued by queer theorists did not merely describe same-sex desires but fixed these in the individual, producing a hierarchal system of good and bad sexualities. Orientalism did not accurately account for the non-Western world. Rather it created the non-West as a discursive image used by imperial powers to justify colonial exploitation. These are just some examples that are left unaccounted for if the focus of intersectionality becomes restricted by a focus on identity categories alone rather than the production of these and their realities. Notably, such discourses are internalised by subjects, rendering them complicit in their own and other's oppression. Crenshaw does to a certain extent touch upon the power of discourse in some of her analysis. In her critique of the legal antidiscrimination doctrine, Crenshaw explains that there is a structural assumption that the pre-legal situation is fair and neutral. That means that antidiscrimination law will only regulate the limited extent to which race and

sex [or any other socially constructed difference] interfere with determining outcomes such as employment promotions rather than changing any substantial and material differences on the ground. As there is an implicit privileging of whiteness and maleness in law, race and sex only become significant where there are explicit disadvantages to victims. Thus, there is no room in anti-discrimination doctrine to grasp real life inequality of black women because their lived experiences of oppression transcend these legal limits. Here's analysis is complementary to queer postcolonial analysis. In effect, Crenshaw's critique points to some of the same oppressive structures as queer postcolonial theories. Firstly, she sees the legal system as potentially oppressive. As we have seen throughout chapters 2 and 3, law often plays an important role in determining the content of identity categories, as well as situating these in a hierarchal relationship to each other. Crenshaw also points to how law does not decide fairly but rather produces the content of fair legal decisions based on white male privilege to the detriment of others, in this case black women. Since Crenshaw refers to substantial differences on the ground, her analysis is not exclusive to the consideration of epistemological and knowledge-based violence and difference. Unfortunately, Crenshaw does not take this analysis further in the texts. The rest of the analysis is focused on the privileging of white women and black men in activism, with no discussion of how that came to be and why.

Lastly Crenshaw's analysis seems restrictive from a queer postcolonial perspective because the underpinning goal of intersectionality seems to be inclusion, rather than change. As mentioned above, Crenshaw sees intersectionality to include marginalised groups within existing activism and critique to prevent only the most privileged from different groups to benefit from non-discrimination doctrine and social policies. In contrast to queer postcolonial approaches, Crenshaw's analysis seems to imply that institutions can be changed from below rather than challenging the existence of these institutions *per se*. Queer postcolonial approaches suggest that Western epistemology, knowledge, and the institutions emanating from them are unable to provide any freedom from oppression for non-Western peoples, as they are rooted in oppressive colonial structures. Therefore, and as discussed throughout this chapter, the solution is not inclusion but fighting for a recognition of difference and value of non-Western experiences. Only by acknowledging and representing non-Western experiences, including non-Western epistemology and knowledges, it is possible to transcend

the oppressive nature of patriarchy, heteronormativity, racism, and imperialism as they form the core of Western knowledge and institutions.

A clear example of how queer postcolonial approaches bring another dimension to intersectionality in the critique of law is Ratna Kapur's article 'In Aftermath of Critique We are Not in Epistemic Free Fall: Human Rights, the Subaltern Subject, and Non-liberal Search for Freedom and Happiness'. Kapur uses both queer affect theory and postcolonial insights to question the ability of human rights to achieve its own promise of happiness and freedom.²⁴¹ Critically examining the underpinning happiness script of liberal human rights law, Kapur concludes that it is based on a capitalist marked economy of consumption as well as a particularly Western, patriarchal, straight, and middle-class viewpoint.²⁴² In common with Crenshaw, she critiques the law, but Kapur's solution to the limits of legal doctrine is very different. Kapur does not propose to re-analyse human rights law from a particular marginalised group's stance. Rather, she proposes the non-Western philosophical tradition of Advaita as an alternative happiness script to deal with the shortcomings of liberal discourse.²⁴³ Advaita, or non-dualism, challenges many of the underpinning structures upholding liberal thought that privileges middle-class white men.²⁴⁴ Advaita disputes the dualisms found in Western discourse as the subject itself is considered as a whole rather than composed of labelled categories such as mind, intellect, emotions and others such as marital status, race, gender and so on. In Advaita the self is articulated as consciousness or awareness but there is no pre-defined or pre-existing subject before the consciousness.²⁴⁵ The focus is on perception and discernment rather than action as a route to freedom and happiness.²⁴⁶ Freedom lies in de-linking one's self from labels and divisions and dualism, and focusing on reflection not rationality. This act of delinking and freeing individuals from boxes provides Kapur with a completely different starting point from which to view the world and its injustices.²⁴⁷ While more philosophical in her focus than the queer postcolonial critiques

²⁴¹Ratna Kapur 'In the Aftermath of Critique We Are Not in Epistemic Free Fall: Human Rights, the Subaltern Subject and Non-Liberal Search for Freedom and Happiness' [2014] 25 Law and Critique 25..

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Kapur (n 241).

discussed above, Kapur challenges human rights law from both queer and postcolonial perspectives and articulates an alternative by representing a specific non-Western understanding of subjectivity which by its very nature extends to queer un-doing of sexual and gender labels. Consequently, while the content of Crenshaw's and Kapur's critiques of law are not miles apart from each other, both targeting white patriarchy, only Kapur's solution transcends the boundaries of Western discourse and therefore imperialist oppression.

This section started with the suggestion that intersectionality might not be adequate for the analysis of oppression of non-white and non-Western queers. As the following discussion has highlighted from a queer postcolonial approach, there are some boundaries to intersectional analysis as proposed by Crenshaw. A key limit is of the focus on material differences that emanate from socially constructed identity categories rather than on the structures that created these in the first place, and which upholds them. While Crenshaw critically engages with some of these structures, her analysis falls short from a queer postcolonial perspective. Notably, Crenshaw's original analysis was limited to highlighting the multiple ways black women are marginalised and excluded in the US legal system, social policies, and in local feminist and anti-racist activism. While Crenshaw's analysis is both geographically and objectively limited, she does not exclude intersectionality from being transported elsewhere. If anything, running through her discussions is a challenge to the re-marginalising of already marginalised groups. In the global episteme and in their own local contexts, non-Western sexually and gender diverse groups are already significantly marginalised and in constant risk of re-marginalisation under contemporary sexual politics. Therefore, intersectionality can be understood as a tool not fixed to a particular subject but as dependent on identifying the most excluded and marginalised in specific geopolitical and social contexts. As seen in the discussions above, in the global episteme non-Western sexually and gender diverse peoples are the most excluded and marginalised. Consequently, in the global context in which the IE operates, intersectional analysis should be focused on non-Western sexually and gender diverse peoples. Only by doing so will intersectionality be able to address the complex structures of oppression of non-Western sexual and gender diversity at the intersection of sexuality, gender, and race.

Conclusion

In this chapter I have explored insights from queer postcolonial approaches that bridge some of the analytical gaps in queer and postcolonial theories when it comes to non-Western sexual and gender diversity. Queer postcolonial approaches highlight how these oppressive structures subject non-Western sexual and gender diversity in specific ways. These include; orientalism in contemporary sexual discourse, which assimilates non-Western sexual and gender diversity to forward imperial agendas; patriarchal heteronormative nationalism, which renders the existence of non-Western sexual and gender diversity impossible; heteronormativity, as it subjects the West's racialised others to socio-economic exploitation and exclusion; and the universalisation of Western knowledge, as it renders impossible non-Western knowledge, conceptualisations, understandings and experiences that transcend Western paradigms. Further, this chapter engaged with a queer postcolonial challenge to these oppressive structures through the representation of non-Western sexual and gender diversity. Because the experiences of non-Western sexually and gender diverse individuals and groups exist outside discourse while at the same time are subjected to dominant structures, their representation fundamentally challenges both erasure and oppression. The last part of this chapter examined intersectionality as a tool used in human rights law to diversify the analysis of oppression.

The queer postcolonial insights discussed in this chapter are central to the analysis in the forthcoming chapters. Queer postcolonial approaches identify specific national and global forms of oppression of sexual and gender diversity that should be accounted for in human right analysis for it to be truly 'universal'. Chapter 5 examines the institutional framework of the IE as the only UN human rights body mandated to examine human rights violations of sexually and gender diverse individuals and groups. In this chapter queer postcolonial insights will be applied to measure the potential of the IE to incorporate queer postcolonial perspectives and protect non-Western sexual and gender diversity. In contrast to other human rights institutions, the IEs enjoys a certain freedom and flexibility in the interpretation of the mandate to consider queer postcolonial concerns. Further, as the IE can visit and interact with local populations as part of fulfilment of the mandate, the Expert could

potentially engage with the type of representation required by queer postcolonial approaches. chapters 6 and 7 will use queer postcolonial approaches to critically examine the IE's analysis of oppression and representation of non-Western sexual and gender diversity. As discussed in chapters 2 and 3, human rights discourse has often been exclusionary towards the concerns of sexual and racial others. chapters 6 and 7 both examine this exclusionary impulse, drawing on queer postcolonial insights from the current chapter. The discussion of intersectionality from this chapter will be returned to in chapters 6 and 7 as the IE uses intersectionality in his analysis of oppression of sexual and gender diversity. By applying insights from queer postcolonial approaches, the following chapters examine if and how human rights discourse analyses the oppression of non-Western sexually and gender diverse people, and whether it is becoming complicit in their further erasure and marginalisation.

Chapter 5. Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity

Introduction

This chapter examines the mandate of the Independent Expert (IE) on protection against violence and discrimination based on sexual orientation and gender identity, setting the background to the reports analysed in forthcoming chapters 6 and 7. As a special procedure of the UN Human Rights Council, the IE comes with its unique sets of possibilities and challenges for achieving queer postcolonial rights interpretations. Former UN Secretary Kofi Annan described the special procedures as the ‘jewel in the crown’ of the institution’s framework of protection of human rights.¹ Notwithstanding the former secretary general’s celebration of the special procedures, they have historically been operating without attracting much academic notice.² The ambiguous institutional placement, the negotiated and fragmented creation of special procedures, as well as the number of mechanisms operating with a large margin of autonomy, are all factors impacting the lack of systematic studies on the topic.³ Yet many of the fundamental characteristics of the special procedures defining the operation of the IE as a protection mechanism are the result of these different factors. Therefore, Section 1 on the background and development of special procedures, examines the development of the special procedures from the first mechanism established in 1967 by the former UN Commission on Human Rights. The section begins with a brief historical outline of the practice of the Commission on Human Rights in establishing special procedures, highlighting the impact it has had on the system today. A key characteristic of this system is the political nature of the adoption of the mandates, which is further examined in section 2 in relation to the adoption of the mandate of the Independent Expert.

¹ Aoife Nolan, Rosa Freedman and Therese Murphy ‘Introduction’ in Aoife Nolan, Rosa Freedman and Therese Murphy (eds) *The United Nations Special Procedures System* (Brill 2017) 1.

² Ibid 1-2; Elvira Dominguez-Redondo *in Defence of Politicization of Human Rights: The UN Special Procedures* (OUP 2020) 3; Ingrid Nifosi ‘The UN Special Procedures in the field of human rights. Institutional history, practice and conceptual framework [2017] 2 *Deusto Journal of Human Rights* 131; Christophe Golay, Claire Mahon and Ioana Cismas ‘The Impact of the UN special procedures on the development and implementation of economic, social and cultural rights’ [2011] 15.2 *The International Journal of Human Rights*, 299, 300.

³ Elvira Dominguez-Redondo *In Defence of Politicization of Human Rights: The UN Special Procedures* (OUP 2020) 3-4.

Section 2 examines some of the political and practical challenges facing the Independent Expert in the implementation of the mandate. To begin, the section explores the process of negotiation leading to the adoption of the mandate of the IE. This section considers both the activism by states and NGOs for the mandate, based on the urgency of the need to address violence and discrimination against sexually and gender diverse people. The discussion also explores the opposition by certain states, rooted primarily in the claim that such diversity does not exist within their respective cultures and religions. Following analysis of the process of negotiation, section 2.2 explores some of the main arguments against the adoption of the IE, considering their impact on the protection of non-Western sexual and gender diversity. In this section I also discuss some changes emerging from the process of renewal of the mandate of the IE in 2019. The last part of section 2 outlines the widespread and systematic nature of the violence committed against sexually and gender diverse people. This section examines criminalisation of same-sex acts and gender diversity, and violence and discrimination including the high murder rates of trans people, abuse by law enforcement, discrimination in schools, employment, housing, and in the medical and health care sectors. The discussion further touches upon the curtailment of political rights of sexually and gender diverse people and the exacerbation of existing inequalities during the COVID pandemic. The analysis concludes with a reflection on challenges addressing the widespread and systematic violence and discrimination in the face of limited resources allocated to the IE, and the importance of using intersectional analysis when considering inequalities faced by sexually and gender diverse people.

Having examined both the importance of the IE and some of the political and resource related challenges faced, section 3 examines the mandate to date. In line with the general approach to special procedures, the mandate is open ended in its direction. Specifically, it established that the mandate holder is responsible for assessment, protection, promotion, and cooperation regarding violence and discrimination against sexually and gender diverse peoples. Both mandate holders to date, Muntarbhorn and Madrigal-Borloz, are academics who have prior experience with the human rights of sexually and gender diverse peoples.⁴

⁴ Biography from the UN Office of the High Commissioner on Human Rights available at: <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/VititMuntarbhorn.aspx> access 8th of

Both have also held positions in other special procedures/UN human rights mechanisms prior to being mandate holders.⁵ The last part of Section 3 examines the main approaches and achievements of the mandate holders. This portion of the chapter highlights the work of Muntarbhorn in setting the direction of the mandate that has been followed and expanded upon by Madrigal-Borloz. The section further examines some of the main work completed to date by the mandate holders. Through this I underscore how this work has given greater depth to the international understanding of violence and discrimination committed against sexually and gender diverse people.

1. The Special Procedures System Today: Background and Development

The position of the special procedures within the UN human rights system has significantly changed since the first mechanism was created in 1967, laying the foundations of the system today.⁶ Since then, the special procedures have increased both in focus and in faculties. Originally there were only a small number of procedures, focused on a few cases of mass human rights violations, while today there are 58 special procedures in existence between thematic and country mandates.⁷ Furthermore, the significance placed on the procedures as a human rights protection mechanism has substantially changed from being a minor and marginal part of the UN frameworks, receiving little attention from academics and civil society,⁸ to today they play a crucial role in the Human Rights Council and General Assembly sessions. They are also the subjects of states', academics', and civil society's expectations.⁹ Moreover, the special procedures have evolved from providing targeted reports on very specific human rights issues to being a main source of information and reporting on a plethora

August 2021; Biography from the UN Office of the High Commissioner on Human Rights available at: <<https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/VictorMadrigalBorloz.aspx>> accessed 8th of August 2021.

⁵ Ibid.

⁶ Aoife Nolan, Rosa Freedman and Therese Murphy (n 1) 1.

⁷ At the time of submission there are 45 thematic mandates and 13 country mandates. This number is subject to change depending on the Council terminating or renewing existing mandates and adopting new ones. An overview over existing mandates is available on the webpages of the UN Office of the High Commissioner on Human Rights: <<https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>> accessed 11 March 2022.

⁸ Aoife Nolan, Rosa Freedman and Therese Murphy (n 1) 1.

⁹ Ibid.

of human rights treaties around the globe.¹⁰ Within this system the IE plays an important role as the first specialised UN human rights mechanism on the topic of sexuality and gender diversity. To better understand the operation of the IE, the following analysis outlines the specificity of the background and institutional framework of the special procedures today.

1.1 Background

The special procedures have their origin in the first ad hoc monitoring bodies established by the former Commission on Human Rights to investigate specific situations of human rights violations.¹¹ The Commission was established by the UN Economic and Social Council (ECOSOC) pursuant to article 68 of the UN Charter authorising ECOSOC to set up ‘commissions ...for the promotion of human rights’ in 1946.¹² Tasked primarily with the drafting of human rights instruments, it was unimaginable that the states represented in the Commission would go on to establish a new category of human rights monitoring bodies.¹³ During the first 20 years of its existence the Commission considered itself primarily a standard-setting body rather than a mechanism for responding to human rights violations.¹⁴ There was also the reluctance by the mostly Western states represented in the Commission to be held accountable for human rights violations in their own territory, in particular for their racist and colonial politics. Several political developments prompted a change in attitudes from considering the Commission’s competences to addressing human rights violations. In 1955 the admission of Eastern European states to the UN began to change the balance of power in the political organs of the organisation.¹⁵ The decolonisation process further reinforced this development as newly-independent states, mainly from Asia and Africa, joined the UN.¹⁶ This changed the membership of the Commission, which was enlarged from 18 to 21 members in 1962 and from 21 to 32 members in 1967.¹⁷ This inevitably changed the political proprieties of the body, with the recently decolonised states determined to create mechanisms that

¹⁰ Aoife Nolan, Rosa Freedman and Therese Murphy (n 1) 1.

¹¹ Aoife Nolan, Rosa Freedman and Therese Murphy (n 1) 1.

¹² United Nations ‘Charter of the United Nations’ 24 October 1945 1 UNTS XVI article 68. available at: <<https://www.un.org/en/charter-united-nations/>> Accessed 18 August 2019.

¹³ Dominguez-Redondo (n 2) 8.

¹⁴ Jeroen Gutter, ‘Special Procedures and Human Rights Council: Achievements and Challenges Ahead’ [2007] 7 Hum. Rts. L. Rev. 93 – 65.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

would address racial discrimination, colonial practices, and the policy of apartheid in South Africa.¹⁸

Prompted by these political changes, the state members of the Commission began responding to 'gross and systematic violations of human rights', relying on the competence afforded by 1967 ECOSOC Resolution 1235 (XLII).¹⁹ The Resolution authorised the Commission to 'examine information relevant to gross violations of human rights and fundamental freedoms' and in 'appropriate cases... to make a thorough study of the situation which reveals a consistent pattern of violations of human rights.'²⁰ It was from this resolution that the Commission deduced implicit authorisation to appoint international experts to examine human rights violations.²¹ However, it was not until 1975 that, the Commission's decision to create a working group on the situation in Chile, the first special procedure emerged. Previously the Commission had established a Working Group of Experts on South Africa that was later transformed into a Special Working Group on the Israeli occupied territories.²² This working group however was presented as unique, justified on the basis of colonial racist practices or instances of illegal occupation.²³ The policy of the apartheid regime and the situation in the occupied Arab territories were considered a concern not only for individuals subjected to human rights abuse but for other states as well.²⁴ The working group on Chile marked a shift in direction, as it was justified primarily based on the concern for the human rights abuse perpetrated by the dictatorial regime and not for the potential spill over effect it had on other states.²⁵ In 1978 the General Assembly endorsed the actions of the Commission establishing the working group on Chile, calling upon them to use it as a basis for further actions when dealing with consistent patterns of gross violations of human rights.²⁶ The

¹⁸ Gutter (n 14).

¹⁹ Ibid.

²⁰ Paras 1-3 ECOSOC Res. 1235 (XLII), 6th of June 1967.

²¹ Nifosi (n 2).

²² Commission Resolution 2(XXIII) 6th of March 1967, E/EC.4/RES/2 (XXIII) and Commission Res. 6 (XXV) 4th of March 1969, E/CN.4/RES/6(XXV).

²³ Gutter (n 14).

²⁴ Dominguez-Redondo (n 2) 23-27.

²⁵ Ibid; Nifosi (n 2).

²⁶ UNGA Res 33/176 (10 of December 1978) UN Doc A/RES/33/176, Elvira Dominguez-Redondo 'The History of the Special Procedures: A 'Learning-by-Doing' Approach to Human Rights Implementation' in Aoife Nolan, Rosa Freedman and Therese Murphy (eds) *The United Nations Special Procedures System* (Brill 2017), 28.

creation of the 1975 Working Group was of considerable significance for the special procedures to come.²⁷

The years 1978-1991 marked a significant phase in the Commission's practice of responding to human rights violations by establishing new special procedures.²⁸ The Commission established numerous country specific procedures which, like the Working Group on Chile, examined human rights violations occurring in specific countries. A further milestone in the development of the system was reached when the Commission appointed its first thematic procedure in 1980. In contrast to country specific procedures that examine human rights violations within the boundaries of a state, thematic procedures examine serious human rights violations occurring on a world-wide scale.²⁹ The 1980 Working Group of Enforced Disappearances was the result of a political battle occurring within the Commission and the UN between Argentina and other member states.³⁰ Argentina was well known for disappearances owing to the work of local activists, NGOs such as Amnesty International, and some states such as the United Kingdom and Canada raising the issue internationally and at the UN.³¹ Fearing being subjected to a country specific Special Procedure, the Argentinian Government launched a diplomatic offensive to avoid the condemnation and institutionalisation of the case of Argentina at the UN.³² The final solution became the establishment of a working group that was thematic on enforced disappearances rather than a country specific mandate for Argentina.³³

The establishment of the first country specific and thematic mandates and those that followed have had significant impact on the special procedures system, developing working methods and setting standards for implementation of mandates.³⁴ Lack of an institutional framework saw the first mandate holders enjoy great autonomy in the performance of their

²⁷ Dominguez-Redondo (n 2) 24-25.

²⁸ Nifosi (n 2) 131-178.

²⁹ Ibid.

³⁰ Dominguez-Redondo (n 26) 31.

³¹ Patrick James Flood *The Effectiveness of UN Human Rights Institutions* (Prager 1999) 51; Dominguez-Redondo (n 2) 28-29.

³² Jeroen Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community* (Intersentia 2006) 83.

³³ Dominguez-Redondo (n 26) 31.

³⁴ Nifosi (n 2).

role.³⁵ The first appointed had little in terms of precedents to use as guidelines, and the evolution of thematic mandates occurred in a short period (between 1980 and 1987 four thematic mandates and 6 country mandates) without any approval of official rules to guide their work.³⁶ Some of the first special procedures were more influential in establishing working methods than others. The Working Group on Enforced or Involuntary Disappearances, together with the Special Rapporteur on torture, have been instrumental in this regard by initiating the practice of receiving individual communications and urgent appeals.³⁷ This use of individual communications by the special procedures is significant, as the Commission was only authorised to deal with human rights violations that clearly referred to patterns of gross and systematic violations. However, the Commission did include references in thematic mandates allowing the special procedures to ‘respond effectively’ to information coming before them.³⁸ This was interpreted as competence to deal with individual communications.³⁹ The Working Group on Enforced or Involuntary Disappearances had also been significant as it set the patterns for country visits by thematic procedures.⁴⁰ The Working Group carried out several visits to Mexico and Cyprus in 1982.⁴¹ Significantly, the Commission encouraged the Working Group’s country visits⁴² and later, in 1987, cited the Secretariat’s need to ‘assist the Working Group carrying out missions or holding sessions in countries prepared to receive them’.⁴³ The country visits have gradually increased from their inception until today, both in numbers and in terms of the length of the visits.⁴⁴ Uncertainty as to the working methods as well as the heterogeneity of practices of the special procedures continued until the 1990s, when the mandate holders started to publish their working methods.⁴⁵

³⁵ Dominguez-Redondo (n 2) 8.

³⁶ Dominguez-Redondo (n 26) 36.

³⁷ Ibid 40.

³⁸ Ibid 44.

³⁹ Ibid 44

⁴⁰ Felice D. Gaer ‘Picking and Choosing? Country Visits by Thematic Special Procedures’ in Aoife Nolan, Rosa Freedman and Therese Murphy (eds) *The United Nations Special Procedures System* (Brill 2017) 91.

⁴¹ Ibid.

⁴² UNCHR Res 1984/23 (6 March 1984) UN Doc E/CN.4/RES/1984/23, para 7.

⁴³ Gaer (40); UNCHR Res 1987/27 (10 March 1978) UN Doc E/CN.4/RES/1987/27 para 10.

⁴⁴ Ibid.

⁴⁵ Dominguez-Redondo (n 26) 44.

The mandate holders themselves have further been important in the increased institutionalisation of the special procedures system. From the early 1990s the mandate holders began to hold annual meetings.⁴⁶ These meetings have been important for the mandate holders to address common concerns, such as the question of their immunities and privileges, coordination of best practices, and the initiation of joint practices.⁴⁷ The increased institutionalisation of the procedures continued in 1997 with the consolidation of the administrative support of the human rights activities into a single Office of the United Nations High Commissioner for Human Rights.⁴⁸ The latter have decisively impacted the functioning of the special procedures, in terms of information sharing, greater transparency, and availability of knowledge of the activities of the Special Procedures.⁴⁹ In 2006, the Human Rights Council substituted the Commission on human rights, inheriting the special procedures system.⁵⁰ The Human Rights Council initiated a review process in 2007, discontinued and amended some mandates, created new ones, developed a new process for selection of mandate-holders, and produced a Code of Conduct for Special Procedures Mandate-holders.⁵¹ Since then the Human Rights Council has steadily adopted new country and thematic procedures.⁵² Despite the increased institutionalisation and coordination of the special procedures, the system still operates without any centralised rules.⁵³ The unique features of the first mandates, including the politicised nature of the adoption of the mandates and the relative autonomy enjoyed by individual mandate holders, continue to underpin the special procedures today. As will be explored further in this chapter, these two characteristics play an important role in the opportunities and limitations of the mandate of the IE under analysis in this thesis to address queer postcolonial human rights concerns.

⁴⁶ Gutter (14) 93 – 65.

⁴⁷ Gutter (14) 93 – 65.

⁴⁸ Dominguez-Redondo (n 26) 47.

⁴⁹ Ibid 46-47.

⁵⁰ Elvira Dominguez Redondo 'Rethinking the legal foundations of control in international human rights law- the case of special procedures' [2011] 29/3 Netherlands Quarterly of Human Rights 261.

⁵¹ Jane Connor 'Special Procedures: Independence and Impartiality' in Aoife Nolan et.al eds. *The United Nations Special Procedures System* (Brill 2017) 54.

⁵² An overview of the mandates is available on the webpage of the UN High Commissioner for Human Rights available at: <<https://www.ohchr.org/EN/pages/home.aspx>> last accessed 10th of August 2021

⁵³ Dominguez-Redondo (n 26) 50.

1.2 Special Procedures Today

The largely accidental and ad hoc development of the special procedures has resulted in a system that is unique in the international human rights machinery.⁵⁴ This uniqueness can be summed up in three main elements of the system; to begin with, the lack of standardised rules and the vague nature of the mandates allows the IEs to be creative when determining the scope and content of the mandate.⁵⁵ Furthermore, the mandate holders are neither employed by the UN nor by states, so while they count on the support of the Secretariat, they are relatively independent from all institutions.⁵⁶ Moreover, in contrast to other significant human rights bodies such as the treaty bodies, the special procedures perform country visits.⁵⁷ These give each mandate holder the opportunity to investigate the human rights situation on the ground to a much greater extent than other human rights bodies.⁵⁸ It also gives the special procedures a rare opportunity to bridge universal human rights norms with the local and concretised norms in specific contexts.⁵⁹ Recalling the analysis in chapter 4, queer postcolonial approaches require analysis to be shifted the universal to the local. In the performance of country visits, the IEs could be better placed to contribute to such a shift in the interpretation of human rights norms.

a) Creation of the Mandates and Appointment of Independent Experts

As mentioned above, today the Human Rights Council is responsible for the creation and renewal of each special procedure. The Council is composed by 47 state representatives and is responsible for the promotion and protection of human rights all around the globe.⁶⁰ In contrast with the former Commission, the Council is a subsidiary body of the General Assembly rather than of the ECOSOC, underscoring the more central role of the body within

⁵⁴Dominguez-Redondo (n 26) 50.

⁵⁵ Joanna Naples-Mitchell 'Perspectives of UN special rapporteurs on their role: inherent tensions and unique contributions to human rights [2011] 15.2 *The International Journal of Human Rights* 232.

⁵⁶ Connor (n 51).

⁵⁷ Gaer (n 40) 88.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ UNGA 'Resolution adopted by the General Assembly on 15 March 2006. Human Rights Council' [2006] UN.Doc. A/RES/60/251.

the UN machinery.⁶¹ The establishment of a special procedure occurs through a process of negotiation in the Council after a member state, or group of states, call upon the Council to adopt a resolution to address a country specific or thematic human rights issue.⁶² As a body composed of state representatives the creation of specific mandates is shaped, as was discussed above with regard to the Commission, by political considerations.⁶³ Elements of national sovereignty, states' own human rights issues, as well as a variety of interests and agendas such as domestic foreign policies, economics, or religion influence the adoption process.⁶⁴ The mandates are reviewed and renewed according to the terms of the mandate itself.⁶⁵ However, the general practice is a one-year review and renewal period for country mandates and a three-year one for thematic mandates.⁶⁶ The process of renewal of mandates is usually less contentious than that of their creation.⁶⁷

Having adopted a resolution establishing a mandate, the Council appoints a mandate holder. The mandate holders are generally entitled Special Rapporteurs, IEs, or members of Working Groups.⁶⁸ The mandate holders are appointed through a process that begins with an online written application in response to a call for candidature.⁶⁹ Shortlisted candidates are interviewed by a Consultative Group of ambassadors from the five regional groups which make recommendations to the President of the Council.⁷⁰ The appointment is finalised when the Human Rights Council accepts the candidate put forward by the President.⁷¹ Mandate holders are selected by the Council based on the following criteria; expertise [in human rights]; experience in the field of the mandate; independence; impartiality; personal integrity

⁶¹ Nazil Ghanea 'From the UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Step Sideways?' [2006] 55.3 *The International and Comparative Law Quarterly* 695.

⁶² Rosa Freedman, Jacob Mchangama 'Expanding or Diluting Human Rights? The Proliferation of United Nations Special Procedures Mandates' [2016] 38.1 *Human Rights Quarterly* 164.

⁶³ *Ibid.*

⁶⁴ Paul Gordon Lauren 'To Preserve and Build on its Achievements and to Redress its Shortcomings': The Journey from the Commission on Human Rights to the Human Rights Council' [2007] 29.2 *Human Rights Quarterly* 307.

⁶⁵ Freedman and Mchangama (n 62).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Connor (n 51).

⁶⁹ UNHRC 'Resolution adopted by the Human Rights Council. Review of the work and functioning of the Human Rights Council' [2011] UN. Doc. A/HRC/RES/16/21, Annex ¶II.A 22, p.5.

⁷⁰ *Ibid.*

⁷¹ UNHRC 'Resolution adopted by the Human Rights Council. Institution-building of the United Nations Human Rights Council' [2007] UN.Doc. A/HRC/RES/5/1, Annex ¶ II. A 52-53.

and objectivity.⁷² The candidates should not hold decision making positions in Government or in any other organization or entity that might rise to a conflict of interest with the responsibilities inherent to the mandate.⁷³ The mandate holders are not only independent from States but also from the United Nations and the Human Rights Council.⁷⁴ The IEs are not UN officials or staff members, nor do they receive any salary or honorarium from the organisation.⁷⁵ Further, they do not operate from any UN headquarters but from their own countries.⁷⁶ Mandate holders usually hold other jobs. Due to the nature of the work and the level of expertise and independence required, most mandate holders are academics.⁷⁷ Nonetheless the mandate holders receive support and travel and subsistence allowances in the performance of their role by the United Nations Secretariat.⁷⁸ They also enjoy privileges and immunities for the independent exercise of their function according to the 1946 Convention on Privileges and Immunities of the United Nations.⁷⁹ The tenure of the mandate holders, whether country or thematic, should not be longer than six years (two terms of three years for thematic mandate holders).⁸⁰

b) Performance of the Role and Working Methods

As the result of political negotiations and compromises, the mandates of the special procedures are often open ended and vague in nature. The IEs enjoy a great deal of flexibility in implementing the mandate and setting the direction for the special procedure. Aspects such as media visibility, identification of specific human rights violations as well as solutions, relationships with the UN institution, as well as with states and civil society, all depend on the approach and individuality of the mandate holder.⁸¹ In their work, the mandate holders need to balance competing interests including the political interests of the states that will dictate not only renewal but also engagement with the mandate. Mandate holders have to consider

⁷² HRC 'Resolution 5/1. Institution-building of the United Nations Human Rights Council' (18 of June 2007) UN.Doc. A/HRC/RES/5/1.

⁷³ Ibid.

⁷⁴ Connor (n 51).

⁷⁵ Ibid.

⁷⁶ Connor (n 51).

⁷⁷ Naples-Mitchell (n 55).

⁷⁸ Connor (n 51).

⁷⁹ Ibid.

⁸⁰ HRC (n 72).

⁸¹ Naples-Mitchell (n 55).

what human rights violations to prioritise, and what risks there might be engaging with local populations subjected to human rights abuses during country visits. They should also consider maintaining a good relationship with the UN institutions from which they receive support. Moreover, the mandate holder is restricted by time and resources. As mentioned above, their role is unpaid and they often hold other jobs. The special procedures are also under-resourced and understaffed when it comes to support from the UN secretariat. Therefore, the mandate holders might be quite restricted in time and resources in the implementation of the mandate.

Following the working methods set out by the first special procedures, the mandate holders receive communications, engage in country visits, and submit annual reports to the General Assembly and the Human Rights Council.⁸² Communications are submitted by individuals, as well as NGOs, informing the mandate holder of human rights violations happening in the context of the special procedures.⁸³ Country visits provide mandate holders with a way to observe practices and learn facts relevant to their mandates, including a possibility for examining complaints first-hand, and to communicate concerns and recommendations to responsible public officials.⁸⁴ The decision to carry out a country visit is determined by the individual mandate holder.⁸⁵ It is not always clear why an expert chooses to visit a particular country, but key motivations seem to include the urgency of a situation and the potential impact of the visit.⁸⁶ One of the key aims of country visits is often fact-finding and fact-checking, especially when a mandate holder has received communications about individual cases.⁸⁷ Often, country visits allow the mandate holder to experience the reality of the human rights situation on the ground, including those circumstances that governments might prefer to conceal or that might be unknown to high level officials.⁸⁸ Moreover, through country visits the mandate holders can compare how states address similar human rights problems.⁸⁹

⁸² Connor (n 51).

⁸³ Ibid.

⁸⁴ Gaer (n 40) 88.

⁸⁵ Ibid 95.

⁸⁶ Naples-Mitchell (n 55); Gaer (n 40) 95.

⁸⁷ Ibid 89.

⁸⁸ Citing former Special Rapporteur on Nigel Rodley Felice D. Gaer 'Picking and Choosing? Country Visit by Thematic Special Procedures' in in Aoife Nolan, Rosa Freedman and Therese Murphy (eds) *The United Nations Special Procedures System* (Brill 2017) 89.

⁸⁹ Gaer (n 40) 88.

Country visits are the primary means through which the special procedures can promote concretisation of general human rights norms in specific local contexts.⁹⁰ Moreover, country visits provide the special procedures with an opportunity to better understand the causes and dynamics of a thematic mandate in a local context and provide an opportunity to propose reforms.⁹¹

Performing a country visit highlights how political considerations facilitate or obstruct the functions of the special procedures. For a country visit to happen, the state in question will have to agree to the mandate holder's request for a visit.⁹² The terms of each visit are negotiated between the mandate holder and the state in question.⁹³ Often the negotiations are complicated by a state's desire to influence the timing, scope, and itinerary of an expert's visits. It is up to each expert to decide whether the conditions of the visits will compromise their ability to independently monitor the human rights situation.⁹⁴ During the visit the mandate holders are engaged with governments, civil society, and the media.⁹⁵ Due to the high profile of the special procedures, visiting a country can be a political minefield. For example, in the capacity of special rapporteur on extrajudicial and arbitrary killings, Phillip Alston met with two human rights defenders during a country visit to Kenya.⁹⁶ The two activists were shot and killed at close range around a month after the visit.⁹⁷ The media often plays an important role, amplifying the visibility of the visit and increasing pressure on governments to respond.⁹⁸ While states are encouraged to engage in dialogue and cooperate with the special procedure, most do not file official responses to country visits.⁹⁹ The final key responsibility of the IE is to present annual reports to the General Assembly and the Human Rights Council. Annual reports discuss general issues concerning working methods, theoretical analysis of the matter in question, updates on general trends and developments

⁹⁰ Gaer (n 40) 88.

⁹¹ Ibid 88, 89.

⁹² Gaer (n 40) 88.

⁹³ Ibid.

⁹⁴ Ted Piccone 'The Contribution of UN's special procedure to national level implementation of human rights norms' [2011] 15.2 *The International Journal of Human Rights* 206, 214.

⁹⁵ Ibid.

⁹⁶ Naples-Mitchell (n 55) 240.

⁹⁷ Naples-Mitchell (n 55) 240.

⁹⁸ Piccone (n 94) 212.

⁹⁹ Ibid.

in issues, protection regarding the subject of the mandate, and general recommendations. The reports explain the legal framework within which the mandate holders develop their work.¹⁰⁰

1.3 Contribution of the Special Procedures to the Promotion and Protection of Human

Rights

The special procedures contribute to the protection and promotion of human rights through successful interaction with a state even if the latter is not always easy to measure. For example, while communications can generate some effort by a state towards addressing an underlying problem, there is no formal procedure for cataloguing received communications.¹⁰¹ Complainants do not usually receive information on whether their correspondence has been registered, or what if any action has been taken by the special procedure in response.¹⁰² In contrast, country visits often yield the most attention and the most significant result.¹⁰³ In general, states have made some progress towards implementing the recommendations after a country visit. Sometimes it is possible to draw a direct line between recommendation and state action. For example, during one country visit, the special rapporteur on Cambodia visited journalists who had been imprisoned on defamation charges. As a result of the visit the special rapporteur managed to improve the conditions of the two prisoners, with one being realised shortly after.¹⁰⁴ Nonetheless it is not easy to see a direct connection between a recommendation presented by an expert and changes on the ground.¹⁰⁵ Governments are often reluctant to give human rights mechanisms credit for their actions, or are motivated by other domestic political factors.¹⁰⁶ At the same time, through the engagement of civil society, NGOs and the media, local commitment to end human rights violations is sometimes strengthened. The special procedures sometimes support the

¹⁰⁰ Elvira Dominguez-Redondo 'Human Rights through the Backdoor: The Contribution of Special Procedures to the Normative Coherence and Contradictions of International Human Rights Law' in Carla M. Buckley, Alice Donald and Phillip Leach (eds) *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill 2016) 548.

¹⁰¹ Theodore J. Piccone *Catalyst for Change: how the UN's independent experts promote human rights* (Brookings Institution Press 2012) 34-35.

¹⁰² Ibid.

¹⁰³ Ibid 21.

¹⁰⁴ Piccone (n 94) 215.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

professionalisation of the work of advocacy groups, prompting cooperation and strengthening actions on the ground.¹⁰⁷

Two areas where the special procedures often make great contributions to the promotion and protection of human rights are through normative developments and standard setting. Many mandate holders devote a significant part of their reports to explain the legal framework within which they develop their work.¹⁰⁸ While formally bound by the Code of Conduct to use any applicable international human rights instruments, the mandate holders are free to draw on a range of sources in determining rights violations and obligations.¹⁰⁹ Often, especially in the cases in which there is no pre-existing legal instrument, the special procedures perform an important role in both developing and codifying normative standards.¹¹⁰ In all cases the personal approach of the mandate holders determines the level of innovation in, and willingness to set, normative standards.¹¹¹ The normative development by mandate holders often has consequences beyond the fulfilment of the mandate itself. Some mandate holders have contributed to debates on specific human rights issues as well as the development of soft law instruments.¹¹² Draft General Guidelines on Foreign Debt and Human Rights and the Draft Guiding Principles on Extreme Poverty and Human Rights: The Rights of the Poor are just two examples of the contribution of special procedures in this area.¹¹³ Many of the international standards developed by or with contribution of some special procedures have had a considerable impact on the development and implementation of international law in their field.¹¹⁴ Many are used by civil society organisations and UN agencies or are used to assist the implementation of specific rights by governments.¹¹⁵ Therefore the special procedure contributes in important ways to the development of the normative content of international human rights law.¹¹⁶

¹⁰⁷ Piccone (n 94) 206, 212.

¹⁰⁸ Dominguez-Redondo (n 100) 548.

¹⁰⁹ Ibid.

¹¹⁰ Dominguez-Redondo (n 100) 548.

¹¹¹ Golay, Mahon and Cismas (n 2).

¹¹² Ibid.

¹¹³ Golay, Mahon and Cismas (n 2).

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

2. Adopting the mandate of the IE: opposition, challenges, and the urgency in addressing violence and discrimination against sexually and gender diverse peoples internationally

As indicated in some of the discussion above, political considerations often affect the work of special procedures. These human rights mechanisms are dependent on state support, both for adoption and renewal of the mandate and also to ensure changes in the approach to human rights violations on the ground. The following section starts by outlining some of the key debates and activists' efforts during the process of adopting the mandate of the IE at the Human Rights Council. The discussion includes references to states' positions both for and against the mandate. From this analysis, two key points that are further analysed in section 2.2 and 2.3 emerge. Section 2.2 examines the key arguments of the political opposition to the IE and its potential effect on the effective implementation of the IE. Section 2.3 considers the urgency in addressing violence and discrimination on the ground based in light of state opposition and the limited resources of the IE. The analysis concludes by considering the centrality of the non-West as both supporters of the IE and victims of violence and discrimination, underscoring the significance of intersectionality in the implementation of the mandate.

2.1 Adopting the mandate of the IE

Despite the increased international attention paid to the rights of sexually and gender diverse peoples, the Human Rights Council was relatively slow in addressing these issues.¹¹⁷ Not until June 2011 did the Council adopt a Resolution on the topic of 'Human rights, sexual orientation and gender identity'.¹¹⁸ At the adoption of the Resolution, the OIC states orchestrated a walkout from the Council debates for the group's members.¹¹⁹ At the time, members of the OIC as well as the Africa Group refused to participate in the Council debates, showing their dissatisfaction with references to sexually and gender diverse peoples.¹²⁰ Moreover, when the Council sought to address the rights of sexually and gender diverse people again in 2014,

¹¹⁷ Eduard Jordaan 'The Challenge of Adopting Sexual Orientation Resolutions at the UN Human Rights Council' [2016] 8 *Journal of Human Rights Practice* 298.

¹¹⁸ Ibid; UNHRC 'Resolution 17/19 Human rights, sexual orientation and gender identity' [2011] UN.Doc. A/HRC/RES/17/19.

¹¹⁹ Voss (n 118).

¹²⁰ Ibid.

members of the OIC served ‘hostile amendments’ to the Resolution.¹²¹ The ‘hostile’ element of these amendments stems from their aim of completely erasing or significantly limiting the references to sexually and gender diverse people in the Council resolutions.¹²² The hostile amendments approach to sexually and gender diverse people is noteworthy, as they have tended to be a rare occurrence at the Council, even when discussing other highly controversial subjects such as Traditional Values or Protection of the Family.¹²³ Hostile amendments were introduced to the resolution establishing the mandate of the Independent Expert as well.¹²⁴ The pushback against the resolution was almost immediate and the ultimate establishment of the mandate is the result of trade-offs and compromises.¹²⁵ This process of negotiations leading up to the resolution began as stated previously when the Latin America and the Caribbean (LAC) core group (Mexico Uruguay, Chile Argentina, Brazil, Colombia plus Costa Rica) introduced draft resolution A/HRC/32/L.2/Rev.1 at the HRC 32rd session in 2016.¹²⁶ The draft resolution strongly deplored ‘acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation or gender identity’.¹²⁷ The resolution further located the protection of sexual and gender diversity in the Vienna Programme of Action, recalling that ‘it is the duty of States regardless of their political, economic and cultural systems to promote and protect human rights and fundamental freedom’.¹²⁸ Furthermore, the resolution reminded the Council that it ‘should be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.’¹²⁹ Lastly, the

¹²¹ Voss (n 118).

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Voss (n 118).

¹²⁶ UNHRC ‘Report of the Human Rights Council on its thirty-second session’ (15 of Jan 2020) UN.Doc A/HRC/32/2 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/008/73/PDF/G2000873.pdf?OpenElement> > accessed 20th of February 2022.

¹²⁷ Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, Uruguay ‘Protection against violence and discrimination based on sexual orientation and gender identity’ (UNHRC 28 of June 2016) UN.Doc. A/HRC/32/L.2/Rev.1, < <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/135/00/PDF/G1613500.pdf?OpenElement> > accessed 20 February 2022.

¹²⁸ Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, Uruguay ‘Protection against violence and discrimination based on sexual orientation and gender identity’ (UNHRC 28 of June 2016) UN.Doc. A/HRC/32/L.2/Rev.1, < <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/135/00/PDF/G1613500.pdf?OpenElement> > accessed 20 February 2022.

¹²⁹ Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, Uruguay ‘Protection against violence and discrimination based on sexual orientation and gender identity’ (UNHRC 28 of June 2016) UN.Doc.

resolution introduced the mandate of the IE by stating ‘decides to appoint an Independent Expert for a period of 3 years’.¹³⁰

The text of the draft resolution was the subjected of two informal meetings conducted by the core sponsors of the resolution.¹³¹ The first was attended by 52 States, with the key opposition states from the OIC and the African Group choosing not to attend.¹³² A notable exception was Albania, which is a member state of the OIC and the Eastern Europe bloc, which, praised the LAC for sponsoring the discussions and highlighted that it was disappointed that other OIC members states were not present.¹³³ In this informal meeting, states from Europe, North America and Latin America as well as the Pacific Islands gave supporting statements to the resolution.¹³⁴ However, some supporting states questioned the choice of Independent Expert rather than a Special Rapporteur. For example, the European Union noted that it preferred a Special Rapporteur, as it would send a stronger signal to end violence and discrimination based on sexual orientation and gender identity.¹³⁵ In response, Uruguay explained the choice of Independent Expert instead of Special Rapporteur was based on an understanding about which role was going to be perceived in the best possible way given the views voiced from all states. Because Special Rapporteur is perceived to be more a mechanism of monitoring, an Independent Expert can enter into dialogue with states more easily, and is understood to operate in a more constructive manner.¹³⁶ On the other side, Russia voiced opposition to the draft resolution, underscoring that it was a ‘controversial and unacceptable’ topic and that they were against the establishment of a new category of rights.¹³⁷ China also highlighted that the LAC had chosen a controversial topic but that it was reserving its position on the

A/HRC/32/L.2/Rev.1, < <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/135/00/PDF/G1613500.pdf?OpenElement>> accessed 20 February 2022.

¹³⁰ Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, Uruguay ‘Protection against violence and discrimination based on sexual orientation and gender identity’ (UNHRC 28 of June 2016) UN.Doc.

A/HRC/32/L.2/Rev.1, < <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/135/00/PDF/G1613500.pdf?OpenElement>> accessed 20 February 2022.

¹³¹ ARC International ‘Appointing an Independent Expert on Sexual Orientation and Gender identity: An Analysis of Process Result and Implications’ (2016) ><http://arc-international.net/research-and-publications/research-and-analysis/>> accessed 20 February 2022 8.

¹³² Ibid.

¹³³ Ibid 10.

¹³⁴ Ibid 8.

¹³⁵ Ibid 9.

¹³⁶ Ibid 9.

¹³⁷ Ibid 9.

establishment of the Independent Expert. Notably South Africa, who attended the informal meeting, choose not to give any statements, despite being one of the sponsors of the first resolution on sexual orientation and gender Identity at the Council in 2011 and voting for the second resolution in 2014.¹³⁸ The first informal meeting was followed by a second informal meeting to discuss the draft resolution, but only 35 countries attended and with no substantial discussions the session ended after 30 minutes.¹³⁹ The NGO Arc International explained that the fact that the second informal was short indicates that the work of getting members of the Council to agree to the text would have to be done through bilateral negotiations rather than in informal sessions.¹⁴⁰

From the announcement of the resolution to the final vote on the 30th of June, intense lobbying and advocacy effort were made by state supportive of the resolution, as well as by civil society, to the members of the Council.¹⁴¹ Letters arrived from several national advocacy groups from countries such as El Salvador, Vietnam, the Philippines, India, South Africa and Mongolia, urging their governments to vote ‘yes’ to the resolution.¹⁴² At a more global level, 628 NGOs from over 151 countries signed a joint letter calling upon ‘the Human Rights Council to address the gap (in protection) through the creation of an Independent Expert to address discrimination and violence against persons based on sexual orientation and gender identity’.¹⁴³ Statistically an overwhelming (68%) majority of the signatories were from the Global South, more specifically from Latin American and the Caribbean, Asia Pacific, and Africa, indicating a deeply felt need from these regions for a more systematic attention to violations against sexually and gender diverse people at the UN level.¹⁴⁴ From the important statements made by NGOs to the Council, different perspectives on the need for the creation

¹³⁸ ARC International ‘Appointing an Independent Expert on Sexual Orientation and Gender identity: An Analysis of Process Result and Implications’ (2016) ><http://arc-international.net/research-and-publications/research-and-analysis/>> accessed 20 February 2022 10.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid 11.

¹⁴² Ibid 11.

¹⁴³ OutRight Action International ‘689 NGOs from 151 Countries Call for a SOGI Independent Expert at the United Nations’ (*Outright Action International* 28 June 2016) <<https://outrightinternational.org/content/628-ngos-151-countries-call-sogi-independent-expert-united-nations>> accessed 20th of February 2022; ARC International ‘Appointing an Independent Expert on Sexual Orientation and Gender identity: An Analysis of Process Result and Implications’ (2016) ><http://arc-international.net/research-and-publications/research-and-analysis/>> accessed 20 February 2022, 11-12.

¹⁴⁴Ibid.

of the IE emerged. From the Joint statement referred to above, the establishment of the Independent Expert was considered to ‘help ensure’ issues of sexual orientation and gender identity being better integrated throughout the UN system, to ‘strengthen attention to the issue at national, regional and international level’ and to be a ‘necessary step towards urgently addressing the serious abuses on these grounds in every region in the world’.¹⁴⁵ The Swedish Federation for Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Rights (RFSL) delivered a statement¹⁴⁶ on gender identity. In this statement, the RFSL pointed to the range of abuses and discrimination committed against gender diverse people, contending that the establishment of the IE would raise awareness to and bring greater understanding of these issues.¹⁴⁷ Furthermore, the IE would be a platform to establish best practices and provide technical assistance to states in ensuring human rights-based laws and policies for the recognition of gender diverse people.¹⁴⁸ The statement from the Mantiqinta Network, Pan Africa ILGA and ARC International explained that they wanted African governments to acknowledge that LGBT people exist and that they suffer brutal violations of human rights, by voting for the establishment of the IE in line with The UDHR and the African Charter of Human and People’s Rights.¹⁴⁹ NGOs from the LAC region explained their support for the resolution and the work of the LAC 7 core groups advocacy efforts.¹⁵⁰

The process of negotiation and advocacy about the IE culminated on the vote held on the 30th of June 2016. The formal debate on the resolution lasted three and a half four hours.¹⁵¹ In total there were 17 votes on amendments to Resolution 32/2 establishing the mandate of the IE.¹⁵² The majority of amendments were introduced by the OIC, with the purpose of transforming the sexual and gender identity (SOGI) resolution into a general resolution on discrimination and excluding any direct reference to SOGI.¹⁵³ All the latter amendments were

¹⁴⁵ ARC International (n 138) 12-13.

¹⁴⁶ Ibid 13.

¹⁴⁷ Ibid 14.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid 14-15.

¹⁵⁰ Ibid.

¹⁵¹ UNHRC 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - ‘Protection against violence and discrimination based on sexual orientation and gender identity’, webcast available < <https://media.un.org/en/asset/k1f/k1f9u3lv8e> > accessed 20th of February 2022.

¹⁵² UNHRC ‘Resolution Adopted by the Human Rights Council on 30 of June 2016 ‘Protection against violence and discrimination based on sexual orientation and gender identity’’ [2016] UN.Doc. A/HRC/RES/32/2.

¹⁵³ Voss (n 118).

rejected. However, the amendments that sought to introduce notions of cultural relativity and of respecting domestic and regional cultural and religious systems were passed, as were other non-substantive amendments referring to combatting racism and deploring the use of coercive measures against developing nations. Nonetheless, the key hostile amendment that sought to replace the establishment of the mandate of the IE with a call for a report by the High Commissioner on Human Rights failed. Eventually the Resolution was adopted with 23 votes in favour, 18 against, and 6 abstentions.¹⁵⁴ Considering statements made by state representatives in relation to the vote, several reasons appear underpinning both the ‘yes’ and the ‘no’ votes as well as the abstentions. In terms of the ‘yes’ votes, the urgent and significant need for the protection of sexually and gender diverse people emerged in the speeches by state representatives. For example, Albania stated that it ‘deplored the acts of violence and discrimination in all regions of the world committed against individuals because of their sexual orientation and gender identity’, as well as underscoring the serious inadequacy of current arrangements to protect this (sexually and gender diverse) ‘vulnerable part of the population’ from the grave violence and abuses committed against them.¹⁵⁵ Moreover, Mexico (one of the sponsors of the resolutions) explained that the Independent Expert would give voice to ‘all individuals that are discriminated against or subjected to violence because of their sexual orientation’ within the international system of human rights.¹⁵⁶ Thus, the urgency of addressing violence and discrimination based on sexual orientation and gender identity at international level shines through in the ‘yes’ votes as well as in the speeches by advocates discussed above.

In relation to the abstention votes, the 6 states’ (South Africa, India, Philippines, Botswana, Ghana, and Namibia) ‘lack of consensus’ appeared as a primary reason for the votes. Notably both South Africa and the Philippines had voted ‘yes’ for the 2014 resolution on sexual

¹⁵⁴ UNHRC ‘Resolution Adopted by the Human Rights Council on 30 of June 2016 ‘Protection against violence and discrimination based on sexual orientation and gender identity’’ [2016] UN.Doc. A/HRC/RES/32/2.

¹⁵⁵ Statement to the HRC by Albania, at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - ‘Protection against violence and discrimination based on sexual orientation and gender identity’, webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 03:12:24, accessed 20th of February 2022.

¹⁵⁶ Statement to the HRC by Mexico at at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - ‘Protection against violence and discrimination based on sexual orientation and gender identity’, webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 02:39:01, accessed 20th of February 2022.

orientation and gender identity. South Africa justified the change in voting pattern by explaining that a better approach was to build maximum consensus at the Council for the protection of LGBT rights.¹⁵⁷ The lack of consensus was also highlighted by the Philippines which explained that creating a mandate holder would ‘pursue a set of standards applied to a very specific sector where there is no consensus on a set of universally accepted human rights standards’.¹⁵⁸ Similarly, Botswana and Namibia noted the need to balance the framework of universal human rights with the ‘lack of consensus’ on the notion of sexual orientation and gender identity.¹⁵⁹ Ghana explained its ‘abstention’ vote was due to sexual orientation and gender identity was a ‘culturally sensitive’ topic nationally.¹⁶⁰ Nonetheless, these three countries, Botswana¹⁶¹ and Ghana¹⁶² had previously voted ‘no’ to SOGI resolutions at the Council, so the move to abstention might indicate some progress in the approach to sexually and gender diverse people in these countries. Ghana for example explained that ‘there had been evolution in thinking – partly because of the Orlando situation but also the resolution on the protection against violence and discrimination based on sexual orientation and gender identity by the African Commission on Human and People’s Rights...’.¹⁶³ India did not offer any explanation for their vote.

¹⁵⁷ Statement to the HRC by South Africa at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - ‘Protection against violence and discrimination based on sexual orientation and gender identity’, webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 03:00:43, accessed 20th of February 2022.

¹⁵⁸ Statement to the HRC by Philippines at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - ‘Protection against violence and discrimination based on sexual orientation and gender identity’, webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 02:51:08, accessed 20th of February 2022.

¹⁵⁹ Statement to the HRC by Botswana at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - ‘Protection against violence and discrimination based on sexual orientation and gender identity’, webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 03:53:11, accessed 20th of February 2022; Statement to the HRC by Namibia at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - ‘Protection against violence and discrimination based on sexual orientation and gender identity’, webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 03:28:02, accessed 20th of February 2022.

¹⁶⁰ Statement to the HRC by Ghana at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - ‘Protection against violence and discrimination based on sexual orientation and gender identity’, webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 03:22:51, accessed 20th of February 2022.

¹⁶¹ UNHRC ‘Resolution Adopted by the Human Rights Council on 14 of July 2011 ‘Human rights, sexual orientation and gender identity’ [2011] UN.Doc. A/HRC/RES/17/19.

¹⁶² UNHRC ‘Resolution Adopted by the Human Rights Council on 2 of October 2014 ‘Human rights, sexual orientation and gender identity’ [2014] UN.Doc. A/HRC/RES/27/32.

¹⁶³ Statement to the HRC by Ghana at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - ‘Protection against violence and discrimination based on sexual orientation and gender identity’, webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 03:22:51, accessed 20th of February 2022.

The 'no' vote was largely united around some key points emerging from the OIC and the African group, supported by Russia and China.¹⁶⁴ Representatives from the OIC countries that spoke were largely united in the perception that the resolution was opposed to their religious, cultural, and traditional values. Qatar explained that the proposal was 'contrary to the sound instinct and to all values, cultures and religious beliefs' and that even if some countries accepted these practices they cannot be 'imposed on other countries'.¹⁶⁵ The United Arab Emirates observed that 'we as people have nothing to do with the content of the draft resolutions, express our rejection of any concept that compromises our cultural and religious specificities'.¹⁶⁶ Saudi Arabia stated that 'the universality of human rights doesn't mean that we have to impose cultures that are contravening with our Muslim religion' while Morocco considered the draft resolution to be 'against the values and beliefs of at least 1.5 billion that belong to one civilisation'.¹⁶⁷ Besides Algeria, referred to above, the OIC countries were united in voting against the resolution. The African group was more divided with the abstentions discussed above, but none of the 'no' voting countries that are not OIC members offered any explanation of their vote.¹⁶⁸ Russia and China on the other hand gave speeches about their votes. Russia stated that 'sexual orientation is an element of private life' and being an individual choice there is no need for 'the creation of any specific conditions for the implementation of such a choice – a particular system of protection for those that take this particular choice'.¹⁶⁹ Consequently, Russia explained that 'The establishment of an Independent Expert... on issues only with respect to private matters is not something we can

¹⁶⁴ ARC International (n 138) 58.

¹⁶⁵ Statement to the HRC by Qatar at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - 'Protection against violence and discrimination based on sexual orientation and gender identity', webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 00:43:11, accessed 20th of February 2022.

¹⁶⁶ Statement to the HRC by United Arab Emirates at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - 'Protection against violence and discrimination based on sexual orientation and gender identity', webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 00:45:22 accessed 20th of February 2022.

¹⁶⁷ Statement to the HRC Saudi Arabia at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - 'Protection against violence and discrimination based on sexual orientation and gender identity', webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 02:58:04, accessed 20th of February 2022.

¹⁶⁸ ARC International (n 111) 63.

¹⁶⁹ Statement to the HRC by Russia at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - 'Protection against violence and discrimination based on sexual orientation and gender identity', webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 02:54:12, accessed 20th of February 2022.

see as anything else as imposing specific behaviour models and we are against such an approach'.¹⁷⁰ China speaking in an explanation after the vote stating the importance of respecting different cultural and judicial systems, underscoring the importance of dialogue within the Council rather than imposing views on others.¹⁷¹ Some countries, such as Russia and Saudi Arabia further clarified in their speeches that if the resolution was adopted, they would not cooperate with the IE in any way.¹⁷²

2.2 State opposition, cooperation, and continued support for the mandate

As indicated in the discussion above, one of the main oppositions to the mandate of the IE was based on the claim that sexual and gender diversity is alien to certain countries, cultures, or religions. Recalling the discussions in chapter 1, one of the key problematic oppositions to the protection of non-Western sexual and gender diversity is the claim that these are 'Western impositions'. This 'imposition' thesis is apparent in some of the state speeches above as well, although there is no explicit reference to the West in the latter. This binary opposition between the West and the rest is also present in some of the hostile amendments introduced during the establishment of the mandate of the IE. An initial amendment L.74 referred to 'fighting racism, racial discrimination, xenophobia and intolerance in all its forms,'¹⁷³ which as a hostile amendment is really an attempt at pitting the fight against racial discrimination against that of oppression of sexual and gender diversity.¹⁷⁴ While L.74 is not in any way incompatible with the mandate of the IE, it highlights some of the discursive

¹⁷⁰ Statement to the HRC by Russia at at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - 'Protection against violence and discrimination based on sexual orientation and gender identity', webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 02:54:12, accessed 20th of February 2022.

¹⁷¹ ARC International (n 111) 65.

¹⁷² Statement to the HRC by Russia at at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - 'Protection against violence and discrimination based on sexual orientation and gender identity', webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 02:54:12, accessed 20th of February 2022; Statement to the HRC Saudi Arabia at at the 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - 'Protection against violence and discrimination based on sexual orientation and gender identity', webcast available <<https://media.un.org/en/asset/k1f/k1f9u3lv8e>> 02:58:04, accessed 20th of February 2022.

¹⁷³ UNCHR .Pakistan on behalf of the OIC amendment to draft resolution A/HRC/32/L.2/Rev.1. Protection against violence and discrimination based on sexual orientation and gender identity' (29 of June 2016) UN.Doc. A/HRC/32/L.4, < https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/L.74> accessed 20 of February 2022.

¹⁷⁴ ARC International (n 138) 26.

structures critiqued previously, through which sexual and gender identities are seen as incompatible with racial ones and vice-versa. Amendment L.77 deplored the use of ‘economic sanctions and conditionality on official development assistance’,¹⁷⁵ particularly against ‘developing countries’ with the aim of influencing domestic debates. While the substantive part of the resolution establishing the mandate of the IE does not authorize coercive measures,¹⁷⁶ there is an intent here to construct sexual and gender diversity as a developed country issue rather than one of developing countries. While this dichotomy between developing and developed countries is false, especially because mostly developing countries sponsored the resolution, there is an underpinning precedent that might speak to this anxiety on behalf of economically poorer states. As a response to Uganda’s 2014 Anti-Homosexuality Bill, Western governments congregated to lobby against the Bill. Because of the lobbying by Western states the World Bank withdrew a \$90 million loan to Uganda.¹⁷⁷ This unprecedented but expansive approach to the rights of sexually and gender diverse people, points to the operation of the SVS paradigm and orientalist structures in the international political environment. Effectively, the World Bank move is underpinned by these ideas of the West, ‘managing’ the ‘unruly’ and ‘uncivilised’ non-Western world through international institutions.¹⁷⁸ Therefore, while these hostile amendments are introduced to restrict the operation of the IE, from a queer postcolonial perspective they underscore the importance of using the intersectional approach discussed in chapter 4 under the mandate. As discussed in chapter 4, the use of homonationalist rhetoric by both Western governments and NGOs erases the visibility and existence of non-Western sexual and gender diversity. However, as analysed by Aleardo Zanghellini, scholars and activists have sometimes made inaccurate claims to homonationalism.¹⁷⁹ Therefore, it is essential that such claims, when unfounded, do not unduly restrict the quest for complete legal protection for sexually and gender diverse

¹⁷⁵ UNCHR .Pakistan on behalf of the OIC amendment to draft resolution A/HRC/32/L.2/Rev.1. Protection against violence and discrimination based on sexual orientation and gender identity’ (29 of June 2016) UN.Doc. A/HRC/32/L.77 < https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/L.77> accessed 20th of February 2022.

¹⁷⁶ UNHRC ‘Resolution Adopted by the Human Rights Council on 30 of June 2016 ‘Protection against violence and discrimination based on sexual orientation and gender identity’’ [2016] UN.Doc. A/HRC/RES/32/2.

¹⁷⁷ Kay Lalor ‘Encountering the Past: Grand Narratives, Fragmented Histories and LGBTI Rights ‘Progress’ [2019] 30 Law and Critique 21.

¹⁷⁸ Ibid.

¹⁷⁹ Aleardo Zanghellini ‘Are Gay Rights Islamophobic? A Critique of Some Uses of the Concept of Homonationalism in Activism and Academia’ [2012] 21 (3) Social & Legal Studies 357.

people.¹⁸⁰ What is crucial is that the IE use an intersectional approach to challenge nationalistic erasure of sexual and gender diversity and homonationalist discourses when they occur. Only by doing so, can mandate holder transcend some of these inherent binary structures aimed at erasing the existence of non-Western sexual and gender diversity.

While the OIC states have maintained their opposition to the IE, at the time of the renewal of the mandate, more states voted in favour of the IE at the renewal in 2019. Significantly, more states from the African Group either voted in favour or abstained rather than voting against, pointing towards a potential change in attitude towards the protection of sexually and gender diverse people.¹⁸¹ In contrast to the 2016 vote, South Africa voted ‘yes’ for the IE in 2019. Rwanda and Tunisia also voted ‘yes’ in 2019.¹⁸² At the adoption of the vote, Tunisia, which is, OIC member and became the second OIC state, along with Albania, to vote for the IE, explained that they were committed to cooperate with the mandate holder and that under their Constitution they are ‘committed to avoid any distinction among citizens on whatever basis and this requires that we should respect each other for our differences and different orientations’.¹⁸³ While South Africa did not give a voting speech, they did so earlier in the Human Rights Council’s session, giving some insights into the change in voting pattern through general observation on the renewal. South Africa pointed to the way that the IE had

¹⁸⁰ Zanghellini (n 179).

¹⁸¹ In 2016 at the adoption of the mandate of the IE no country from the African Group voted ‘yes’ to the resolution whilst in 2019 Rwanda and South Africa voted ‘yes’ to the renewal. In 2016 8 countries from the African Group voted ‘no’ to the mandate (Algeria, Burundi, Congo, Côte D'Ivoire, Ethiopia, Kenya, Morocco, Nigeria and Togo) while in 2019 only 3 countries (Eritrea, Nigeria and Somalia) voted against renewal. In 2016 4 countries abstained (Botswana, Ghana, Namibia and South Africa) while in 2019, 5 countries from the Group (Angola, Burkina Faso, Democratic Republic of Congo, Senegal and Togo abstained). UNHRC ‘Resolution Adopted by the Human Rights Council on 30 of June 2016 ‘Protection against violence and discrimination based on sexual orientation and gender identity’ [2016] UN.Doc. A/HRC/RES/32/2 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/154/15/PDF/G1615415.pdf?OpenElement> > accessed 20 of February 2022; UNHRC ‘Resolution Adopted by the Human Rights Council on 12 of July 2019 ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ [2019] UN.Doc. A/HRC/RES/41/18, < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/221/62/PDF/G1922162.pdf?OpenElement> > accessed 20 of February 2022.

¹⁸² UNHRC ‘Resolution Adopted by the Human Rights Council on 12 of July 2019 ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ [2019] UN.Doc. A/HRC/RES/41/18, < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/221/62/PDF/G1922162.pdf?OpenElement> > accessed 20 of February 2022.

¹⁸³ Statement to the HRC by Tunisia at at the 40th Meeting 41st Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/41/L.10/Rev.1 - ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’, webcast available < <https://media.un.org/en/asset/k1z/k1ztl1xy6v> > 01:39:37, accessed 20th of February 2022.

handled its mandate with a ‘great deal of sensitivity, avoiding the ‘naming and shaming’ of countries’.¹⁸⁴ Thus, the way of dealing with the issues through dialogue with affected communities and with states in face of the lack of protection for sexually and gender diverse people had according to South Africa ‘contributed to the dissipation of tension in the Council’ and had created an ‘ideal atmosphere for the renewal of the mandate’.¹⁸⁵ Furthermore, South Africa highlighted that the widespread nature of violence and abuse against sexually and gender diverse people required monitoring by the Council and that the work by the IE highlighted how much more ‘still needs to be done to protect the human rights of the LGBTI people in recognition of their inherent dignity and equal and inalienable rights’.¹⁸⁶ A further significant change in voting pattern came from the Bahamas, who in 2019 became the first Anglophone Caribbean nation to vote in favour of the mandate of the IE.¹⁸⁷ The Representative of the Bahamas explained before voting that ‘sexual orientation and gender identity continues to be a matter of ongoing domestic discourse’ but that the country is ‘principled in its support of efforts to combat all forms of discrimination and violence against all persons on any ground and to promote tolerance’.¹⁸⁸ Moreover, Philippines voted ‘yes’ instead of abstaining as in 2016, and from the Asia and Pacific Group, Japan, Nepal, and Fiji voted ‘yes’.¹⁸⁹ In the General Observations on the draft resolution, Fiji explained that ‘sexual orientation and gender identity...have been the basis for discrimination, violence and degrading acts, intended to diminish individual integrity’, that ‘we must therefore take steps to address it,

¹⁸⁴ Statement to the HRC by South Africa at at the 40th Meeting 41st Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/41/L.10/Rev.1 - ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’, webcast available < <https://media.un.org/en/asset/k1z/k1ztl1xy6v> > 00:28:34, accessed 20th of February 2022.

¹⁸⁵ Statement to the HRC by South Africa at at the 40th Meeting 41st Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/41/L.10/Rev.1 - ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’, webcast available < <https://media.un.org/en/asset/k1z/k1ztl1xy6v> > 00:28:34, accessed 20th of February 2022.

¹⁸⁶ Ibid.

¹⁸⁷ ARC International, ILGA World, International Service for Human Rights ‘Compilation of the Adoption of the 2019 SOGI Resolution 41/18 Renewal of the Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ (ILGA 2019) <https://ilga.org/downloads/RenewIESOGI_report.pdf > accessed 20 of February 2022, 4.

¹⁸⁸ Statement to the HRC by Bahamas at at the 40th Meeting 41st Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/41/L.10/Rev.1 - ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’, webcast available < <https://media.un.org/en/asset/k1z/k1ztl1xy6v> > 01:36:51, accessed 20th of February 2022.

¹⁸⁹ UNHRC ‘Resolution Adopted by the Human Rights Council on 12 of July 2019 ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ [2019] UN.Doc. A/HRC/RES/41/18, < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/221/62/PDF/G1922162.pdf?OpenElement> > accessed 20 of February 2022.

this is our collective duty and responsibility’ and that the renewal of the mandate was ‘our chance to work constructively together’ to prevent acts of ‘violence, degradation, dehumanization and indignity’ based on sexual orientation and gender identity.¹⁹⁰ Lastly, as in 2016, the main sponsors of the mandate were from the LAC group and all the countries from the Western and Others Group and Eastern European Group voted for the mandate besides Hungary, which abstained.¹⁹¹ Nonetheless, as mentioned, the OIC countries (except Albania and Tunisia) continued to be vocal against the mandate, introducing several amendments aimed at discontinuing the special procedure.¹⁹² Pakistan explained the votes of the OIC countries (except Albania and Tunisia) stating their concern ‘at the introduction in the United Nations of concepts and new notions that have no legal foundation in any international human rights framework’ underscoring that ‘these notions contradict the fundamentals of universality of human rights...’ and that the OIC was ‘perturbed at the introduction of controversial topics that are not universally agreed and represent a particular set of values and lifestyles not accepted by the majority of society and that directly impinge on the socio-cultural and religious sensitivities of a number of UN Member States’.¹⁹³ China did not offer any explanation for the vote this time, but voted ‘no’ to a renewal.¹⁹⁴

¹⁹⁰ Statement to the HRC by Fiji at the 40th Meeting 41st Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/41/L.10/Rev.1 - ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’, webcast available < <https://media.un.org/en/asset/k1z/k1ztl1xy6v> > 00:33:51, accessed 20th of February 2022.

¹⁹¹ UNHRC ‘Resolution Adopted by the Human Rights Council on 12 of July 2019 ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ [2019] UN.Doc. A/HRC/RES/41/18, < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/221/62/PDF/G1922162.pdf?OpenElement> > accessed 20 of February 2022.

¹⁹² Statement to the HRC Pakistan (on behalf of the OIC except Albania and Tunisia) at the 40th Meeting 41st Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/41/L.10/Rev.1 - ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’, webcast available < <https://media.un.org/en/asset/k1z/k1ztl1xy6v> > 00:07:03, accessed 20th of February 2022.

¹⁹³ Statement to the HRC Pakistan (on behalf of the OIC except Albania and Tunisia) at the 40th Meeting 41st Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/41/L.10/Rev.1 - ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’, webcast available < <https://media.un.org/en/asset/k1z/k1ztl1xy6v> > 01:46:28, accessed 20th of February 2022.

¹⁹⁴ UNHRC ‘Resolution Adopted by the Human Rights Council on 12 of July 2019 ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ [2019] UN.Doc. A/HRC/RES/41/18, < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/221/62/PDF/G1922162.pdf?OpenElement> > accessed 20 of February 2022.

From the renewal process, the support for the protection of sexual and gender diversity through the IE appears to be increasing.¹⁹⁵ The NGO Arc International explained that these changes in voting patterns point to progress in the position of states on the protection of sexually and gender diverse people, and, also reflects the extensive work of civil society in these countries.¹⁹⁶ As a preparation for the renewal process, 1312 NGOs from 174 different states of the world signed a campaign for the renewal of the mandate that was submitted to the Human Rights Council at its 41st session.¹⁹⁷ In the statement presented to the Human Rights Council, the NGOs explained that ‘around the world millions of people face human rights violations and abuse because of their real or perceived sexual orientation’¹⁹⁸ and that these violations ‘take place in conflict and non-conflict situations, are perpetrated by State and non-State actors (including victims’ families and communities) and impact all spheres of life’.¹⁹⁹ Furthermore, the submission explained that ‘this mechanism (IE) and its work have been a beacon of hope that violations and discrimination will not be ignored’ but while some progress has been made, ‘lesbian, gay, bisexual, and trans and gender diverse people face daily discrimination and violence’.²⁰⁰ The following section explores the range of violence and discrimination committed against sexually and gender diverse people in more depth.

2.3 The urgency in addressing violence and discrimination on the ground: COVID-19 and intersectionality

A key argument in support of the IE emerging from the debates discussed above is the urgency with which it is necessary to address the widespread and systematic violence and discrimination committed against sexually and gender diverse people internationally. This section builds on the analysis in chapter 1, giving a more in-depth overview of the range of violence and discrimination committed against sexually and gender diverse people. In the

¹⁹⁵ ARC International, ILGA World, International Service for Human Rights (n 185) 4.

¹⁹⁶ Ibid.

¹⁹⁷ ARC International, ILGA World, International Service for Human Rights (n 185) 8.

¹⁹⁸ Statement by the International Lesbian and Gay Association, Ms. Phylesha Brown-Acton (Joint Statement) to the HRC during General debate Under Agenda Item 8: Follow-up to and implement of the Vienna Declaration Programme Action at the 30th Meeting, 41st Regular Sessions Human Rights Council webcast available < <https://media.un.org/en/asset/k1h/k1hvcx77ms> > 00:43:21 accessed 20 February 2022.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

discussion I draw on reports of violence and discrimination by UN institution, national and international NGOs, civil society, and the media. A natural starting point in surveying violence and discrimination against sexually and gender diverse people is the criminalisation of same-sex activity and gender expression. Currently, private consensual same-sex activity is criminalised in 69 jurisdictions.²⁰¹ The majority of these criminalise sex between men via penal laws against ‘sodomy’, ‘buggery’ and ‘unnatural offences’.²⁰² 43 of these countries explicitly criminalise sex between women, using laws against ‘lesbianism’ ‘sexual relations with a person of the same sex’ and ‘gross indecency’.²⁰³ Even in countries where sex between women is not explicitly criminalised, lesbian and bisexual women have been subject to arrest or treat of arrest.²⁰⁴ In 11 of these jurisdictions, the death penalty is a possible sanction, with six of these, Iran, Northern Nigeria, Saudi Arabia, Somalia, and Yemen implementing the death penalty, and in the others; Afghanistan, Brunei, Mauritania, Pakistan, Qatar, and United Arab Emirates, it is a legal possibility.²⁰⁵ In 15 jurisdictions gender identity or expression of gender diversity is criminalised under legislation that penalises ‘cross-dressing’, ‘impersonation’ and ‘disguise’.²⁰⁶ In at least 26 countries, gender diverse peoples are targeted under laws that criminalise same-sex activity and vagrancy, hooliganism, and public order offences.²⁰⁷

Criminalisation leads to a range of violence and discrimination against sexually and gender diverse peoples. Reports by NGOs and UN institutions highlight the use of such legislation to commit arbitrary arrests and detentions as well as criminalising based on suspicion.²⁰⁸ Sexually and gender diverse people are subjected to entrapment, street arrests, and tipoffs by private and public officials.²⁰⁹ There are reports of torture and violence by officials to

²⁰¹ Human Dignity Trust ‘LGBT and the Law’ < <https://www.humandignitytrust.org/lgbt-the-law/>> accessed 7 of March 2022.

²⁰² Ibid.

²⁰³ Human Dignity Trust (n 199).

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ UNOCHR ‘Born Free and Equal’ (2019) UN Doc. HR/PUB/12/06/Rev.1, 40, 44, 50 <<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>> accessed 7 of March 2022.

²⁰⁹ UNOCHR ‘Born Free and Equal’ (2019) UN Doc. HR/PUB/12/06/Rev.1, 30 <<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>> accessed 7 of March 2022.

obtain confessions as well as the infliction of intrusive ‘anal examinations’ by officials to prove ‘homosexuality’ of a subject.²¹⁰ Criminalisation also prevents sexually and gender diverse peoples from accessing healthcare, and legitimises private and familial types of violence such as conversion therapies, forced marriages, rape, confinement at home, deprivation of education, work, and travel, and domestic violence.²¹¹ In sum, criminalisation leaves sexually and gender diverse people beyond the protection of the law as well as creating an environment where individuals and groups must live in fear of expressing and living their sexuality and gender diversity. Currently, most of the countries criminalising same-sex activity and gender expression are in Africa, Middle East, Asia and in the Caribbean.²¹² In many of these countries, the existence of criminal legislation can be traced back to the colonial period.²¹³ Legal codes criminalising same-sex activity, first implemented in Europe, were spread through the colonies where the European powers took control.²¹⁴ In particular, the penal codes of the British Empire have had long lasting impact on the criminalisation of same-sex activity underpinning much contemporary legislation. Out of the 69 countries criminalising same-sex activity over half are former British colonies.²¹⁵

The acts of violence and discrimination committed against sexually and gender diverse people are not exclusive to countries that criminalise same-sex activity. Targeted killings, kidnappings, and beatings, rape, and sexual violence aimed at sexual, and gender diverse people are reported all over the world.²¹⁶ For example, 2021 has been reported to be the ‘deadliest’ year for trans people, with a total of 375 reported killings.²¹⁷ 70% of all the murders

²¹⁰ UNOCHR ‘Born Free and Equal’ (2019) UN Doc. HR/PUB/12/06/Rev.1, 31, <<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>> accessed 7 of March 2022.

²¹¹ Human Dignity Trust (n 199).

²¹² Human Dignity Trust ‘A History of LGBT Criminalisation’ <<https://www.humandignitytrust.org/lgbt-the-law/a-history-of-criminalisation/>> accessed 19 of February.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ UNOCHR ‘Born Free and Equal’ (2019) UN Doc. HR/PUB/12/06/Rev.1, vii, <<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>> accessed 7 of March 2022.

²¹⁷ Jamie Wareham ‘375 Transgender People Murded In 2021- ‘Deadlies Year’ Since Records Began’ (Forbes 11 November 2021) available at: <<https://www.forbes.com/sites/jamiewareham/2021/11/11/375-transgender-people-murdered-in-2021-deadliest-year-since-records-began/?sh=1fc5e99e321c>> last accessed 16 of February 2022; Ester Pinheiro ‘Brazil continues to be the country with the largest number of trans people killed’ (translated by Ana Paula Rocha, Brasil de Fato 23 January 2022) available at:

recorded in 2021 have happened in South and Central America, with Brazil being responsible for 33% followed by Mexico (65 persons) and the US (53) persons.²¹⁸ However, cases have also been reported from countries as diverse as Greece, Kazakhstan, and Malawi for the first time.²¹⁹ 96% of those murder rates were of trans women or transfeminine people.²²⁰ In the US, 89% of murder victims are trans people of colour with, and 665 are black trans women that are disproportionately affected by violence.²²¹ Furthermore, in Europe, 43% of trans people murdered were migrants.²²² These statistics point to the intersectional nature of violence against trans people, which is compounded by homophobia, transphobia, misogyny, racism and xenophobia. In addition, while South and Central America is disproportionately represented in the statistics, where there are data, killings of trans people are reported across regions, state- systems and irrespective of the existence or not of the type of criminal legislation discussed above.²²³ Significantly, the murder rates are likely to be much higher than reported due to lack of systematic data collection, underreporting, misreporting, and lack of media attention.²²⁴

Despite being victims of violence, sexually and gender diverse people often face issues when interacting with law enforcement agencies.²²⁵ Reports point to discrimination, harassment, and violence on the part of law enforcement that deters victims from reporting abuses.²²⁶ UN human rights bodies have expressed concern about the lack of effective investigation and prosecution for acts of violence committed against sexually and gender diverse people, including the lack of redress and compensation for coercive and abusive medical treatments of sexually and gender diverse people (discussed further below). A 2019 report from the NGO

<https://www.brasildefato.com.br/2022/01/23/brazil-continues-to-be-the-country-with-the-largest-number-of-trans-people-killed> last accessed 16 of February 22.

²¹⁸ Ester Pinheiro 'Brazil continues to be the country with the largest number of trans people killed' (translated by Ana Paula Rocha, Brasil de Fato 23 January 2022) available at:

<https://www.brasildefato.com.br/2022/01/23/brazil-continues-to-be-the-country-with-the-largest-number-of-trans-people-killed> last accessed 16 of February 22.

²¹⁹Wareham (n 215).

²²⁰ Transrespect Versus Transphobia (TVT) 'Trans Murder Monitoring Update- Trans Day of Remembrance 2021' (TVT 11th of November) available on < <https://transrespect.org/en/tmm-update-tdor-2021/#>> accessed 16 of February 2022.

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Born Free and Equal (n 214) 19.

²²⁶ Ibid 70.

Human Dignity Trust reported an overwhelming majority of trans and gender diverse people experience harassment, violence, and abuse from state officials. These acts include blackmail, extortion, public humiliation, and physical and sexual assault.²²⁷ Notably, discrimination and violence on behalf of law enforcement appear to persist whether criminal legislation is in place or not, and even where there is protective legislation in place.²²⁸ These law enforcement agencies often act with impunity, with trans people – especially those that are sex workers, poor, immigrants, with disabilities, or of colour, being disproportionately targeted.²²⁹ Thus, those who are there to protect often commit abuses against sexually and gender diverse people themselves. Furthermore, visibly sexually and gender diverse people tend to be overrepresented in their interactions with the police, in incarceration rates and in prison populations.²³⁰ A 2021 research report by Kharkiv Human Rights Protection Group conducted in Ukraine, found that LGBT people have the hardest time when involved in a conflict or ambiguous situation with the police.²³¹ This is especially the case when they are under control of the police and law enforcement agencies i.e. detained or deprived of liberty, when they are often subjected to physical violence and also deprived of meals, showers, play or sport, and are forced to do jobs such as cleaning toilets, as they are seen to ‘carry disease’. In this context they are also often subjected to extortion by law enforcement agencies and by other prisoners threatening them with ‘outing’, and in the case of the police with prosecution.²³² Studies from the American NGO Prison Policy Initiative conclude that LGBTQ people are overrepresented in American prisons and that they are subjected to especially harmful conditions behind bars.²³³ In this context, LGBTQ people of colour are even more vulnerable to higher sentencing and victimisation by officers and inmates while incarcerated, with black

²²⁷ Human Dignity Trust ‘Transgender people say law enforcement officials are main perpetrators of harassment, violence and abuse against them’ < <https://www.humandignitytrust.org/news/transgender-people-say-law-enforcement-officials-are-main-perpetrators-of-harassment-violence-and-abuse-against-them/>> accessed 16 of February 2022.

²²⁸ Human Dignity Trust (n 225).

²²⁹ Alexi Jones ‘Visualizing the unequal treatment of LGBTQ people in the criminal justice system’ (*Prison Policy Initiative* 2 March 2021) < <https://www.prisonpolicy.org/blog/2021/03/02/lgbtq/> > accessed 16 of February 2022.

²³⁰ Ibid.

²³¹ D. Kobzin and S. Scherban ‘Problems of discrimination and violence by law enforcement bodies against LGBT people. The results of qualitative research’ (*Kharkiv Institute for Social Research, Karkiv Human Rights Group* 2021) < <https://khpg.org/files/doc/1608811305.pdf> > accessed 16 of February 2022.

²³² Ibid.

²³³ Jones (n 227).

trans women topping the negative statistics.²³⁴ Discrimination and stigma as well as issues such as family rejection, poverty, unsafe schools, and employment discrimination are all factors contributing to criminalisation of sexually and gender diverse people, according to the Prison Policy Initiative study.²³⁵

Stigma and discrimination further affect sexually and gender diverse people in all areas of life including education, employment, and housing. Reports from UN human rights bodies point to active discrimination by education and school authorities, which refuse admission or expel young people because of their sexual and gender diversity.²³⁶ These groups also frequently experience bullying, violence, and harassment in schools from teachers and peers, and are subjected to discriminatory policies, teaching materials and practices.²³⁷ For example in 2021, 8 out of 10 books subjected to bans in US schools had LGBTQ+ related content.²³⁸ Persistent bullying and discrimination in school, often exacerbated by family and community rejections, can lead to poorer performance and limited opportunities later in life.²³⁹ Research from the International Labour Organisation (ILO) conducted in Argentina, Costa Rica, France, Hungary, India, Indonesia, Montenegro, South Africa and Thailand shows the range of violence and discrimination faced by sexually and gender diverse people in the employment sector.²⁴⁰ These groups face discriminatory hiring practices and also discrimination throughout employment.²⁴¹ In the more extreme cases, sexually and gender diverse people have been sexually and physically assaulted in the workplace.²⁴² The report also shows the prevalence of bullying, stereotyping, and invasive questioning in relation to their sexuality and gender.²⁴³ Trans

²³⁴ Jones (n 227).

²³⁵ Ibid.

²³⁶ Born Free and Equal (n 214), 61, 63, 65.

²³⁷ Ibid 61.

²³⁸ Meghan Olson 'Human Rights Campaign Foundation Releases List of LGBTQ+ Affirming Books In the Wake of Discriminatory Book Bans Across the Country' (*Human Rights Campaign* 16 of February 2022)

<<https://www.hrc.org/press-releases/human-rights-campaign-foundation-releases-list-of-lgbtq-affirming-books-in-the-wake-of-discriminatory-book-bans-across-the-country>> accessed 16 of February 2022,

²³⁹ Graeme Reid 'LGBTQ Inequality and Vulnerability in the Pandemic' (*Human Rights Watch* 18 June 2020) <<https://www.hrw.org/news/2020/06/18/lgbtq-inequality-and-vulnerability-pandemic>> accessed 16 of February 2022.

²⁴⁰ International Labour Organization 'Discrimination at work on the basis of sexual orientation and gender identity: Results of the ILO's PRIDE Project' (*International Labour Organisation* 15 of May 2015) <https://www.ilo.org/gender/WCMS_368962/lang--en/index.htm> accessed 16 of February 2022; Born Free and Equal (n 214) 63.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

people experience significant rates of exclusion from formal employment, of discrimination and harassment in the workplace, and discouragement from using bathrooms appropriate to their gender.²⁴⁴ Employment discrimination means that many sexually and gender diverse people find themselves restricted to certain kinds of work, often in the informal sector, with little or no security and no related benefits.²⁴⁵ Because of the discrimination and violence often experienced by sexually and gender diverse people in the education setting and in the employment sector, these groups are often trapped in cycles of inequality and poverty.²⁴⁶

Lack of access to housing is another factor affecting the precariousness of sexually and gender diverse lives.²⁴⁷ UN human rights bodies find that private landlords, credit providers and public housing providers both directly and indirectly deny access to housing or mortgages based on sexuality and gender diversity.²⁴⁸ While it seems to be difficult to estimate exact numbers, studies show that sexually and gender diverse people are more likely to experience homelessness. According to these studies, sexually and gender diverse people are estimated to constitute between 20-40% of the homeless population.²⁴⁹ According to the ILGA Europe survey in Europe and Central Asia, 10-20% of LGBTI youth (defined as under 24 or 30 depending on the homelessness organisation reporting) experience homelessness in these countries.²⁵⁰ According to this research, the primary reasons for homelessness in the LGBTI youth population are poverty, family rejection, trauma/mental health issues and migration/refugee status.²⁵¹ Other studies have found additional factors such as discrimination and stigma, racism, sexual abuse, substance abuse, physical illness such as HIV, engaging in

²⁴⁴ ILO (n 140).

²⁴⁵ Reid (n 237).

²⁴⁶ Reid (n 237).

²⁴⁷ Born Free and Equal (n 214) 64.

²⁴⁸ International Organization for Migration 'International Standards for the Protection of People with Diverse Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics (SOGIESC) in the Context of Migration' (*International Organization for Migration* May 2021) < <https://www.iom.int/sites/g/files/tmzbdl486/files/documents/InfoNote-International-Standards-Protection-of-People-with-Diverse-SOGIESC.pdf> > accessed 16 of February 2022

²⁴⁹ Brodie Fraser, Nevil Piers, Elinor Chisholm, Hera Cook 'LGBTIQ+ homelessness: A review of the literature' [2019] 16 (15) *International Journal of Environmental Research and Public Health* 1677.

²⁵⁰ J Shelton, A Ritosa, B Van Roozendaal, K Hugendubel and S.J Todd 'Perceptions: Addressing LGBTIQ Youth Homelessness in Europe and Central Asia – Findings from a Survey of LGBTI Organisations' (*ILGA-Europe, True Colors United and Silberman Center for Sexuality and Gender at Hunter College* 2021) < <https://www.ilga-europe.org/sites/default/files/Perceptions%20-%20ILGA%20Europe%20Compressed.pdf> > accessed 16 of February 2022.

²⁵¹ Ibid.

sex work, and lack of shelter accessibility all affect sexually and gender diverse homelessness.²⁵² Migrant sexually and gender diverse people are a particularly vulnerable population who often face 'hidden homelessness', meaning that they stay for short periods in temporary housing but ultimately face homelessness, according to the International Organization for Migration (IOM).²⁵³

A key sector where sexually and gender diverse people face discrimination, violence and abuse is in the medical and health sector. Historically sexually and gender diverse people have been pathologized, that is classified as disordered, ill, malformed, or abnormal, based on their sexuality, gender, and sex diversity.²⁵⁴ This history is not only the root cause of existing stigma and discrimination, but many sexually and gender diverse people continue to be pathologized today. Specifically, trans, gender diverse and intersex people are treated as ill, disordered, or malformed both medically and legally in almost all countries.²⁵⁵ Intersex children and adults are often subjected to unnecessary medical treatments aimed at 'normalising' their bodies.²⁵⁶ Trans and gender diverse people are often forced to undergo medical evaluations and treatments to be recognised according to their self-declared gender.²⁵⁷ These practices often include psychological evaluations, use of hormones, and gender reaffirming surgery.²⁵⁸ Further barriers to self-recognition are often imposed through lengthy and costly proceedings, and other abusive requirements such as being unmarried and undergoing forced sterilization.²⁵⁹ Pathologisation and stigma further impact access to healthcare for sexually and gender diverse people.²⁶⁰ Studies show that sexually and gender diverse people are less likely to access healthcare due to experiences of discrimination by healthcare professionals and medical personnel.²⁶¹ Furthermore, trans and gender diverse people do often not fit within the strict gender-based medical categories and have been denied access to life saving services such as

²⁵² Fraser, Pierce Chisholm and Cook (n 247).

²⁵³ International Organization for Migration (n 246).

²⁵⁴ Born Free and Equal (n 214) 56, 60.

²⁵⁵ Ibid 60.

²⁵⁶ Ibid 35-37.

²⁵⁷ Ibid 67.

²⁵⁸ Ibid 35-37.

²⁵⁹ Ibid 67.

²⁶⁰ Ibid.

²⁶¹ Stonewall 'Stonewall report reveals impact of discrimination on health of LGBT people' (Stonewall 2018) < <https://www.stonewall.org.uk/about-us/media-releases/stonewall-report-reveals-impact-discrimination-health-lgbt-people> > accessed 16 of February 2022.

cervical smears for trans men.²⁶² Significantly, sexually and gender diverse people often experience poorer health outcomes due to the social stigma and inequality they face, and show higher rates of mental health problems, substance abuse and suicide.²⁶³

One practice that falls between medical, religious, and familial/community violence is the practice of so-called conversion therapy. This practice aims to ‘change’ somebody’s sexual or gender diversity to heterosexual and cisgender, often initiated, paid for and supported by the family of the victims.²⁶⁴ Both medical and religious institutions engage in such practices, with ‘therapies’ ranging from talking therapy to electroshock, exorcisms, physical and sexual violence, injection of hormones and deprivation of food or liberty.²⁶⁵ Sexually and gender diverse people subjected to conversion therapies report long lasting physical and mental violence and trauma.²⁶⁶ In recent years, the practice of conversion therapy has been subject to increased scrutiny, with several countries having banning some practices of conversion therapy in all or parts of their territory.²⁶⁷ Nonetheless, despite the harm committed by these practices, only a few countries completely ban the practice in their territory; these are Brazil, Ecuador, Germany, Malta,²⁶⁸ Canada²⁶⁹ and recently France²⁷⁰ and New Zealand.²⁷¹

²⁶² Born Free and Equal (n 214) 56.

²⁶³ Jorge Medina-Martínez, Carlos Saus-Ortega, María Montserrat Sánchez-Lorente, Eva María Sosa-Palanca, Pedro García-Martínez and María Isabel Mármol-López ‘Health Inequities in LGBT People and Nursing Interventions to Reduce Them: A Systematic Review [2021] 18(22) Int J Environ Res Public Health 11801.

²⁶⁴ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Practices of so-called “conversion therapy”’ [2020] UN.Doc. A/HRC/44/53.

²⁶⁵ Ibid; Lucas Ramón Mendos ‘Curbing Deception: A world survey on legal regulaton of so-called “conversion therapies”’ (*ILGA World* 2020) <

https://ilga.org/downloads/ILGA_World_Curbing_Deception_world_survey_legal_restrictions_conversion_the_rapy.pdf>; Inge Snip ‘I was afraid I was going to die’: Kenyan Survivor of ‘conversion therapy’ (*OpenDemocracy* 12 of July 2021) <

<https://www.opendemocracy.net/en/5050/conversion-therapy-africa-lgbtq-survivors/> > accessed 16 of February 2022.

²⁶⁶ Ibid.

²⁶⁷ Stonewall ‘Which countries have already banned conversion therapy?’ (*Stonewall* November 2021)

<<https://www.stonewall.org.uk/about-us/news/which-countries-have-already-banned-conversion-therapy> > accessed 16 of February 2022.

²⁶⁸ Mendos (263).

²⁶⁹ ITV News ‘New Zealand passes law banning LGBT+ conversion therapy’ (*ITV News* 15 of February 2022) <

<https://www.itv.com/news/2022-02-15/new-zealand-bans-lgbt-conversion-therapy>> accessed 16 of February 2022.

²⁷⁰ ITV News ‘Being oneself is not a crime’: France bans gay conversion therapy with new law’ (*ITV News* 26 of January 2022) <

<https://www.itv.com/news/2022-01-26/france-bans-gay-conversion-therapy-with-new-law>>

accessed 16 of February 2022.

²⁷¹ Rachel Treisman ‘New Zealand just became the latest country to outlaw conversion therapy’ (*National Public Radio* 16 of February 2022) <

<https://www.npr.org/2022/02/16/1081139566/new-zealand-ban-conversion-therapy?t=1645531771189> > accessed 16 if February 2022.

In addition to the violence and discrimination experienced by sexually and gender diverse people, these groups are often prevented from being able to organize and participate in political processes to better their collective conditions. In some places, sexually and gender diverse people are legally prohibited from organising and distributing information, whilst in others they are de facto prevented from participating in these kinds of activities. For example, Russia passed an anti-LGBT ‘propaganda law’ in 2013 which made it illegal to equate straight and gay relationships and to distribute gay rights materials, in order to silence any public discussion or positive message about LGBT issues.²⁷² Latest reports from Russian LGBT activists are that, this legislation is used to restrict LGBT+ projects and initiatives, from banning Pride events to blocking LGBT+ organizations from being registered in the country.²⁷³ Furthermore, Russian Federal Security Services are misusing their power to identify ‘propaganda of non-traditional sexual relations’ online, even when it is not part of their mandate.²⁷⁴ Policing of online platforms and censorship of LGBT+ content on the internet is often used to target these groups, and according to a recent NGO OutRight Action study is on the rise globally.²⁷⁵ For sexually and gender diverse people who are often excluded, marginalised and stigmatised in their familial and community settings, online platforms are crucial to identify information and resources and connect with other sexually and gender diverse peoples.²⁷⁶ Being able to connect virtually can constitute a lifeline for many sexually and gender diverse people around the world and allows them to build advocacy and movement communities.²⁷⁷ Online censorship significantly obstructs the freedom of expression of LGBTIQ people, and often works to restrict and curtail the exercise of other rights such as access to information and development of human rights movements.²⁷⁸ In countries such as Saudi Arabia, 75% of all

²⁷² Miriam Elder ‘Russia passes law banning gay ‘propaganda’ (*The Guardian* 11 June 2013) <<https://www.theguardian.com/world/2013/jun/11/russia-law-banning-gay-propaganda>> accessed 16 of February 2022.

²⁷³ Elene Kurtanidze ‘Dismantling LGBT+ rights as a means of control in Russia’ (Perspectives 30 April 2021) <<https://freedomhouse.org/article/dismantling-lgbt-rights-means-control-russia>> accessed 16 of February 2022.

²⁷⁴ Ibid.

²⁷⁵ Outright International, The Citizen Lab and OONI ‘NO ACCESS. LGBTIQ Website Censorship in Six Countries’ (*Outright International, The Citizen Lab and OONI* 10 of August 2021) <<https://outrightinternational.org/content/no-access-lgbtqi-website-censorship-six-countries>> accessed 16 of February 2022.

²⁷⁶ Ibid.

²⁷⁷ Ibid

²⁷⁸ Ibid

LGBTQI URLs were blocked when tested, with Iran and United Arab Emirates blocking 75 and 51 unique LGBTQI URLs respectively.²⁷⁹ Another example is China, who recently blocked the LGBTQ rights groups on the country's biggest social media app.²⁸⁰ Beyond censorship, according to the OutRight Action research referenced above, in Russia as well as Iran and Saudi Arabia, members of law enforcement have posed as LGBTIQ people online to entrap sexually and gender diverse individuals, putting them at risk of arrest, exploitation and threats of violence.²⁸¹ Censorship often extends to the media, including banning advertisements featuring sexual and gender diversity (Hungary)²⁸² or excluding LGBT+ scenes and references from TV shows (China).²⁸³ Beyond online platforms, LGBTQ+ rights organisations often experience police surveillance and shutdowns. For example, the LGBT+ Rights Ghana Group experiences raids and closure of their Accra office by security forces.²⁸⁴

As a population which is vulnerable to discrimination, violence and inequality, the COVID-19 pandemic has had significant impact on sexually and gender diverse people. To begin with, directives to stay at home and isolate have led to an increase in violence committed against sexually and gender diverse people.²⁸⁵ Reports show an increase in violence by family and relatives as sexually and gender diverse people are confined to the home.²⁸⁶ In countries such as Iran, France, Montenegro and Italy, a significant increase in family violence has been reported during the pandemic.²⁸⁷ Because sexually and gender diverse people often rely on informal community networks for support, lockdown has led to further social isolation and exacerbated negative mental health outcomes.²⁸⁸ Furthermore, increased policing of public

²⁷⁹ Outright International, The Citizen Lab and OONI (n 275).

²⁸⁰ France 24 'LGBTQ right groups blocked on China's biggest social media app' (*France 24* 7 of July 2021) <<https://www.france24.com/en/live-news/20210707-lgbtq-rights-groups-blocked-on-china-s-biggest-social-media-app>> accessed 16 of February 2022.

²⁸¹ Outright International, The Citizen Lab and OONI (n 273).

²⁸² BBC News 'Hungary LGBT: Content aimed at children to be banned' (*BBC News* 11 of June 2021) <<https://www.bbc.co.uk/news/world-europe-57439699>> accessed 16 of February 2022.

²⁸³ BBC News 'Chinese sites accused of censoring LGBT content from Friends' (*BBC News* 13 of February 2022) <<https://www.bbc.co.uk/news/world-asia-china-60366628>> accessed 16 of February 2022.

²⁸⁴ Emmanuel Akinwotu 'Ghanaian LGBTQ+ centre closes after threats and abuse' (*The Guardian* 25 of February 2021) <<https://www.theguardian.com/global-development/2021/feb/25/lgbtq-ghanaians-under-threat-after-backlash-against-new-support-centre>> accessed 16 of February 2022.

²⁸⁵ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Covid-19'' [2020] UN.Doc. A/75/258.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

spaces has led to increased number of arrests of sexually and gender diverse people. For example, in Uganda, police detained and tortured some 20 homeless LGBT+ youth for ‘breaking COVID restrictions’.²⁸⁹ The International Commission of Jurists explains that the pandemic has generally increased the risk of persecution of sexually and gender diverse people, with some states intentionally targeting the LGBT+ communities under the guise of ‘public health’.²⁹⁰ Reports also show that strains on healthcare services have led in some cases to the ‘interruption or deprioritisation’ of services needed by sexually and gender diverse people, such as HIV treatments and testing or hormonal treatment and gender affirming treatment for trans people.²⁹¹ Disproportionate levels of homelessness and poverty among sexually and gender diverse people further expose these groups to higher risk of contracting COVID-19, while pre-existing stigma prevents access to healthcare, as discussed above.²⁹² For example, in Colombia a trans woman who had COVID-19 symptoms did not receive medical attention after the paramedics found out that she was a person living with HIV.²⁹³ The paramedics decided not to treat her, stating that she was probably suffering from an overdose, and she died 40 minutes after the paramedics left the house.²⁹⁴ Lastly, the practice of scapegoating sexually and gender diverse people²⁹⁵ by conservative political and religious movements has extended to the pandemic as well. Sexually and gender diverse people have been singled out as carriers of COVID 19.²⁹⁶ For example, in South Korea, a Christian newspaper linked the outbreak of a few COVID cases to gay men, unleashing a wave of hostility against the community.²⁹⁷ Sexually and gender diverse people of colour, as well as

²⁸⁹ Graeme Reids ‘Global Trends in LGBT Rights During the Covid-19 Pandemic’ (*Human Rights Watch* 24 of February 2021) < <https://www.hrw.org/news/2021/02/24/global-trends-lgbt-rights-during-covid-19-pandemic> > accessed 16 of February 2022.

²⁹⁰ International Commission of Jurists (ICJ) ‘Living Like People Who Die Slowly: The Need for Right to Health Compliant Covid-19 Responses’ (ICJ September 2020) 63 < <http://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf> > accessed 16 of February 2022.

²⁹¹ Ibid

²⁹² Ibid

²⁹³ Ibid

²⁹⁴ Ibid.

²⁹⁵ Commissioner for Human Rights ‘Pride vs. indignity: political manipulation of homophobia and transphobia in Europe’ (*Council of Europe Commissioner for Human Rights* 16 of August 2021) < <https://www.coe.int/en/web/commissioner/-/pride-vs-indignity-political-manipulation-of-homophobia-and-transphobia-in-europe?inheritRedirect=true> > accessed 16 of February 2022.

²⁹⁶ Reid (n 287).

²⁹⁷ Nemo Kim ‘South Korea struggles to contain new outbreak amid anti-gay backlash’ (*The Guardian* 11 of May 2021) < <https://www.theguardian.com/world/2020/may/11/south-korea-struggles-to-contain-new-outbreak-amid-anti-lgbt-backlash> > accessed 16 of February 2022.

migrants, are reported to face even higher rates of inequality and challenges during the pandemic.²⁹⁸

From this outline, it can be seen that sexually and gender diverse people face a significant range of violence and discrimination perpetrated by numerous actors, in varied settings, in a systematic and widespread manner. Moreover, as already vulnerable populations, sexually and gender diverse peoples are more likely to be subjected to further abuse in times of crisis such as the COVID-19 pandemic. Furthermore, the extent of violence and discrimination is likely to be higher as there are gaps in research and statistic on the real situation on the ground.²⁹⁹ As discussed in section 2.1 and 2.2, combatting this violence and discrimination forms one of the core arguments for the establishment and continued operation of the IE. Despite the latter, the IE is restricted in both time and resources; as discussed above it is an unpaid position, counting on limited support from UN institutions. The dichotomy between the extent of violence and discrimination committed against sexually and gender diverse people and the limited resources of the IE might impact the mandate holder's ability to address some of the deconstructive critical analysis proposed by queer postcolonial approaches. However, as suggested in some of the discussions above, violence and discrimination against sexually and gender diverse people are often exacerbated by the intersection of race. Notably, sexually and gender diverse people of colour and migrants are more likely to experience higher levels of discrimination and violence, poverty, and health inequality than their white counterparts.³⁰⁰ Furthermore, while the COVID-19 report by the IE

²⁹⁸ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Covid-19'' [2020] UN.Doc. A/75/258; Human Rights Campaign 'Research on LGBTQ People and the COVID-19 Pandemic' < <https://www.hrc.org/resources/research-on-lgbtq-people-and-the-covid19-pandemic> > accessed 16 of February 2022.

²⁹⁹ Transrespect Versus Transphobia (TVT) 'Trans Murder Monitoring Update- Trans Day of Remembrance 2021' (TVT 11th of November) available on < <https://transrespect.org/en/tmm-update-tdor-2021/#> > last accessed 16 of February 2022; Mark Bell 'Analysis and comparative review of equality data collection practices in the European Union: Data collection in relation to LGBTI people' (*European Union 2017*) < file:///Users/isabel/Downloads/report_on_equality_data_and_lgbt_people_7E662C39-037D-E4A0-3B0E67E7ADBFD052_45790.pdf > accessed 16 of February 2022; The World Bank 'sexual orientation and gender identity' < <https://www.worldbank.org/en/topic/sexual-orientation-and-gender-identity#1> > accessed 16 of February 2022.

³⁰⁰ See for example Transrespect Versus Transphobia (TVT) 'Trans Murder Monitoring Update- Trans Day of Remembrance 2021' (TVT 11th of November) available on < <https://transrespect.org/en/tmm-update-tdor-2021/#> > accessed 16 of February 2022; J Shelton, A Ritosa, B Van Roozendaal, K Hugendubel and S.J Todd 'Perceptions: Addressing LGBTIQ Youth Homelessness in Europe and Central Asia – Findings from a Survey of LGBTI Organisations' (*ILGA-Europe, True Colors United and Silberman Center for Sexuality and Gender at Hunter College 2021*) < <https://www.ilga-europe.org/sites/default/files/Perceptions%20->

is not analysed in chapters 6 and 7 it is important to underscore the importance of intersectional approaches emerging from the pandemic. Notably, the non-Western world is significantly at a disadvantage because of global economic structures that impact healthcare systems, access to vaccines and economic recovery.³⁰¹ The economic impact of COVID and its effect on non-Western sexual and gender diversity specifically, and the IE's response to these conditions, will be highlighted in the conclusion of this thesis as an area of interest for further research.

3. The Independent Expert to date: main approaches and achievements

From the discussions in section 2, several reasons emerge in terms of the importance of the IE with respect to the protection of sexually and gender diverse people. To begin with, the urgency in addressing the widespread and systematic violence against sexually and gender diverse at national and local level people, often by state authorities or with their acceptances, points to the need for an international human rights mechanism whose responsibility it is to challenge how state exercise power. The latter appears particularly important to civil society and people on the ground from the Global South who have, as discussed, been at the forefront of advocating for the IE.³⁰² Furthermore, as some of the states and NGOs discussed above have also pointed out, prior to the Independent Expert there was a 'protection gap'

[%20ILGA%20Europe%20Compressed.pdf](#)> accessed 16 of February 2022; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Covid-19' [2020] UN.Doc. A/75/258; Human Rights Campaign 'Research on LGBTQ People and the COVID-19 Pandemic' <<https://www.hrc.org/resources/research-on-lgbtq-people-and-the-covid19-pandemic>> accessed 16 of February 2022.

³⁰¹ Ruth Hill and Ambar Narayan 'What COVID-19 can mean for long-term inequalities in developing countries' (*World Bank Blogs* 7 of January 2021) <<https://blogs.worldbank.org/voices/what-covid-19-can-mean-long-term-inequality-developing-countries>> accessed 16 of February 2022; UN News 'COVID vaccines: Widening inequality and millions vulnerable' (*UN News* 19 of September 2021) <<https://news.un.org/en/story/2021/09/1100192>> accessed 16 of February 2022; Amnesty International UK 'COVID-19: G20 leaders must 'put aside greed and selfishness' to end vaccine inequality' (*Amnesty International UK* 16 of October 2021) <https://www.amnesty.org.uk/press-releases/covid-19-g20-leaders-must-put-aside-greed-and-selfishness-end-vaccine-inequality?utm_source=google&utm_medium=grant&utm_campaign=&utm_content=covid%20vaccine%20in-equality>

³⁰² OutRight Action International '689 NGOs from 151 Countries Call for a SOGI Independent Expert at the United Nations' (*OutRight Action International* 28 June 2016) <<https://outrightinternational.org/content/628-ngos-151-countries-call-sogi-independent-expert-united-nations>> accessed 20th of February 2022; ARC International 'Appointing an Independent Expert on Sexual Orientation and Gender identity: An Analysis of Process Result and Implications' (2016) ><http://arc-international.net/research-and-publications/research-and-analysis/>> accessed 20 February 2022, 11-12.

when it came to sexually and gender diverse people at international level.³⁰³ The joint submission by the 638 NGOs at the adoption of the mandate of the IE asked governments to ‘move beyond one-off initiatives’ and urgently address this ‘protection gap’.³⁰⁴ Before the IE, there was no specialised human rights instrument addressing violence and discrimination against sexually and gender diverse people. At the renewal of the mandate of the IE, South Africa pointed to the fact that the IE had made strides to address this ‘atrocious gap’ in protection of these groups through the implementation of the mandate.³⁰⁵

A key tool available to the IE in addressing violence and discrimination against sexually and gender diverse people, and exploring the protection gap for sexually and gender diverse people is the annual reports. As highlighted by the NGO Arc International, ‘the reports of the Independent Expert will (hopefully) produce new normative understandings and give greater depth to the notion that violence and discrimination on grounds of sexual orientation and gender identity are a core violation of the human rights framework.’³⁰⁶ As mentioned in section 1.3, in particular where there are no pre-existing legal documents, special procedures play an important role in developing and codifying human rights standards for protection in the annual reports.³⁰⁷ The reports also constitute key documents that are also used by other institutions in the struggles of sexually and gender diverse people at national and local level.³⁰⁸ Thus, the reports constitute important tools in addressing violence and discrimination committed against sexually and gender diverse people through human rights standards setting and their subsequent use by civil society, NGOs and other institutions and organisations. Furthermore, the reports explain the legal framework in which the mandate holders develop their work, giving important insights into the priorities and goals of the individual mandate holder. Recalling the analysis in chapters 2 to 4, queer postcolonial approaches are concerned with the way that human rights discourses privilege certain sexual and gender subjects to the exclusion of others. Because the reports contain the primary

³⁰³ OutRight Action International (n 302); ARC International (n 302).

³⁰⁴ Ibid.

³⁰⁵ Statement to the HRC by South Africa at the 40th Meeting 41st Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/41/L.10/Rev.1 - ‘Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’, webcast available < <https://media.un.org/en/asset/k1z/k1ztl1xy6v> > 00:28:34, accessed 20th of February 2022.

³⁰⁶ Arc International (n 138) 33.

³⁰⁷ Elvira Dominguez-Redondo (n 100). 548.

³⁰⁸ Golay and Cismas (n 2).

analysis of violence and discrimination, human rights protection, and main approaches on behalf of the Independent Expert, it is likely to inform the work of other institutions and groups, the reports form the main discourse on protection of sexual and gender diversity developed under the mandate. Therefore, these reports have been chosen for the purpose of the analysis in forthcoming chapters. Section 3.2 outline some of the main contributions to human rights standards setting by the IE's in the annual reports.

3.1 Mandate and Mandate Holders

In line with the general approach to the mandate of the special procedures, that of the IE is vague and open ended. In terms of substantive prescriptions, Resolution 32.2 requires the mandate to assess implementation of human rights instruments, identify root causes and address intersectional and aggravated forms of violence and discrimination based on SOGI.³⁰⁹ There is no more direction of, for example, the type of assessment the mandate holder should perform, or which human rights instruments should be considered. Moreover, there is no discussion or clarification of the meaning of 'root causes' or 'intersectional forms of violence'. There is no definition given of sexual orientation or gender identity leaving it open to the mandate holder to identify subjects of protection under the mandate. As will be discussed in depth below, through addressing these different requirements of the mandate the IEs have considered a range of questions relating to the protection of sexually and gender diverse people under international human rights law. In addition to raising awareness about violence and discrimination, most of the remaining prescription of the mandate considers cooperation with stakeholders, including states, UN agencies, other human rights mechanisms, and civil society.³¹⁰ Further, the mandate holder is asked to engage in technical assistance and capacity building to help support ending violence and discrimination based on SOGI.³¹¹ Lastly, there are references in the Resolution to the IE using the most common working methods of the Special procedures, including reporting to the General Assembly and the Human Rights

³⁰⁹ UNHRC 'Resolution Adopted by the Human Rights Council on 30 of June 2016 'Protection against violence and discrimination based on sexual orientation and gender identity'' [2016] UN.Doc. A/HRC/RES/32/2.

³¹⁰ UNHRC 'Resolution Adopted by the Human Rights Council on 30 of June 2016 'Protection against violence and discrimination based on sexual orientation and gender identity'' [2016] UN.Doc. A/HRC/RES/32/2.

³¹¹ Ibid.

Council as well as performing country visits.³¹² In line with the general rule for thematic mandates, the mandate is set to be reviewed every three years, and was extended in 2019.³¹³

To date the mandate has been held by two different IEs. Vitit Muntarbhorn was first elected for the post after the establishment of the mandate in September 2016. Vitit Muntarbhorn is a professor of law and has extensive experience in research, policy development, and advocacy in the field of sexual orientation and gender identity.³¹⁴ He was the Co-Chairperson of the drafting committee of the Yogyakarta Principles on the Application of International Human Rights Law in relation to sexual orientation and gender identity in 2006.³¹⁵ Muntarbhorn also had previous experience with special procedures, having served as Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea and as Special Rapporteur of the UN Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography.³¹⁶ However, after holding the mandate for only 14 months (August 2016 to October 2017) rather than the full three years expected, Muntarbhorn stepped down, leaving the mandate vacant for four months (October 2017-January 2018).³¹⁷ Before stepping down, the first IE laid six directions or focus points for the work of the mandate, which will be explored further below.³¹⁸ The second IE, and current mandate holder, is Victor Madrigal-Borloz who was appointed in late 2017.³¹⁹ Madrigal-Borloz is currently a visiting researcher at Harvard Law School's Human Rights Programme and has extensive experience with technical as well as litigation work with human rights cases at the Inter-American Commission and Court of Human Rights.³²⁰ With Muntarbhorn, Madrigal-

³¹² UNHRC 'Resolution Adopted by the Human Rights Council on 30 of June 2016 'Protection against violence and discrimination based on sexual orientation and gender identity'' [2016] UN.Doc. A/HRC/RES/32/2.

³¹³ Ibid.

³¹⁴ Biography from the UN Office of the High Commissioner on Human Rights available at: <<https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/VititMuntarbhorn.aspx>> access 8th of August 2021.

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc/ A/HRC/35/36.

³¹⁹ Biography from the UN Office of the High Commissioner on Human Rights available at: <<https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/VictorMadrigalBorloz.aspx>> accessed 8th of August 2021.

³²⁰ Biography from the UN Office of the High Commissioner on Human Rights available at: <<https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/VictorMadrigalBorloz.aspx>> (accessed 8th of August 2021).

Borloz has experience with the UN human rights framework, having been a member of the UN Subcommittee on Torture from 2013-2016.³²¹ During his work at the Subcommittee, he oversaw a draft policy on the torture and ill-treatment of LGBTI persons³²². Following the directions for the mandate laid by Muntabhorn, Madrigal-Borloz has both built upon and extended the original framework established for the special procedure by the first mandate holder.³²³

3.2 Main Approaches and Achievements

While Muntarbhorn did not have much time as a mandate holder, during his time, as mentioned he identified six key areas of concern that directed the work of the special procedures during the first years of the mandate.³²⁴ These six areas of consideration are: decriminalisation of adult same sex conduct and gender identity and expression; effective anti-discrimination measures; legal recognition of gender identity; destigmatisation and depathologisation, socio-cultural inclusion, and education with empathy.³²⁵ These topics have been the main subjects of analysis in the first five reports of the mandate and continue to appear, being included in the latest report on gender theory of 2021, which highlights the impact Muntarbhorn had on setting the direction of the special procedure.³²⁶ During his time

³²¹ Biography from the UN Office of the High Commissioner on Human Rights available at: <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/VictorMadrigalBorloz.aspx> (accessed 8th of August 2021).

³²² Ibid.

³²³ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity "Social inclusion"' [2019] UN.Doc. A/74/181; ³²³ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity "Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity"' [2019] UN.Doc. A/HRC/41/45; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity "Practices of so-called "conversion therapy"' [2020] UN.Doc. A/HRC/44/53; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity "The law of inclusion"' [2021] UN.Doc. A/HRC/47/27.

³²⁴ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/72/172; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/HRC/35/36.

³²⁵ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/72/172; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/HRC/35/36.

³²⁶ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity "Gender Theory"' [2021] UN.Doc. A/HRC/47/27, ¶136, p.10.

as a mandate holder, Muntarbhorn also conducted one country visit to Argentina in March 2017.³²⁷ Moreover, Muntarbhorn actively engaged with a range of stakeholders while seeking and drawing on information from a range of different sources when preparing the work of the mandate.³²⁸

Madrigal-Borloz has largely followed Muntarbhorn's approach when it comes to engaging with a range of stakeholders in the implementation of the mandate. For example, in preparation of the latest report on gender theory, the second mandate holder recorded 592 submissions from states, civil society as well as individuals.³²⁹ Several of these submissions were later used in the report by the IE when analysing multiple forms of oppression against gender diverse peoples.³³⁰ Madrigal-Borloz is also quite active when it comes to cooperating with stakeholders in the promotion of SOGI rights meeting with states, international and regional human rights bodies, and with activist and civil society organisations.³³¹ As mentioned, Madrigal-Borloz has followed the direction set by Muntarbhorn in the sense that he has continued to develop the analysis of the six areas of concern set by the first mandate holder. The second IE has also added additional areas of concern to the mandate, including negation and data collection, conversion therapy and gender theory. Madrigal-Borloz has conducted four country visits to date, respectively to Georgia, Mozambique, Ukraine, and Tunisia.³³²

While it is hard to measure the exact impact of the work by the IE holder on the ground, it is possible to trace some positive development in line with the work of the mandate holder. Since 2016 a range of legislative and policy changes have happened throughout the world. By

³²⁷ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc/ A/HRC/35/36, ¶15, p. 4.

³²⁸ End of Mission Statement by the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Mr. Vitit Muntarbhorn, of his visit to Argentina available at: <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21343&LangID=E>> accessed: 14 of March 2022.

³²⁹ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory' [2021] UN.Doc. A/HRC/47/27, ¶14, p.2.

³³⁰ Ibid.

³³¹ Ibid.

³³² Overview over country visits as well as the accompanying documentation is available from the UN Office of the High Commissioner on Human Rights available at: <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/CountryVisits.aspx>>(accesses 8th of August 2021).

way of example, some states have introduced SOGI within educational curriculums, added SOGI to non-discrimination legislation, provided reparation for historical violence committed against SOGI people,³³³ secured anonymity in the information gathering process ensuring protection for sexually and gender diverse individuals,³³⁴ and eliminated medical intervention in the process for recognising gender diverse individuals.³³⁵ However, it is difficult to be certain to what extent these changes are directly linked to the work of the mandate holder. In contrast, there are also areas of consideration under the mandate where very little progress has been made. For instance, the critique of conversion therapy has been consistent throughout the mandate from the first report in 2017.³³⁶ However, two years after, at the time of the submission of Madrigal-Borloz's report on the practice, only two countries (Ecuador and Malta) had banned conversion therapy in all their territory.³³⁷ Nonetheless, as seen in section 2.3, increased attention has been paid to the harmful nature of conversion therapy which has led to some more countries for example New Zealand to ban the practice.

Through their work, both mandate holders have given a greater insight into the violence and discrimination committed against sexually and gender diverse people internationally. Prior to the establishment of the mandate of the IEs, protection of sexually and gender diverse individuals had largely been established by human rights bodies that were not specifically focused on this topic.³³⁸ From the work by these bodies, five key human rights obligations had been previously identified: protection from homophobic and transphobic violence; prevention from being subjected to torture and cruel, inhuman, and degrading treatment because of a lack of conformity to social norms; decriminalisation of same-sex practices between

³³³ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43, ¶76, p.17.

³³⁴ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity'' [2019] UN.Doc. A/HRC/41/45, ¶51, p.16.

³³⁵ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶63-65, p.18-19.

³³⁶ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/HRC/35/36, ¶57-58, p.17.

³³⁷ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Practices of so-called "conversion therapy"' [2020] UN.Doc. A/HRC/44/53, ¶75, p. 18.

³³⁸ Ignacio Saiz 'Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN' [2004] 7.2 Health and Human Rights 48.

consenting adults; prohibition of discrimination based on SOGI, including barriers in accessing healthcare including forced psychological and/or physical treatment of homosexuality, transgenderism, or intersex individuals; and finally the respect for freedom of expression, association, and peaceful assembly, which extends to the limiting of these rights based on the SOGI of the participants.³³⁹ In line with the requirements of the mandate, both IEs have continued to assess and build on these existing human rights obligations under the mandate. More specifically, most of the first reports by the IE dealt in depth with non-discrimination, criminalisation, and medical pathologising, as well as mentioning or referring to instances of torture and infringements of political rights.³⁴⁰

Furthermore, both mandate holders have given greater depth to the analysis of violence and discrimination against sexually and gender diverse people as well as potential human rights solutions to the latter. For Muntarbhorn both socio-cultural inclusion as well as education and empathy are fundamental to ending violence and discrimination against sexually and gender diverse peoples.³⁴¹ Madrigal-Borloz, building on Muntarbhorn's analysis, has dedicated an entire report to the analysis of the meaning of socio-cultural inclusion for sexually and gender diverse peoples, and has identified specific human rights obligations in this regard.³⁴² The second mandate holder has further identified negation by states of the existence of sexually and gender diverse peoples as a human rights violation, and has identified, data collection as a key remedy to address the latter.³⁴³ In another report, Madrigal-Borloz has discussed the aforementioned conversion therapies, identifying the numerous human rights violations these practices entail.³⁴⁴ Both mandate holders have also made considerations in relation to experiential differences between sexually and gender diverse subjects depending on geopolitical location and other factors such as gender, age,

³³⁹ UNOCHR 'Born Free and Equal' (2019) UN Doc. HR/PUB/12/06/Rev.1 available at: <https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>.

³⁴⁰ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc/ A/HRC/35/36.

³⁴¹ Ibid.

³⁴² UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181.

³⁴³ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity'' [2019] UN.Doc. A/HRC/41/45.

³⁴⁴ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Practices of so-called "conversion therapy"' [2020] UN.Doc. A/HRC/44/53.

and class in line with the mandate's, reference to intersectional experiences of violence and discrimination.³⁴⁵ The IEs have also distinguished between sexual and gender subjects, identifying specific obligations especially in relation to the latter, such as legal recognition.³⁴⁶ Thus, the mandate holders have significantly contributed to a greater understanding of violence and discrimination in relation to sexually and gender diverse peoples under international law.

Conclusion

This chapter has examined the institutional framework for the IE, laying the groundwork for the analysis to come in chapters 6 and 7. The chapter started with an analysis of the special procedures system, outlining some of its key characteristics affecting the IE. This chapter examined the largely ad hoc development of the special procedures through the Commission on Human Rights and the increased institutionalisation of the mechanism through the work of the mandated holders themselves. Following this, I described the special procedures today including their establishment by the Human Rights Council, working methods, and impact on human rights protection around the world. Through this analysis I underscored the importance of the political support to secure the continued existence and impact on the ground of the special procedures. The section further highlighted the importance of the special procedures in developing the content and standard setting for human rights protection. Having outlined the key characteristics of the special procedures, Section 2 examined the establishment of the IE, pointing to some of the main political and on the ground challenges for the implementation of the mandate. In this section I examined the

³⁴⁵ UNHRC "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity" [2017] UN.Doc/ A/HRC/35/36; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27.

³⁴⁶ UNHRC "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity" [2017] UN.Doc/ A/HRC/35/36; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Legal recognition of gender identity and depathologisation'' [2018] UN.Doc. A/73/152; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27.

process of negotiation leading up to the adoption of the mandate of the IE, underscoring the efforts by non-Western NGOs in particular in ensuring its adoption. Furthermore, I outlined some of the main oppositions to the mandate, and these were explored in more depth in section 2.2. Section 2.3 examined the systematic and widespread nature of the violence and discrimination committed against sexually and gender diverse people. The analysis in section 2 highlighted the importance of using intersectional analysis in the interpretation and exploration of violence and discrimination committed against sexually and gender diverse people in light of the political and experiential circumstances for these groups.

Lastly, in section 3 I examined the mandate of the Independent Expert so far. This section began by considering the importance of the IE in addressing some of the protection gap for sexually and gender diverse people at the UN. Subsequently, I outlined the mandate of the IE and considered the experience of the two mandate holders to date. I also examined the main approaches and achievements of both Muntarbhorn and Madrigal-Borloz. More specifically I examined how both mandate holders has contributed to a better and more in depth understanding of the type, range, and causes of violence committed against sexually and gender diverse people at an international level.

Chapter 6. Critical Analysis of the Protection of Sexual Diversity in the Reports

Introduction

This chapter analyses the protection of sexual and gender diversity in the reports by the Independent Expert on Sexual Orientation and Gender Identity (IE).¹ Building on the discussion at the end of Chapter 4, the first section of this chapter examines intersectionality as the starting point of any analysis of sexual and gender-based oppression. The IE underscores a commitment to intersectionality from the beginning of the mandate and gives an in-depth explanation of what intersectionality means in the third report. From a queer postcolonial approach, intersectionality requires a re-orientation of the analysis towards non-Western sexually diverse peoples as the most marginalised in a global context. With this in mind, the analysis examines the approach by the mandate holders in the reports with an aim of identifying whether the definition of intersectionality in the reports achieves a queer postcolonial reorientation. The analysis finds three limits in the IEs discussion of intersectionality. First, the IE conflates intersectionality with structural analysis. Secondly, the IE seems to understand intersectionality as only requiring awareness of the effect of different social categories, rather than being a tool for recentring the analysis of oppression. Lastly, the IE's lack of commitment to engaging with intersections between race and sexuality limits the mandate's potential to centre non-Western sexually diverse peoples within it. Consequently, the IE's conceptualisation of intersectionality does not re-direct the analysis to non-Western sexually diverse people, as required by queer postcolonial approaches.

¹ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/72/172; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN. Doc. A/HRC/35/36; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' 'Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity' [2019] UN.Doc. A/HRC/41/45; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' 'Social inclusion' [2019] UN.Doc. A/74/181; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' 'Practices of so-called "conversion therapy"' [2020] UN.Doc. A/HRC/44/53.

The second part of this chapter examines the privileging of Western sexual identities throughout the reports of the IE. Chapter 4 underscored the need to shift the analysis of oppression from sexual categories to a structural one. This change would move the analysis away from the West and give a better account of the challenges faced by non-Western sexually diverse individuals and groups. Moreover, it would challenge the privileging of Western paradigms that leads to the exclusion of non-Western sexual diversity. The IE, though, as the analysis concludes, only refers to Western sexual categories in the analysis of oppression. The link between privileging of Western categories and orientalist structures of understanding is further explored in Section 1. In this part of the analysis, I identify two instances of orientalist approaches in the reports. First, the IE implicitly favours the Western saviour narratives of orientalism. Secondly, the mandate holder's implicit erasure of sexual diversity in the discussion of the local reinforces the orientalist civilised/barbarian dichotomy that erases the existence and visibility of non-Western sexually diverse peoples. The last part of Section 1 gives a brief analysis of sexual orientation as the other category used by the IE to identify subjects of human rights protection. In this analysis I examine whether 'sexual orientation' is less fixed, potentially opening the mandate up for a better representation of non-Western sexual diversity.

In Chapters 2, 3 and 4, queer postcolonial insights identify a number of causes of violence and discrimination against sexually diverse individuals and groups. In the reports, the IE offers other causes of violence and discrimination against sexual diversity. In the texts, these appear defined as 'root causes' by the mandate holders. Examples include criminalisation and pathologisation, and often go together with solutions, such as discrimination and adoption of non-discrimination legislation. Section 3 of this chapter analyses some 'root causes' proposed by the IE. This critical analysis of the root causes begins with an exploration of 'criminalisation' as defined in the reports. In this analysis I explore the potential limits of the IE's approach to criminalisation, highlighting some potentially dangerous effects of using sexual categories, restricting protection based on age and focusing on privacy. Secondly, I explore the report's linking of criminalisation to colonialism and sharia law, underscoring that this reference by the mandate holder is too restrictive to grapple with the consequences of colonialism on the oppression of non-Western sexual and gender diversity. Further in Section 3, I examine the IE's discussion of pathologisation as a root cause, concluding that it falls short from engaging

with all types of sexual pathologisation. The final part of Section 3 considers the report by the mandate holder on so-called 'conversion' therapies. In this section I explore some of the gaps in the analysis of the reports emanating from the lack of engagement with queer postcolonial causes of violence and discrimination, such as imperialism and medicalisation of sexual difference.

The final analysis of this chapter focuses on the 'solutions' to violence and discrimination offered by the IE, specifically non-discrimination legislation, data collection, and social inclusion. In this section on 'solutions' I start the analysis by considering non-discrimination legislation, drawing attention to some of the boundaries of this type of legislation to address some of the causes of inequality for non-Western sexual and gender diverse people. The second part of the analysis of this section examines data collection as discussed in the reports. Building on insights from Bal Sokhi-Bully's application of Foucault's paradigms of biopolitics to data collection,² the analysis considered the approach by the mandate holder to normalising sexual diversity. From the discussion I conclude that the normative impulse of data collection is restrictive from a queer postcolonial perspective as it ends up marginalising and victimising sexually diverse peoples, reinforcing rather than challenging heteronormativity. The last section of this chapter examines erasure of difference, victimisation and assimilation in the context of social inclusion as defined by the IE. Because the IE only considers sexually diverse peoples as victims while at the same time privileging Western paradigms, both the representation and celebration of queer postcolonial worlds become impossible under the mandate. The chapter ends with a reflection on the main conclusions that can be drawn from a queer postcolonial perspective, based on the analyses of this chapter.

² Bal Sokhi-Bulley 'Governing (Through) Rights: Statistics as Technologies of Governmentality' [2011] 20 (2) Social & Legal Studies 139.

1. Intersectionality

The Resolution establishing the mandate of the IE requires the mandate holder to address “intersecting and aggravated forms of violence and discrimination.”³ In the first reports referring to this part of the Resolution, Muntarbhorn underscores the mandates’ commitment to strengthen all human rights agendas, in particular ending racial discrimination and xenophobia and states: “... This introduces intersectionality between sexual orientation and gender identity on the other hand and other issues such as race and other forms of discrimination.”⁴

Chapter 4 examined intersectionality as a tool for re-orienting analyses of oppression. It argued that in a global setting, such as the one in which the IE operates, intersectional analysis requires taking a queer postcolonial approach. This would mean orienting the analysis of oppression towards non-Western sexual and gender diverse subjects as they are the most marginalised within a global episteme. In the reports, the mandate holder engages primarily with Western sexual categories (lesbian, gay and bisexual) while approaching other subjects through the lenses of intersectionality.⁵ The following analysis explores the IE’s approach to intersectional analysis in the reports. From the beginning of the mandate, the IE has underscored the importance of intersectionality to the analysis of violence and discrimination against sexual and gender diverse individuals. However, throughout the reports the intersectional analysis does not always shine through or take centre stage in the discussions. The lack of a real intersectional approach results in the exclusion of non-Western sexual and

³ UNHRC ‘Resolution Adopted by the Human Rights Council on 30 of June 2016 ‘Protection against violence and discrimination based on sexual orientation and gender identity’ [2016] UN.Doc. A/HRC/RES/32/2. ¶3 (e), p. 2.

⁴ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172, ¶19, p. 5.

⁵ The reference to Western sexual categories in the report is discussed in more depth below. But the first reports in particular underscores the link between these categories and the mandate, as well as outlining the Independent Expert’s approach to diversity through intersectionality. UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172, ¶16,9, p.4, 5; UNHRC “Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc/ A/HRC/35/36, ¶7, 21-22, p. 4-5, 8-

⁹UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/HRC/38/43, ¶22-25, p.6.

gender diverse peoples, as their experiences are compounded by race and imperialism and not sexuality and gender alone.

As mentioned, the IE firmly establishes a commitment to intersectionality early in the mandate. Following this, in the initial report the IE explains that “discrimination is also intersectional” pointing out patriarchy and racism as possible other factors that impact lesbians, refugees and migrants.⁶ A more in-depth explanation of the IE’s understanding of intersectionality appears in report number three.⁷ In this report, the IE reiterates the centrality of intersectional analysis to the mandate,⁸ and dedicates a section of the report to exploring the meaning of the term.⁹ In this section of the third report, the IE summarise three different ways that intersectionality is applied in the reports.

The first outline given by the IE of intersectionality relates to the request by the Human Rights Council Resolution that the mandate addresses multiple and aggravated forms of violence and discrimination.¹⁰ According to the IE, such an analysis requires a “multidimensional assessment of social factors combining to create an understanding of norms regarding sexuality, sex, and sexual attraction”.¹¹ Further, according to the IE, this “analytical process needs to take into account the fact that the crux of what is considered the norm for sexual orientation and gender identity in a particular context are notions of the binary and non-binary, the male and the female, the masculine and feminine.”¹² It is unclear why the IE considers the analysis of sexual and gender norms to form part of intersectionality. Intersectionality or intersectional analysis is supposed to re-orient the analysis of oppression to begin from the experiences of those that are most marginalised. While this will require the form of structural analysis of sexual and gender normativity that the IE advocates, such an analysis alone does not constitute intersectionality. If anything, an analysis of structures of oppression focused solely on sexual and gender normativity sits well within the single axis

⁶ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc A/HRC/35/36, ¶21, p. 8.

⁷ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/HRC/38/43, ¶ 22-25, p.6.

⁸ Ibid ¶ 18, p.5.

⁹ Ibid ¶ 22-25, p.6.

¹⁰ Ibid ¶ 22, p.6.

¹¹ Ibid.

¹² Ibid..

focus on oppression critiqued by Crenshaw.¹³ An example of the limits of single axis analysis has already been highlighted in Chapters 2 and 4, pointing to queer theories' failure to engage with race and imperialism and thereby marginalising the experiences of non-Western sexual and gender diverse individuals and groups in the analysis. The sole focus on sexual and gender normativity cannot explain the multiple forms of oppression of non-Western sexual and gender diversity. Advocating such a single focused structural analysis on sex and gender seems confusing, if not outright wrong, from an intersectional perspective. However, the IE seems to slightly remedy this single focus in the second interpretation of intersectionality.

In the second interpretation of intersectionality, the IE refers to doing actual intersectional analysis. The IE describes an “intersectional approach that remains aware of all the conditions that create substantively different life experiences... including race, ethnicity, religion or belief, health, status, age, class and caste, as well as migration and economic status.”¹⁴ While here the IE does touch upon aspects of ‘real’ intersectional analysis, the gaps in the understanding of what is required to do intersectional analysis become immediately obvious. The IE seems to understand that intersectional analysis requires “being aware” of the different conditions. In contrast with a queer postcolonial perspective, intersectional analysis requires shifting the starting point towards those that, within those different lived experiences, are the most marginalised and oppressed. This shift in focus forms the core of intersectional analysis and cannot be just an ‘awareness’ of difference in experience. Further, to do the type of intersectional analysis required by queer postcolonial approaches means analysing and engaging with all the different structural factors that underpin such different conditions. Rather than taking these differences for granted as something to be aware of, intersectional analysis means challenging the creation of these differences in the first place. Thus, a mere awareness of these is not enough to constitute intersectional analysis. The starting point of the analysis should be the experience of those affected by all these conditions which should be examined and challenged accordingly.

¹³ Kimberlé Crenshaw ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ [1989] U. Chi.Legal.F 140.

¹⁴ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/HRC/38/43, ¶ 23, p.6.

The IE's last key interpretation of intersectionality is probably the most disappointing, as the mandate holders inherently miss a great opportunity to engage with non-Western sexual and gender diverse people in the analysis. The IE refers to intersectionality of lived experiences, including "asymmetries between the urban and the rural, and the largely *unexplored* intersections with disability, racism, xenophobia or the cycles of violence that motivates persons to flee their country (emphasis mine)."¹⁵ This reference to the unexplored nature of the intersection between sexuality (as well as gender) is curious as intersectional analysis was very much born out of academic engagement with these intersections. As discussed in Chapter 4, Crenshaw's conceptualisation was at the core because of the racism black women faced socially, institutionally, and legally. Crenshaw's work can be contextualised within decades of feminist writing by women of colour. These women, including Audre Lorde and Gloria Anzaldúa, wrote extensively on the experiences of oppression and marginalisation due to race, gender, and sexuality.¹⁶

Gay authors of colour have continuously challenged pinkwashing and racism in white sexual activism.¹⁷ As analysed in Chapter 4, postcolonial theories already engage with sexuality and the effect of colonialism and imperialism on the sexual oppression of non-Western and non-white individuals and groups.¹⁸ Furthermore, queer postcolonial approaches have theorised extensively on racism and xenophobia's relationship with sexuality and gender. Thus, the submission by the IE that the relationship between race and xenophobia and gender and sexuality is unexplored is unfounded. Such an exclusion not only ignores the voices of those living and theorising at the intersection between race and sexuality but contributes to their re-marginalisation within dominant narratives. This approach by the IE raises further questions about the extent to which the mandate holders understand the responsibility of undertaking intersectional analysis. Even in the event of the intersections between race, sexuality and gender being unexplored, the IEs overlook the mandate's own potential in

¹⁵ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43, ¶ 24, 6.

¹⁶ See Gloria Anzaldúa *Borderlands/La Frontera: The New Mestiza* (1st ed. Aunt Lute Book Company 1987); Audre Lorde *Sister Outsider* (Ten Speed Press 1984).

¹⁷ See for example Joseph Beam eds. *In the life: A Black Gay Anthology* (2nd ed. Redbone Press 2008).

¹⁸ Frantz Fanon *Black Skin White Masks* (Translated by Charles Lam Markmann, new edition, Pluto Press 2008); Franklin E. Frazier *Black Bourgeoisie: The Rise of a New Middle Class* (Collier Books: 1962); Greg Thomas *The Sexual Demon of Colonial Power: Pan-African Embodiment and Erotic Schemes of Empire* (Indiana University Press 2007).

examining this overlap. Chapter 5 identified key tools available to the IE, some of which the mandate holders already use, that allow them to engage with sexual subjects from all over the world. Instead of grasping this opportunity, the IE seems to imply that there might be no need to explore these intersections in the reports, or that it is no possibility under the mandate to do so. The IE only recognises the “needs... of the largely unexplored intersection”,¹⁹ rather than giving an actual commitment to engage with and remedy those differences. The omissions in the mandate holders’ understandings of intersectionality risks excluding non-Western sexually diverse peoples as they are not centred in the analysis of the mandate.

2. Privileging of Western Identities in the Reports: Exclusion and Lack of Representation

This section examines the inclusion and exclusion of sexually diverse people in the reports through the analysis of the specific references made to certain categories and identities by the IE. The following analysis draws on the discussion of the application to and re-use of Western sexual categories by non-Western sexually diverse people from Chapter 4. Building on the considerations of Western sexual categories as not automatically representative of non-Western sexual diversity, the analysis argues that the mandate holder neither contextualises nor diversifies use of these categories under the mandate. Therefore, the IE does not sufficiently challenge the Western centrism of these categories in the analysis of the mandate. Furthermore, the analysis will explore to what extent the IE acknowledges and engages with non-Western sexual diversity in his references to sexual identities and categories. Representation of non-Western sexual diversity plays a key role in transcending this marginalisation and exclusion, as it renders legible a sexual diversity rendered invisible by dominant discourses.

In the reports, the IE clearly privileges Western sexual categories by only referring to lesbian and gay identities. At the beginning of the mandate, the IE stressed the importance of using a ‘balanced’ terminology.²⁰ However, ‘balanced’ in this case becomes almost immediately

¹⁹ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/HRC/38/43, ¶ 24, p.6.

²⁰ UNHRC “Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc/ A/HRC/35/36, ¶6, p.4.

limited by reference to a “close link” between the mandate and the LGB[T] acronym referring to lesbian, gay and bisexual.²¹ In contrast, queer postcolonial approaches are critical of the use of Western sexual identities in this way in a global context. From previous analysis there are several reasons why queer postcolonial approaches reject such an automatic linkage between the ‘universal’ and Western sexual categories. To begin with, the conflation between the universal and the West is a structure of understanding that is usually exclusionary towards non-Western thought, understandings and lived experiences.²² In the context of sexuality this exclusionary impulse also derives from the boundaries of construction of these categories themselves, which as seen in chapters two and four limits sexual (and gender) diversity through the fixation of sexuality in gender and identity.²³ While being critical of the use of Western sexual categories, queer postcolonial approaches also acknowledge the re-use of these identities by non-Western sexually diverse peoples to challenge oppression and marginalisation.²⁴ This re-working of categories by non-Western sexually diverse people both points to the diversity of lived experiences under the different identities and to how they can be adapted in different contexts. Furthermore, rather than being a mere instance of assimilation into Western categories, this active re-use and redefinition by non-Western people constitutes more of a hybrid challenge²⁵ to the fixity of the nationalistic and Western discourses which render these subjects invisible. However, as

²¹ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172, ¶7, 4; UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc/A/HRC/35/36, ¶6, 4.

²² Dipesh Chakrabarty *Provincializing Europe: postcolonial thought and historical difference* (Reissue with new preface by the author, Princeton University Press 2008) xiii; Leela Gandhi *Postcolonial Theory: A Critical introduction* (Columbia University Press 2019) 23-41, 42; William J. Spurlin ‘Broadening Postcolonial Studies/Decolonizing Queer Studies’ in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 186.

²³ Judith Butler *Gender Trouble: Feminism and the Subversion of Identity* (Routledge Classics 2006); Eve Kosofsky Sedgwick *Epistemology of the Closet* (New Preface 2008 ed. University of California Press 2008); Maaïke Bleeker ‘Of Passing and Other Cures: Arjan Everdeen’s Born in the Wrong Body and the Cultural Construction of Essentialism’ in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 129.

²⁴ Chong Kee Tan ‘Transcending Sexual Nationalism and Colonialism: Cultural Hybridization as Process of Sexual Politics in 90s Taiwan’ in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 123.

²⁵ Referring here to Bhabha’s notion of hybridity discussed in chapter 3. Recalling from that chapter hybridity denotes the process of negotiation between different authorities (both imperial and also nationalistic) that seek to fix racial, social differences and hierarchies that emerge in different historical contexts, creating opportunities for transformation. Homi K. Bhabha *The Location of Culture* (Routledge 1994) 2, 22-23.

these re-workings tend to be rendered invisible under dominant discourse that considers these categories to be exclusive representations of the Western sexual experiences, such re-workings should be acknowledged and celebrated. While later the IE later acknowledges ‘a difference in situation’ for lesbians and gays all over the world, this falls short of a recognition of the diversity in experience and use of these identities. Therefore, without contextualisation of the origin and boundaries and re-use of these categories, and by establishing a close link to these categories the IE appears to limit the consideration and representation of non-Western sexual diversity in the reports. The way that the use of lesbian and gay categories in the reports further marginalises and excludes non-Western sexual diversity is exemplified in the subsequent analysis.

2.1 Privileging and Negation

The consequences of the IE’s lack of engagement with and representation of non-Western sexual diversity is the erasure of these groups within other important parts of the reports. A clear example of this is the IE’s conceptualisation of negation as a root cause of violence and discrimination. The IE first introduced the idea of this concept in the report of May 2018 stating:

Negation is adopting the position that violence and discrimination based on sexual orientation or gender identity do not exist in a particular context or that, in a given social context, there are no lesbian, gay, bisexual, trans or gender non-conforming persons.²⁶

Following this statement, the IE immediately links negation to data collection as a tool in combatting the erasure of sexual diversity within national discourse.²⁷ Both parts, negation and data collection, are the sole subject of a later 2019 report by the IE.²⁸ As both are linked, the following discussion will touch upon on data collection and negation as a cause of human

²⁶ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/HRC/38/43, ¶ 62, p.14.

²⁷ Ibid 63-65, p.14.

²⁸ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ ‘Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity’ [2019] UN.Doc. A/HRC/41/45.

rights violations, while Section 4.2 below will explore data collection as a solution to violence and discrimination by the IE. Going back to the text of the report repeated immediately above, the IE seems to point to one of the key structures of exclusion in nationalistic discourses. Queer postcolonial approaches are critical of nationalistic discourses that create hierarchies and structures of oppression, in particular those underpinned by old colonial approaches to sexual diversity. In previous chapters, the traces of several colonial approaches to sexual diversity have been identified in nationalistic discourse. Firstly, the erasure of local sexual diversity per se as well as the favouring of masculine heterosexual subjects.²⁹ This [colonial] link between power and masculinity in particular, that is repeated in postcolonial nationalism, erases the possibility of the existence of non-Western sexual diversity.³⁰ At the same time it reinforces the battle between emerging nationalistic elites and former colonial powers.³¹ Here the nationalist elite denies the existence of any sexual diversity against Western orientalist narratives that inscribes Western sexuality onto the colonial population to further the image of Western superiority. With the latter in mind, the mandate holder not only fails to consider some of these complexities in his analysis of negation, but also reinforces the invisibility of non-Western sexual people by only referring to Western sexual categories (LGB), fuelling rather than challenging nationalistic and imperial discourses that use the latter categories strategically to negate the existence of local non-Western sexual diversity.

The privileging of Western sexual identities continues throughout the report which is dedicated to negation and data collection.³² The report is primarily focused on explaining how data collection gives insights into violence and discrimination and challenges negation.³³ Both in the reference to negation and throughout the rest of the report, only lesbian, gay and bisexual identities are used by the IE. There is no attempt at exploring the reasons for negation in the report, rather the text underscores how data collection can be used to identify instances of violence and discrimination. Interestingly, the IE identifies as an example of “best

²⁹ Hema Chari ‘Colonial Fantasies and Postcolonial Identities’ in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press: Albany 2001) 277, 283.

³⁰ Beth Kramer ‘The Double Nature of the Love triangle: Sedgwick, Greene and Achebe’ in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi: Amsterdam 2011) 115.

³¹ Ibid.

³² UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity’ [2019] UN.Doc. A/HRC/41/45.

³³ Ibid.

practice' of data collection that participants should be able to identify according to their self-understanding and not through imputation or proxy.³⁴ The IE continues to highlight that some of these identities transcend Western concepts, and these should be respected by the states in question.³⁵ However, while the IE acknowledges non-Western sexual diversity in the texts, he immediately restricts the importance of its existence to the local. Effectively, such identities are only significant to states where such diversity exists, but not to the mandate of the IE. As a consequence, Western sexual identities become the universal expression of sexual diversity in the reports, whilst non-Western sexual diversity is considered the particular, irrelevant at international level. By doing this the IE favours Western conceptualisations upholding the erasure of non-Western sexual diversity already embedded within Western sexual discourse.

By favouring Western sexual paradigms, the IE fails to understand negation as it forms part of orientalist discourses. As explored in depth in Chapter 4, it is not only nationalistic patriarchal narratives that erase non-Western sexual diversity.³⁶ Western sexual narratives are as complicit in this erasure as they deny agency and subjectivity to non-Western sexually diverse individuals and groups. Within these narratives the rest of the world becomes an object, but they can only exist as the projection of Western sexual narratives.³⁷ By favouring Western sexual identities, the IE becomes complicit in upholding Western orientalist discourse. Recalling the discussions in Section 1 above, a proper use of intersectionality would have required the IE to centre non-Western sexual diversity in the analysis of negation and data collection. Conversely, there are parts of the text of the report on data collection where

³⁴ Ibid ¶49, p.15.

³⁵ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity'' [2019] UN.Doc. A/HRC/41/45, Ibid ¶49, p.15.

³⁶ Murat Aydemir 'Introduction' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 9; Amar Wahab 'Homosexuality/Homophobia is Un-African?: Mapping Transnational Discourse in the Context of Uganda's Anti-Homosexuality Bill/Act [2016] 63.5 *Journal of Homosexuality* 685. Momin Rahman 'Queer Rights and the Triangulation of Western Exceptionalism' [2014] 13:3 *Journal of Human Rights* 274; Rahul Rao *Third World Protests: Between Home and the World* (OUP 2010) 173-195.

³⁷ Murat Aydemir 'Introduction' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 9; Joseph Boone 'Vacation Cruises; Or the Homoerotics of Orientalism' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 43.

the IE seem to actually resist doing intersectional analysis. In line with some omissions in the reports discussed above, the IE again reiterates the unexplored link between race, xenophobia and sexuality.³⁸ There is no attempt by the IE to explore this link in the report itself, furthering the exclusion of the experience of non-Western sexually diverse individuals and groups under the mandate. At the same time, as examined in Chapter 4, female non-Western sexual diversity is particularly subjected to negation and erasure due to the linkage of patriarchy and heterosexuality. While the IE highlights some challenges faced specifically by lesbian and bisexual women, in particular the higher percentage of experience of sexual and domestic violence,³⁹ and of murder of young trans women,⁴⁰ there is no attempt at engaging with gender as a structure of exclusion and marginalisation. By erasing non-Western sexual diversity within the report through the privileging of Western paradigms, the IE runs the risk of becoming complicit in upholding orientalist narratives.

2.2. Privileging and Orientalism

As mentioned in Chapter 4, sexual orientalism operates through a binary structure through which modern Western sexual subjects are situated against the backwards non-West, rendering invisible non-Western sexual diversity. This influence of this binary division becomes apparent in the texts when the IE underscores that the situation for lesbian, gay and bisexual people is heterogeneous and states: “The lack of awareness or understanding or knowledge, the biases and stereotypes vary between countries and within each country - depending on diverse factors such as geography (urban vs rural), demography (different educational and economic levels) and cultural affinity.”⁴¹ In this part of the text, while referring to difference in circumstances, the IE seems to exclude the possibility of consideration of the experience of sexually diverse individuals and groups beyond the LGB matrix. The focus is exclusively on the difference in perpetrators of violence, rather than the multiplicity of sexual subjects and their experience. By restricting the analysis of the local to

³⁸ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ ‘Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity’ [2019] UN.Doc. A/HRC/41/45, ¶15, 6.

³⁹ Ibid, ¶14, p.5

⁴⁰ Ibid, ¶ 32, p.11

⁴¹ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172, ¶18, p.7.

perpetrators per se, the IE further runs the risk of becoming complicit in imperial sexual discourse. A key part of imperial sexual discourse is the erasure of non-Western sexual individuality, favouring the orientalist stereotype of the culturally backwards other.⁴² In these discourses there is no room for non-Western sexual diversity as it can only be understood within Western sexual paradigms.⁴³ The underpinning structures in the homonationalist sexual discourses used by van Dalen and others, as outlined in chapter 4, are dependent on this binary division between modern sexual subject against backwards other.⁴⁴ By keeping the sexual subject fixed in Western lesbian and gay identities [modern and civilised] and focused solely on the perpetrators' [backwards and uncivilised] lack of awareness, understanding and knowledge, the texts fails to challenge homonationalism inherent in dominant Western narratives.

In this context, non-Western sexually diverse individuals and groups can only be understood through the Western lens (gay and lesbian) and only as victims of their own homophobic culture rather than subjects in themselves. The latter becomes even more clear in the IE's use of binaries to describe the differences between locations of prejudice and biases. According to the IE, lack of knowledge, biases, and prejudice can be understood through binaries such as urban/rural, educated/uneducated, rich/poor, sex/culture. As we have seen in different parts of this thesis, binaries are problematic as they structure reality according to fixed categories that are situated as hierarchically opposed to each other. Urban is better than rural, educated better than uneducated, rich better than poor and so on. Internationally this is significant because of the imbalance between Western and non-Western states, not only in terms of economy and infrastructure but also relating to the increased recognition of certain rights for some sexually diverse individuals. Therefore, implicitly the West is situated as a favoured place of human rights protection, even if the IE tries to counteract this

⁴² Aydemir (n 36) 9; Scott Long 'Unbearable witness: how Western activists (mis) recognize sexuality in Iran' [2009] 15.1 Contemporary Politics 119; Jasbir Puar, Amit Rai, 'Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots' [2002] 72 Social Text 117.

⁴³ Murat Aydemir 'Introduction' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 9, Joseph Boone 'Vacation Cruises; Or the Homoerotics of Orientalism' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 43.

⁴⁴ Murat Aydemir 'Introduction' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 9.

interpretation by acknowledging that violence and discrimination is not restricted to only some states. The IE explains:

Even countries that are party to the human rights treaties and even where there are responsive laws, policies and programmes there are sometimes major incidents of violence and discrimination, such as killings of transgender persons, attacks on sexual orientation and gender identity-related human rights defenders, and sexual orientation and gender identity-related hate speech on social networks...⁴⁵

2.3 Sexual Orientation

Seemingly interchangeably with 'lesbian' and 'gay', the IE refers to 'sexual orientation' in the reports. The term 'sexual orientation' has recently become the favoured term to advance the rights of sexual minorities under international human rights law,⁴⁶ and is foundational to the mandate of the IE. While the use of 'sexual orientation' in the report is not surprising, the meaning of the term is not necessarily immediately clear. Historically, the term sexual orientation was primarily used in biomedical science by researchers to subdivide human beings based on the object of their desire, male or female, into three categories: homosexual, heterosexual and bisexual.⁴⁷ Within this context, the scientist situated heterosexuality as the 'most common type' and sought explanations for the existence of homosexuals and bisexuals.⁴⁸ Thus, the term 'sexual orientation' has been used to reinforce the hetero/homo binary whereby one is acceptable and 'normal' (hetero), and the other (homo) abnormal and in need of explanation. Furthermore, sexual orientation is defined by the hetero/homo divide, pointing to the socio-political significance of this binary to the construction of sexuality in the West. Sedgwick explains:

⁴⁵ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/HRC/35/36 ¶133, p. 10.

⁴⁶ Matthew Waites 'Critique of 'sexual orientation' and 'gender identity' in human rights discourse: global queer politics beyond the Yogyakarta Principles' [2009] 15.1 Contemporary Politics 137.

⁴⁷ Tasmin Wilton, *Sexual (Dis-) Orientation: Gender, Sex, Desire and Self-Fashioning* (Springer 2004) 20.

⁴⁸ *Ibid* 20-21.

of the very many dimensions along which genital activity of one person can be differentiated from that of another (dimension that includes preference for certain acts, certain zones or sensations, certain physical types, certain frequency, certain symbolic investment, certain relations of age or power, a certain species, a certain number of participants etc. etc.) precisely one, the gender of object choice has remained as the dimension denoted by the now ubiquitous category of 'sexual orientation'.⁴⁹

Thus, the term 'sexual orientation' appears from the outset to be limiting from a queer postcolonial perspective. The term is defined according to the Western medicalised approach to sexuality, which not only fixes sexuality in the hetero/homo binary but also reinforces the socio-political and cultural significance of same-sex sexuality. Interestingly, sexual orientation is favoured in international law for being 'less' Western which, looking at the history of the term, does not hold true from a queer postcolonial perspective.⁵⁰ Western sexual categories are dependent on certain assumptions about gender and sexuality which are not necessarily applicable outside Western contexts. Because the IE has taken the time to define sexual orientation for the purposes of the mandate, the following analysis considered to what extent the definition is more flexible than that underpinning LGB identities. The IE explains: "Everybody has some form of sexual orientation...sexual orientation denotes a person's physical, romantic, and/or emotional attraction towards others."⁵¹

In addition to IE's definition of sexual orientation there is only one international instrument that offers a [legal] explanation of the term, namely the Yogyakarta Principles.⁵² The IE's construction of sexual orientation can be contrasted to the explanation in the principles as the latter has been critiqued for being not only fixed but also gendered in line with the historical understandings of sexual orientation.⁵³ The principles were drafted by international

⁴⁹ Sedgwick (n 23) 8.

⁵⁰ Waites (n 46).

⁵¹ UNHRC "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity" [2017] UN.Doc/ A/HRC/35/36, ¶13, p. 3.

⁵² International Commission of Jurists (ICJ) 'Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity' (March 2007) available at: <<http://yogyakartaprinciples.org/>> accessed 10th of June 2021.

⁵³ Waites (n 46).

human rights experts with the purpose of “[declaring the] existing state of international human rights law about issues of sexual orientation...”⁵⁴ While the principles are not binding upon states, they have attained a high degree of influence internationally. The principle’s definition of sexual orientation is twofold: principle 3 states: “Each person’s sexual orientation...is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”⁵⁵

Following principle 3 there is an explanatory footnote in the text of the Yogyakarta stating:

Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to as well as intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.⁵⁶

Following the language used in the Principles, sexuality appears as a distinct component in the identity of the self,⁵⁷ effectively upholding the fixity of modern sexual identities critiqued above. This is due to that part of the text that requires sexual orientation to be “integral to their personality and one of the most basic aspects of their self-determination and dignity.”⁵⁸ In contrast, the IE does not define sexual orientation in such clear essentialist terms, opting for a broader understanding by stating that “everybody has some form of sexual orientation”. Here, the term “some form” rather than “integral and basic aspect” implies a lower threshold of the meaning that sexuality has for each individual. If we recall the discussion in chapter 2, one of the key elements of the construction of the modern regime of sexuality was fixing sexuality in identity so that everything an individual did was ultimately affected by their sexuality.⁵⁹ By reducing the meaning that sexuality needs to have for each individual to be

⁵⁴ International Commission of Jurists (ICJ) ‘Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity’ (March 2007) available at <http://yogyakartaprinciples.org/> accessed 10th of June 2021.

⁵⁵ Ibid Yogyakarta principle 3.

⁵⁶ Ibid Yogyakarta principle 3. f.

⁵⁷ Aeyal Gross ‘Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?’ [2007] 101 Proceedings of the Annual Meeting (American Society of International Law) 129.

⁵⁸ Ibid.

⁵⁹ Michel Foucault *The History of Sexuality, Volume 1. An Introduction* (Translated from French by Robert Hurley, Phanteon Books 1978) 43.

recognised as a subject of the mandate, the IE opens up the possibility of inclusion of numerous individuals for whom their sexuality does not necessarily define their identity but are still oppressed by sexual structures. Further, the IE reference to “everybody” rather than “each person” is more inclusive as the term refers to “every person” while “each person” is used to refer to every one of two or more members of the set.⁶⁰ By not requiring a separate and identifiable group of individuals the IE challenges the fixity of sexual identities as they do not require the identification of a separate group for the purpose of being protected under the mandate. On the other hand, the term ‘sexual orientation’ was not historically limited to a specific group of people. As seen above, the term was applied to distinguish between different orientations that were fixed in gender. Thus, it is unclear how much of a radical break with the categorical approach to sexuality is achieved by this shift in emphasis by the IE.

Nonetheless, Yogyakarta principle 3 refers only to gender. The latter situates the principles in line with the gendered understanding of sexual orientation. The IE’s definition, on the other hand, is not explicitly gendered as it refers [only] to ‘others.’ While the term ‘others’ refers to ‘people in general’ rather than people of the same or different gender, this seems more open-ended than the Yogyakarta definition, in particular concerning individuals falling outside the gender binary. Unfortunately, neither mandate holder explores the circumstances where sexual and gender diversity intersect in one subject, so it becomes unclear if the report’s definition is intended to constitute a radical break with the semi-essentialism of the Yogyakarta principles.⁶¹ Yet the definition in the reports does transcend some of the limitations of the original medical definition of sexual orientation, as well as the one in the Yogyakarta principles.

This more open-ended definition in the reports could potentially be used as a tool to be more inclusive of non-Western sexual and gender diversity. As the definition is less fixed and removed from its primarily medical basis, the IE could refer to other non-Western sexual

⁶⁰ ‘Everybody, pronoun’ (OED Online Third ed. January 2018) available at: <<https://www-oed-com.sheffield.idm.oclc.org/view/Entry/65341?redirectedFrom=everybody#eid>> accessed 10th of August 2021; ‘each adj. and pronoun’ (OED Online Third ed. January 2018) available at <<https://www-oed-com.sheffield.idm.oclc.org/view/Entry/65341?redirectedFrom=everybody#eid>> accessed 10th of August 2021.

⁶¹ Waites (n 46).

identities and expressions as examples of 'sexual orientation', transcending the limits of LGB categories. However, from a queer postcolonial perspective, the IE should acknowledge the Western origin of the term and specifically work to diversify the meaning of 'sexual orientation' under the mandate.

3. Root Causes: Missing the Underpinning Structures of Oppression

Building on the insights from queer postcolonial analysis into the discursive oppression and marginalisation of non-Western sexual diversity, the following sections explore to what extent the IE considers these in his analysis of 'root causes' in the reports. The 'root causes' identified by queer postcolonial approaches point to the epistemological violence that underpins the type of violence and discrimination explored by the IE. Thus, if these structural causes of violence and discrimination are left unexplored and uncontested, the mandate can only achieve very limited freedom from oppression, discrimination, and violence of sexually diverse individuals and groups. The analysis above in this chapter has pointed to the lack of engagement in the reports with some root causes identified by queer postcolonial approaches such as orientalism. Nonetheless, the IE does sometimes, especially in the mandate's definition of 'root causes', touch upon some of the same structures critiqued by queer postcolonial approaches. The analysis begins exploring criminalisation as root causes of violence and discrimination identified by the IE. In the examination of criminalisation, the IE touches upon colonialism, an important structure of oppression identified by queer postcolonial approaches. Unfortunately, as the analysis will show, the IE does not engage with colonialism in any depth, missing the opportunity to identify the operation of imperial structures oppressing sexual diversity outside the West. The second part of this section on 'root causes' examines pathologisation as a root cause identified by the IE. While pathologisation has been determined by queer postcolonial approaches to cause oppression on the basis of gender, sexuality and race, the analysis does not coincide exactly with that of the IE. The Expert's account lacks any real challenge to the medicalisation of difference for the purpose of securing compliance with normalising regimes. The section also analyses

“conversion therapies” as a root cause of violence and discrimination, identified by the IE in the May 2020 report.⁶²

3.1. Criminalisation as a root cause of violence and discrimination

This section examines criminalisation as a ‘root cause’ of violence and discrimination identified by the IE. Recalling the analysis in chapter 5, criminalisation leaves sexual and gender diverse people outside the protection of the law and legitimises a range of acts of violence and discrimination against these groups. Arbitrary arrests, entrapments by public officials and private individuals, and torture by law enforcement including invasive anal examinations are committed on the back of criminal legislation. Moreover, lack of access to public services such as healthcare and lack of remedy and protection against private acts of violence such as forced marriages, rape, conversion therapy, and domestic violence were highlighted as some of the consequences of criminal legislation. Chapter 5 further outlined some of the types of criminal legislation used against sexual and gender diverse people including laws against ‘sodomy’, ‘unnatural offences’, ‘lesbianism’ or ‘sexual relations with persons of the same sex’. Gender diversity is often targeted by penal legislation against ‘cross-dressing’, ‘impersonation’ and ‘disguise’ and other criminal legislation against for example ‘vagrancy’, ‘hooliganism’ or ‘public order offences’ are used to target sexual and gender people as well. The IE touch upon these issues in the discussion of criminalisation in the reports.

In the reports, the IE condemns the use of such legislation to criminalise sexual and gender diverse people. Under the rubric ‘decriminalisation of consensual same-sex relations and gender identity (covering also gender expression), the IE outlines key issues that are recalled in subsequent reports.⁶³ The IE points to the number of states that criminalise consensual same-sex relationships between adults, and critiques the existence of laws to punish

⁶² UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Practices of so-called “conversion therapy”’ UN.Doc. A/HRC/44/53.

⁶³ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/HRC/38/43; UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity’ [2019] UN.Doc. A/HRC/41/45, ¶156, p.17;

transgender persons.⁶⁴ Specifically the IE refers to the number of countries criminalising same-sex relations, highlights existing differences between those states targeting just men and those targeting both men and women, as well as pointing to the use of the death penalty.⁶⁵ In addition the IE expresses concern for the use of legislation against ‘cross dressing’ or other public offences to criminalise gender diverse people, and the use of legislation against sex work, which relates to public decency or health and security to target both sexual and gender diverse groups.⁶⁶ Furthermore, the IE considers how criminalisation fuels stigma and prejudice and leads to a range of corollary human rights violations, from legitimising familial and institutional violence and discrimination to preventing HIV treatments.⁶⁷

Recalling the analysis in chapters 2, a concern in queer theory is the erasure of sexual and gender diversity from the public sphere. The IE does challenge the elimination of sexual and gender diversity in the public by condemning the use of criminal legislation to do so. For example, the IE states that: “...other laws and policies can have a disproportionate impact on the liberty and security of lesbian, gay..., such as those based on public decency, public morals, public health and security, and laws that criminalize conduct seen as ‘indecent’ or ‘provocative’”.⁶⁸ From a queer postcolonial perspective the reference to ‘lesbian and gay’ might be limiting in terms of the protection offered to sexual and gender diverse people that do not fit those categories. As critiqued elsewhere in this thesis, the categories of ‘lesbian and gay’ are not automatically representative of all sexual and gender diversity. Furthermore queer postcolonial approaches are concerned with these categories implicitly privileging a certain type of sexual and gendered person, that is white, cisgender and sexually normative beyond same-sex desires. It is unlikely that the IE would only wish to protect ‘normative’ ‘lesbians and gays’ from criminalisation in the public sphere, as the mandate holder clearly refers to the range of ways that people are targeted based on their sexuality and gender diversity. However, the primary reference to ‘lesbian’ and ‘gay’ subjects might unintentionally

⁶⁴ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN. Doc/ A/HRC/35/36, ¶31, p.11-12.

⁶⁵ Ibid, ¶31, p.11-12.

⁶⁶ Ibid, ¶31, 34, 11-12.

⁶⁷ Ibid, ¶32, 33, 35, 36, 11-13.

⁶⁸ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172; UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/HRC/38/43.

omit other sexual and gender diverse people from consideration. As with the general use of categories by the IE, there are risks of the marginalisation and exclusion of other types of sexual and gender diversity as they are not automatically acknowledged or represented by the use of such categories. Thus, the IE should better account for this diversity when considering criminalisation in the public sphere, instead of unnecessarily restricting the report by only mentioning 'lesbian and gay'.

Furthermore, the IE's approach to criminalisation in private raises some additional concerns from a queer postcolonial perspective. In the reports the IE explains that "The criminalization of consensual same-sex relations between adults of the same sex violates State's obligations under international law, including the obligation to protect privacy and to guarantee non-discrimination."⁶⁹ While as pointed to in previous discussions, same-sex sexuality has gained specific social and political importance over other sexual preferences, part of queer postcolonial approaches is to consider the oppression of this diversity beyond same-sex sexualities. Thus, while it is understandable that the IE is focused primarily on the criminalisation of same-sex acts, it is worth noting that there are other types of sexual preferences such as BDSM, celebrated by queer theorists in particular,⁷⁰ that are at risk of being subjected to criminalisation and state intervention, by potentially being left outside the definition given by the IE. The oppression of such sexual diversity is discussed further in the section below on pathologisation. Nevertheless, the reference to adults might unnecessarily restrict the protection offered by the obligation to decriminalise. In dominant medical discourse, challenged by queer postcolonial approaches, sexuality is often seen in a linear and sequential model premised upon stages of physical and psychological developments.⁷¹ This model is premised upon three stages of gender and sexual development.⁷² The first stage is

⁶⁹ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/72/172; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43., ¶132, p.12.

⁷⁰ As discussed in chapter 4, queer theorists such as Pat Califia and Carol Queen sometimes represent their own experiences with other sexual practices such as BDSM or gender-bending to challenge heteronormativity and homonormativity and to draw attention to the limits of essentialised sexual identities. Patrick Califia 'Gay Men, Lesbian and Sex: Doing It Together' in Annabelle Willox and Ian Morland eds. *Queer Theory* (Palgrave MacMillan 2005) 22; Carol Queen 'The Leather Daddy and the Femme' in Annabelle Willox and Ian Morland eds. *Queer Theory* (Palgrave MacMillan 2005) 40.

⁷¹ Steven Angelides 'Feminism, Child Sexual Abuse, and the Erasure of Child Sexuality' [2004] 10:2 GLQ 141.

⁷² Ibid.

childhood, in which gender identity is considered to be formed.⁷³ The second stage refers to adolescence, considered to encompass sexual fantasy and emerging erotic identity.⁷⁴ The final stage is that of adulthood in which sexual identity becomes fixed.⁷⁵ In these discourses adult sexuality is almost always understood as the final product of the transitional phase of childhood and adolescence.⁷⁶ In heteronormative discourses on gender and sexual development heterosexuality is idealised as the final result for adults, while childhood and adolescence are constructed with a certain impermanence and malleability.⁷⁷ Through this model of fixed adult sexuality and malleable child-adolescent sexuality, any pre-adult sexual and gender expression is subjected to evaluations of normality or abnormality.⁷⁸ Sedgwick has analysed how the heteronormative framing of sexuality engages categories of childhood and adolescence to explain how and when developmental ‘deviations’ such as homosexuality arise.⁷⁹ Thus, terms such as sexual experimentation or sex play are applied as regulatory practices through which one child’s erotic expression and experiences are seen as mere experimentation, while another’s are seen as pathological development. The only difference between the two children is the adult identity and the developmental narrative being forcibly or retroactively applied.⁸⁰ In light of the above the explicit reference to adult same-sex activity by the IE becomes problematic. As decriminalisation only applies to adults, criminal and other interventions in childhood and adolescence aimed at forcing heteronormative development might be left outside the protection, without any explicit reference and condemnation of the latter in the reports.

Secondly, from an intersectional queer postcolonial perspective there might be some harmful effects of centring the private sphere in the protection from criminalisation. Chapter 4 highlighted how colonialism spread patriarchal heteronormativity, favouring the masculine subject in the construction of the nation.⁸¹ In this context women hold a paradoxical position,

⁷³ Angelides (n 72)

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Angelides (n 72).

⁷⁸ Ibid.

⁷⁹ Eve Kosofsky Sedgwick ‘How to Bring Your Kids Up Gay’ in *Tendencies* (Duke University Press 1993) 154.

⁸⁰ Angelides (n 70).

⁸¹ Chari (n 29)185; Gayatri Gopinath *Impossible Desires: Queer Diaspora and South Asian Public Cultures* (Duke University Press 2005).

being considered private and ineffectual as well as worshipped, while at the same time being relegated to the private sphere.⁸² In places where women have limited access to the public sphere, the private sphere, the home can be a place where non-heteronormative desires can be experienced.⁸³ In these contexts female same-sex desire poses an important threat to patriarchal heteronormative nationalism. The representation through the different movies analysed renders evident the potentiality of the private sphere as well as the dangers of the public one. Deepa Metha's *Fire* renders evident how the private sphere allows for the evolvment and experience of same-sex desire between women.⁸⁴ The relationship between the women emerges within the family home in the notable absence of their husbands' operations in the public sphere.⁸⁵ The women are eventually forced out of the security of the private sphere by the betrayal of the servant.⁸⁶ A concern emerging from the literature is that the fixing of protection in the private sphere in these contexts will lead to the increased policing of the private sphere, jeopardising this as a safe space for women.⁸⁷ While the latter is clearly not the indendent effect of the IE, it is worth noting as a potential dangerous effect that should be taken into account in the reports. This conclusion also points to the need for greater contextualisation of the human rights standards proposed by the IE in the reports.

Having outlined some of the potential boundaries in the IE's approach to criminalisation, the following section considers some of the additional analysis made by the mandate holder in relation to the existence of penal legislation. Recalling the discussion in chapter 5, colonialism has had a disproportionate impact on the criminalisation of same-sex activities. The IE does make reference to this fact, as well as pointing to Islam when condemning the existence of criminal legislation. Both considerations by the mandate holder are subjected to critical analysis below.

⁸² Hema Chari 'Colonial Fantasies and Postcolonial Identities' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 277; Savina Balasubramanian 'Contextualising the Closet: Naz, Law, and Sexuality in Postcolonial India' [2016] 30 *Political Power and Social Theory* 135.

⁸³ Savina Balasubramanian 'Contextualising the Closet: Naz, Law, and Sexuality in Postcolonial India' [2016] 30 *Political Power and Social Theory* 135.

⁸⁴ Anikó Imre 'Lesbian Representation and Postcolonial Allegory' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 185.

⁸⁵ Anikó Imre 'Lesbian Representation and Postcolonial Allegory' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 185.

⁸⁶ Ibid.

⁸⁷ Balasubramanian (n 96).

a) Orientalism, Colonialism, Religion and Criminalisation

While in later reports there is not a fundamental change in the approach to criminalisation, the IE does add a reference to the origin of such laws. The report from May 2018 states: “These discriminatory laws derive from French or British colonial systems of justice or from particular interpretations of Sharia or Islamic law, and per se violate international law.”⁸⁸ This is the only time in the report that the IE refers to colonialism as playing a role in the oppression of sexual diversity. In contrast, queer postcolonial approaches understand colonialism as having impacted the oppression of non-Western sexual diversity in more ways than the just legislation. In particular, non-Western sexual diversity was pathologised and attempts were made to erase it by the colonial powers through civilising missions.⁸⁹ Moreover, because of the colonial relationship and the imposition of patriarchal heteronormativity, non-Western populations⁹⁰ have been forced to discard local sexual and gender diverse practices, including matrilineages and the adoption by postcolonial nationalistic elites and assimilatory middle-classes of Western heteronormative paradigms.⁹¹ Because the IE does not engage any further with colonial oppression of sexuality and its impact today, the mere reference to it allows for the continued naturalisation of Western heteropatriarchy as a universal structure of organising sexuality, rather than being a consequence of Western colonialism. Furthermore, the IE homogenises the situation of all these different postcolonial states rather than examining the diverse reasons why these laws continue to be in place.

Notably, while the IE refers to both French and British legislation, French colonialism did not leave the same institutional legacy of criminalisation of same-sex relations as the British.⁹²

⁸⁸ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/HRC/38/43, ¶ 52, 12.

⁸⁹ Anne McClintock *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (Routledge 1995); Ann Laura Stoler *Race and the education of Desire: Foucault’s History of Sexuality and the Colonial Order of Things* (Duke University Press 1995); Haley McEwen ‘Inventing the Family: Colonial Knowledge of the Politics of “Family” and the Coloniality of “Pro-Family” Activism in Africa’ [2021] 67.4 *Africa Today* 31.

⁹⁰ Ann Laura Stoler *Race and the education of Desire: Foucault’s History of Sexuality and the Colonial Order of Things* (Duke University Press 1995) 95-110; Frantz Fanon *Black Skin White Masks* (Translated by Charles Lam Markmann, new edition, Pluto Press 2008) 111; Greg Thomas *The Sexual Demon of Colonial Power: Pan-African Embodiment and Erotic Schemes of Empire* (Indiana University Press 2007) 83-89.

⁹¹ Greg Thomas *The Sexual Demon of Colonial Power: Pan-African Embodiment and Erotic Schemes of Europe* (Indiana University Press, Bloomington and Indianapolis 2007) 66.

⁹² Enze Han and Joseph O’Mahoney, ‘British colonialism and the criminalisation of homosexual conduct’ [2014] 27:2 *Cambridge Review of International Affairs* 268-288.

After the French Revolution in 1791 sodomy between over-age consenting adults in private was decriminalised in the French Penal Code, which was spread through its colonial empires.⁹³ The British Empire on the other hand, from 1860 onwards, spread a specific set of legal codes criminalising sex between men in its colonies.⁹⁴ Out of the 69 countries that currently criminalise homosexuality⁹⁵ over half are former British colonies.⁹⁶ However, the legal and non-legal circumstances in these countries are not the same, with only some of these countries, such as Kenya, Uganda, and Singapore, maintaining the original British legislation.⁹⁷ Even in the latter cases where the link to British colonial legislation is direct, it is unclear why the current governments of these countries continue to maintain the criminal legislation.⁹⁸ Homogenising all these different circumstances under the same blanket reference to colonialism without further explanation allows for the operation of orientalism. Linking these countries to colonialism implies a level of 'backwardness' or 'un-modernness' for their inability to surpass colonialism. Against all these countries, the West then appears as 'advanced' and 'modern' because they have surpassed criminalisation in their legislation. While this might be an unintended consequence in the IE's discussion, it exposes the impact that orientalism has in contemporary discourse.

There might be an argument for the IE pointing to colonialism to challenge nationalistic homophobia, as the reports appear to implicitly attempt to do in other places, such as through the discussion of negation. As analysed previously, nationalistic homophobia often relies on rejecting sexual diversity through arguing that it is a purely Western phenomenon and therefore inapplicable locally.⁹⁹ Recalling the colonial root of criminalisation could therefore

⁹³ Ibid.

⁹⁴ Ibid; Corinne Lennox and Matthew Waites 'Human rights, sexual orientation and gender identity in the Commonwealth: from history and law to developing activism and transnational dialogues' in Corinne Lennox and Matthew Waites eds. *Human Rights Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (Institute for Commonwealth Studies, London 2013) 15.

⁹⁵ Equaldex 'Equality Index' available at: <<https://www.equaldex.com/issue/homosexuality>> accessed 15th of September 2021.

⁹⁶ Corinne Lennox and Matthew Waites 'Human rights, sexual orientation and gender identity in the Commonwealth: from history and law to developing activism and transnational dialogues' in Corinne Lennox and Matthew Waites eds. *Human Rights Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (Institute for Commonwealth Studies, London 2013) 5.

⁹⁷ Enze Han and Joseph O'Mahoney *British Colonialism and the Criminalisation of Homosexuality: Queens, Crime and Empire* (Routledge: New York 2018) 10.

⁹⁸ Ibid.

⁹⁹ Anthony Tirado Chase 'Human rights contestations: sexual orientation and gender identity' [2016] 20:6 The International Journal of Human Rights 703; Amar Wahab 'Homosexuality/Homophobia is Un-African?':

constitute an attempt at identifying homophobia as a Western phenomenon as well. Colonialism played an important role in the cultural spread of homophobia and heteronormativity.¹⁰⁰ Consequently, the broader cultural and ideological effects deriving from colonial education, such as hypermasculinity and patriarchal heteronormativity, should be challenged more broadly as well. Unfortunately, without a clear reference and broader discussion the different oppressive effects of colonialism affecting criminalisation and homophobia today are rendered invisible under the mandate. Further, because the IE is complicit in maintaining the orientalist binary between the non-West and the rest it is unclear whether the linkage between criminal legislation and colonialism is a call for ‘modernisation’ instead.

As with the reference to colonialism, the mention of Islam raises questions from queer postcolonial perspectives. Returning to the analysis in chapter 4, Islam has become the primary enemy of Western sexual liberty in contemporary discourse.¹⁰¹ The analysis by Aydemir, examined previously, underscored the discursive construction of the straight and homophobic Muslim other in American and European political discourse exemplified in van Dalen’s condemnation of the execution of the two Iranian boys.¹⁰² By only referring to Islam in the context of criminalisation (oppression) and not engaging with orientalism, the IE seems to legitimise such contemporary orientalist discourse. In the report ‘Practices of so-called “conversion therapy”, the IE offers a more nuanced view of religion as being susceptible to be used for oppressive or subversive purposes.¹⁰³ For example the mandate holder explains that “there is no correlation between religion and exclusion of sexual orientation and gender identity” and acknowledges that some religions communities welcome sexual and gender diverse peoples.¹⁰⁴ However, this discussion of religion is generalised and there is no specific reference to Islam to remedy this already implicitly constructed link between Islam and

Mapping Transnational Discourse in the Context of Uganda’s Anti-Homosexuality Bill/Act’ [2016] 63.5 Journal of Homosexuality 685.

¹⁰⁰ Chari (n 29), Imre (n 100).

¹⁰¹ Ibid.

¹⁰² Aydemir (n 36) 17.

¹⁰³ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Practices of so-called “conversion therapy”’ [2020] UN.Doc. A/HRC/44/53.

¹⁰⁴ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Practices of so-called “conversion therapy”’ [2020] UN.Doc. A/HRC/44/53 ¶168, p. 16.

oppression in the mandate. Thus, the reference to Islam is therefore not only unfortunate, it is not clear what purpose it really serves, besides at best coinciding with and at worst legitimising contemporary orientalist narratives. It further renders the risk of re-marginalising non-Western sexually diverse Muslims as they become trapped between homophobic religious fundamentalism and Islamophobic Western sexual narratives.

This underpinning dichotomy between the West and its homogenised other can be identified in other parts of the reports as well. In particular, in the IE's 2019 report to the General Assembly it becomes evident that only anti-LGBT rhetoric is seen as oppressive to sexual diversity.¹⁰⁵ In this report under the section on 'backlash' the IE highlights that ultraconservative and ultra-nationalistic groups are encouraged in the construction of LGBT peoples as 'others', preventing the development of LGBT inclusive legislation.¹⁰⁶ Because in orientalist discourse, sexual diversity can only exist if assimilated into Western narratives, the pitting of LGBT identities against homophobic discourse contributes to the erasure of non-Western sexual diversity. Disappointingly, there is no consideration of the use of sexual rights in Western discourse to delegitimise and oppress non-Western populations, furthering imperialistic discourses. Because such discourses are just as complicit in erasing non-Western sexual diversity and are sometimes complicit in homonationalism and pinkwashing, these should also be challenged by the IE. Further, in line with the orientalist inscription of Western sexuality in particular on 'Arab men'¹⁰⁷ the IE makes some interesting references to the Middle East in the 2019 report to the General Assembly.¹⁰⁸ Under the rubric *dynamics of inclusion* the IE explains that:

¹⁰⁵ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181, ¶34-35, 10.

¹⁰⁶ Ibid, ¶34-35, 10.

¹⁰⁷ Referring to homoeroticism as discussed in Chapter 4: Joseph Boone uses homoeroticism to describe how male homoerotic fantasies became a powerful tool in the subordination of men by men. Thus, homoeroticist narratives inscribing abominable homosexuality on the [often colonised Egyptian and Arab] other served competing colonial interests, including some connected to Western white male anxieties around their own sexualities. See Joseph Boone 'Vacation Cruises; or, The Homoerotics of Orientalism' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 43.

¹⁰⁸ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181, ¶ 62, 15.

Self-unawareness, self-hatred and lying should not be encouraged by any societal norm or forced on any person as the only way to avoid violence and discrimination. These dynamics appear more marked in regions in which negation is more common: a recent survey conducted by the online dating application Grindr among gay men in the Middle East and North Africa region revealed that 71 per cent of respondents concealed their sexual orientation from their families.¹⁰⁹

Here the IE comes very close to some contemporary homoorientalist rhetoric explored by Boone and discussed in Chapter 4.¹¹⁰ Going back to that discussion, Boone highlights how Western sexual narratives inscribe Western sexual identities on Arab men, underscoring their desire to be with Western men who can provide secrecy to their relationship.¹¹¹ In the quote above, the IE points both to the identification of subjects as gay and also to their lives in secret. Whilst the IE's conceptualisation might derive directly from the survey itself, there is no attempt to understand the actual circumstances of those men in the Middle East and North Africa. The IE's reference, however, assumes that 'coming out' or being out is a necessity for every sexually diverse individual.¹¹² The narrative with the closet and 'coming out' that the IE seems to point to is the result of a specific Western conceptualisation in contemporary [Western] gay and lesbian thought.¹¹³ The operation of privacy as a place of shame and fear is not as prominent outside the Western context.¹¹⁴ Consequently, the inscription of not only an identity and the specific conceptualisation of privacy as necessarily linked to self-unawareness, self-hatred, and lying enforces a Western conceptualisation on a non-Western sexually diverse subject. Such an inclusion not only maintains orientalist narratives in international sexual politics but also erases any opportunity to actually engage with non-Western sexual diversity under the mandate.

¹⁰⁹ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181, ¶ 62, 15.

¹¹⁰ Boone (n 37).

¹¹¹ Ibid.

¹¹² Balasubramanian (n 96).

¹¹³ Balasubramanian (n 96).

¹¹⁴ Ibid.

3.2. Pathologisation

The second root cause of violence and discrimination subject to analysis in this section of the chapter is pathologisation. The IE first mentioned pathologisation as a root cause of violence and discrimination in first report in relation to access to healthcare, decriminalisation, pathologisation of gender diversity, and medical classification of disease. The first report also contains a specific section on pathologisation as a root cause of violence and discrimination and a subsequent report makes brief references to this.¹¹⁵ Only in the last report on conversion therapy is pathologisation re-examined more in depth and this, will be discussed in section 3.3 below. Building on previous analysis, medicalisation of Western societies can be identified as a source of multiple oppressive structures affecting sexuality, gender, and race. Two insights are relevant to the following analysis: psychiatric and medical disciplines' complicity in creating categories of normal and abnormal sexual behaviour, and gender identification to secure compliance with heteronormativity; these sexual discourses have been used to pathologise non-Western populations because of their race, intimately linking sexual and racial categorisations in systems of oppression and exclusion. Drawing on the insights from these previous chapters the following analysis explores the IE's discussion on depathologisation, pointing to the gaps in protection of all sexual diversity. In particular, the next part of this section explores the International Classification of Diseases (ICD), as it is centred in the report's approach to depathologisation of both sexuality and gender (discussed in chapter 7).¹¹⁶

¹¹⁵ UNHRC "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity" [2017] UN.Doc/ A/HRC/35/36, ¶158, p. 17; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/72/172, ¶1, p. 3; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43, ¶17, p. 5; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' 'Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity' [2019] UN.Doc. A/HRC/41/45, ¶12, p. 5; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' 'Social inclusion' [2019] UN.Doc. A/74/181, ¶ 19, 23, p. 25-26.

¹¹⁶ UNHRC "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity" [2017] UN.Doc/ A/HRC/35/36, ¶158, p.17; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶10-16, p. 4-6.

Sexual deviation first appeared in the ICD-6 in 1948 as a sub-category of 'pathogenic personality'.¹¹⁷ It regrouped a number of non-reproductive sexual behaviours including exhibitionism, fetishism, homosexuality, pathologic sexuality, and sadomasochism. The latter were considered to be the result of having a pathological personality that would be to some extent the cause of the pathological behaviour in sexual deviations. These deviations were clearly distinguished from other types of sexual dysfunctions such as erectile disorders, that were considered not to derive from personality disorders. In the ICD-8 (1965) the structure of sexual deviations was revised to constructing homosexuality (both male and female) as an extended category that included paedophilia, sodomy, exhibitionism, as well as transvestitism and fetishism. Homosexuality continued to make up the paradigmatic model of deviant sexual behaviour associated with pathologies of the personality. In 1975, the term sexual deviation gained a precise definition with the publication of category 302 in the ICD-9:

Abnormal sexual inclinations or behaviour, which are part of a referral problem. The limits and features of normal sexual inclination and behaviour have not been stated absolutely in different societies and cultures but are broadly such as serve approved social and biological purposes. The sexual activity of affected persons is directed primarily towards people not of the opposite sex, or towards sexual acts not associated with coitus normally, or toward coitus performed under abnormal circumstances...¹¹⁸

This definition of sexual deviations implied that these behaviours did not serve biological and social purposes or normal sexual behaviour, situating sexual deviations as an intermediate disorder falling between the violation of the social order, moral faults and the non-psychotic personality.¹¹⁹ However, this definition of sexual deviations was short-lived, with the arrival

¹¹⁷ Alain Giami 'Between DSM and ICD: Paraphilias and the Transformation of Sexual Norms' [2015] 44 Arch Sex Behav 1127.

¹¹⁸ World Health Organisation (WHO), *The ICD-9 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (World Health Organisation) 1985, category 309 cited in Alain Giami 'Between DSM and ICD: Paraphilias and the Transformation of Sexual Norms' [2015] 44 Arch Sex Behav 1127.

¹¹⁹ Alain Giami 'Between DSM and ICD: Paraphilias and the Transformation of Sexual Norms' [2015] 44 Arch Sex Behav 1127.

of the notion of paraphilia in the 1990s ICD-10.¹²⁰ The term paraphilia marked a shift in the understanding of sexual disorders whereby the criterion of heteronormative reproduction was no longer considered sufficient for understanding deviant sexual behaviours. The latter change can be situated within socio-political developments in the twentieth century. The sexual liberation movement in the 1960s and 70s legitimised non-reproductive and non-marital sex life.¹²¹ The recognition of development of hormonal contraception, the depathologisation of homosexuality by the American Psychiatric Association in 1973, and the recognition of masturbation as a practice to better understand one's erotic body changed social norms on sexuality, with issues of well-being and consent becoming central in the social regulation of sexual acts.¹²² The term paraphilia was first proposed in the 1930s by Stekel, who considered the phrase to encompass two domains: fetishism and sadomasochism,¹²³ but he did not consider homosexuality to constitute a paraphilia.¹²⁴ The term paraphilia was popularised by American Sexologist Money in the 1990s. Money used the term to refer to sexual interest that he considered to be 'unusual' because the behaviours were not within the confines of a loving and romantic heteronormative relationship.¹²⁵ Money did not consider non-reproductive sexual desires and acts to be the primary reason for sexual deviance. For Money, sexual deviance derived from a dissociation between sexual pleasure and love.¹²⁶ Money was not the only one who considered that the criterion of reproduction was no longer sufficient for understanding unusual sexual behaviour.¹²⁷ Thus, to understand 'unusual sexual behaviours' it was necessary to introduce other criteria such as 'personal distress, hatred, the desire of harm or a criminal dimension'.¹²⁸ The introduction of paraphilia in the ICD-10 can be situated within larger socio-political and theoretical developments which no longer considered non-reproductive sexuality as the primary reason for sexual deviance.

¹²⁰ World Health Organization (WHO), *The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (World Health Organization 1990) available at: <https://icd.who.int/browse10/2019/en> last accessed 15th of September 2021, F65.

¹²¹ Alain Giami 'Between DSM and ICD: Paraphilias and the Transformation of Sexual Norms' [2015] 44 Arch Sex Behav 1127.

¹²² Ibid.

¹²³ Ibid; Nick J. Mulé 'Regulation of Kink and BDSM: Pathologisation through Diagnostic Tools' in SJ Dodd ed. *The Routledge International Handbook of Social Work and Sexualities* (Routledge 2021) 527.

¹²⁴ Giami (n 137).

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Giami (n 137).

The category paraphilia was introduced in ICD-10 as 'Disorders of sexual preference', differentiated from gender identity disorders. Homosexuality is excluded as a sexual disorder on its own in ICD-10.¹²⁹ Disorder of Sexual preference in ICD-10 are listed as Fetishism, Fetishistic transvestism, Exhibitionism, Voyeurism, Paedophilia, Sadomasochism, Multiple disorders of sexual preference, other disorders of sexual preference, and Disorders of sexual preference, unspecified.¹³⁰ This latter category of other disorders covers:

'...activities that are too rare or idiosyncratic to justify a separate term for each... [such] as making obscene telephone calls, rubbing up against people for sexual stimulation in crowded public places, sexual activity with animals, the use of strangulation or anoxia for intensifying sexual excitement, and preference for partners with some particular anatomical abnormality such as an amputated limb... Masturbatory...extreme practices such as the insertion of objects into the rectum or penile urethra or partial self-strangulation, when they take the place of ordinary sexual contacts, amount to abnormalities. Necrophilia should also be coded here.'¹³¹

What is interesting in the consideration of these disorders in the ICD-10 is that in most cases they are restricted to behaviours by themselves. This stands in contrast with the actual definition of a disorder by WHO, that requires some kind of distress and interference with personal functions. The ICD-10 defines disorders as follows:

the term disorder is used throughout the classification, so to avoid even greater problems in the use of terms such as 'disease' and 'illness'. Disorder is not an exact term, but is used here to imply the existence of a clinically recognizable set of symptoms or behaviours associated in most cases with distress and with interference of with personal functions. Social deviance or conflict alone, without

¹²⁹ WHO (n 140), F65.

¹³⁰ Ibid.

¹³¹ Ibid, F65.9,

personal dysfunction should not be included in mental disorders as defined here.¹³²

In the ICD-10, only in relation to fetishism is distress mentioned as a factor to consider. The other types of paraphilias are only considered pathological when they substitute coital intercourse or are the most important form of sexual stimulation.¹³³

The 11th revision of the ICD was approved in May 2019. The revision process has been the longest in the history of the ICD to this date, and the revision of sexual and gender identity disorders has been one of the most controversial issues.¹³⁴ The Working Group on Sexual Disorders and Sexual Health noted that the diagnostic guidelines provided in the ICD-10 classifications of disorders of sexual preferences often, as pointed to above, merely describe the sexual behaviour involved rather than requiring any sort of distress or dysfunction, or any reference to public health or clinical relevance of the behaviour.¹³⁵ Thus, a concern in the revision process was whether the desires and behaviours in the 1990 manual represent conditions of public health significance and have clinical importance.¹³⁶ For example, Kruger proposed that paraphilic disorders in the ICD-11 should only include those where the sexual arousal involves others whose age or status renders them unwilling or unable to consent (e.g. prepubertal children or animals) and the arousal pattern is acted upon or creates marked distress, or if there is significant risk of injury or death between consenting adults/individual practice.¹³⁷ The Working Group focused primarily on the absence of consent in their proposed reform of the manual, similarly to Kruger, including the following diagnostic requirements: a) a sustained, focused or intense pattern of sexual arousal – as manifested by persistent sexual thoughts and fantasies, urges or behaviours – that involves others whose age or status

¹³² WHO (140), F65.8

¹³³ Ibid F65.5.

¹³⁴ Geoffrey M. Reed Jack Drescher, Richard B, Krueger, Elham Atalla, Susan D. Cochran, Michael B. First, Peggy T. Cohen-Kettenis, Ivan Arango-de Montis, Sharon J. Parish, Sara Cottler, Peer Birken and Shekhar Saxena 'Disorders related to sexuality and gender identity in the ICD-11: Revising the ICD-10 Classification based on current scientific evidence, best clinical practices and human rights considerations' [2016] 15.3 World Psychiatry 205.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid: Richard B. Krueger, Geoffrey M. Reed, Michael B. First, Adele Marais, Eszter Kismodi and Peer Birken 'Proposal for paraphilic disorders in the International Classification of Disease and Related Health Problems, eleventh revision (ICD-11) [2017] 45.5 Archives of Sexual Behaviours 1529.

renders them unwilling or unable to consent (prepubertal children, an animal or an unsuspected individual being viewed through a window and b) that the individual has acted on these thoughts, fantasies or urges or is markedly distressed by them.¹³⁸

The latest version of the ICD-11 published on the pages of the WHO website reflects the proposed changes mentioned above. Under rubric 17, *Conditions related to sexual health*, numerous 'sexual disorders' were included: exhibitionist disorder, voyeuristic disorder, paedophilic disorder, coercive sexual sadism disorder, frotteuristic disorder, other paraphilic disorders involving non-consenting adults, and paraphilic disorders involving solitary behaviours or consenting individuals.¹³⁹ Notably all these different desires and behaviours are only considered disorders if they involve the lack of consent of the other person/persons involved.¹⁴⁰ The last category regarding solitary behaviour or consenting adults is only considered a paraphilic disorder if the aforementioned criterion is met.

In the reports, the IE refers to the ICD when discussing depathologisation, but only to underscore that homosexuality has been depathologised internationally. In the more detailed exploration of pathologisation in the second report the IE implicitly refers to the International Classification of Disease (ICD) by stating that while 'homosexuals/gays' are not classified as mentally ill internationally, depathologisation at national and local levels has not been achieved.¹⁴¹ A more explicit reference to the ICD appears in the report of July 2019 where the IE recalls that homosexuality was removed from the ICD in 1990.¹⁴² Further, in both reports the IE references the medical community and their responsibility in perpetuating pathologisation of sexual diversity. In the 2017 report the IE invites more cooperation with 'the medical, scientific and ethics sectors, to promote shared understanding that sexual

¹³⁸Reed, Drescher, Krueger, Atalla, Cochran, First, Cohen-Kettenis, Arango de-Montis, Parish, Cottler, Birken and Saxena (n 154).

¹³⁹ World Health Organization (WHO), *The ICD-11 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (World Health Organization 2019) available at: <<https://icd.who.int/browse11/l-m/en>> last accessed 15 of September 2021.

¹⁴⁰ Ibid, 17, 6D30 – 6D3Z.

¹⁴¹ UNHRC "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity" [2017] UN. Doc/ A/HRC/35/36, ¶58, 17.

¹⁴² UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181, ¶ 21, 7.

orientation and gender identity are part of the natural state of being human.’¹⁴³ In the 2019 report the IE goes further, condemning discrimination by health workers and a lack of LGBT friendly medical education.¹⁴⁴ However, none of the reports actually engage with the problem of medicalisation of sexual difference. As the examination on the ICD above shows, certain sexual desires and practices are still pathologised based on the lack of consent of the receiving individual. If lack of consent is the only reason for these practices to be regulated, it seems unjustified to include them in a diagnostic manual and not to handle them through criminal legislation. At the same time, the IE does not actually denounce the inclusion of sexual desires in the manual. Rather it is the continued pathologisation against lesbians and gays, discrimination by health professionals against LGBT peoples, and the lack of LGBT friendly education that is denounced.¹⁴⁵ As explored in other discussions in this chapter, the focus on the protection of sexual identity prevents a real engagement with the oppressive structures underscoring persecution of sexual diversity in the first place. At the same time, the narrow focus on the protection of only certain sexual identities impedes a broader engagement with the sexual pathologisation outside this narrative of oppression fixed solely in medicalisation.

Chapter 4 examined pathologisation of sexuality in the context of racial exclusion and oppression. That chapter explored the ways in which sexuality and race have been linked to colonial discourses on pathologisation. The chapter also noted how, sexual deviance was used to prove the racial inferiority of the non-West and therefore used to justify colonial exploitation. At the same time, adherence to patriarchal heteronormativity became the measure to prove superior racial membership, playing a role in the unfortunate assimilation into Western narratives. The impact of this link between race and sex continues to play a role in the oppression of non-Western people in today’s discourses, as explored in the analysis by Ferguson, discussed in Chapter 4. Ferguson’s analysis highlighted how the cultural pathologisation of African American sexuality in the US is used to justify material class differences. Here, race-based oppression is legitimised because of the failure to comply with the rules of heteronormativity, which in turn is considered to be an expression of

¹⁴³ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN. Doc/ A/HRC/35/36, ¶58, 17.

¹⁴⁴ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Social inclusion’ [2019] UN.Doc. A/74/181, ¶24-25, 8.

¹⁴⁵ Ibid.

pathologised sexuality. Rather than being purely medical, these discourses are reinforced by sociological accounts and through public policy. This type of sexual pathology cannot be grasped by the mere focus on medicalised sexual identities alone. There is no discussion by the IE on how sexual pathologisation operates outside medical contexts and what consequences this has, especially for non-Western sexually diverse individuals and groups. Here, the mandate's narrow understanding of intersectionality plays a role in preventing a real engagement with different sexual subjects and their experiences of oppression, which are multiple and complex.

3.3. "Conversion Therapies"

The last report by the IE subjected to analysis in this chapter is the 2020 report on 'Practices of so-called "conversion therapy"'. Conversion therapies loosely consist of practices aimed at achieving conformity with stereotypical binary gender norms, a cisgender identity and heterosexuality, and it is reported to occur in all regions of the world.¹⁴⁶ The practices can be traced to late 19th century Europe, with doctors primarily attempting to cure 'homosexuality' through medical procedures such as castration and testicle implants.¹⁴⁷ While today the practice is performed by a range of actors including faith leaders, there is no denial that the medical industry has played an important role in legitimising such practices.¹⁴⁸ From the mid-20th century psychiatrists and psychologists both recommended and performed a range of inhumane techniques such as electroshock, lobotomy, as well as other techniques such as talk therapy.¹⁴⁹ Both electroshock and talk therapy are still used today in efforts to 'cure' nonconformity with sexual and gender norms, as are a whole range of violent and discriminatory practices.¹⁵⁰ In the report on conversion therapies the IE addresses and condemns a range of different practices while at the same time discussing causes and

¹⁴⁶ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181, ¶17, 4.

¹⁴⁷ Tiffany C. Graham 'Conversion Therapy: A Brief Reflection on the History of the Practice of and Contemporary Regulatory Efforts' [2019] 52 CREIGHTON L. REV. 419.

¹⁴⁸ Ibid.

¹⁴⁹ Lucas Ramon Mendos *Curbing Deception: A world survey on legal regulation of "conversion therapies"* (Geneva: ILGA World 2020) 23-onwards; Tiffany C. Graham 'Conversion Therapy: A Brief Reflection on the History of the Practice of and Contemporary Regulatory Efforts' [2019] 52 Creighton L. Rev. 419.

¹⁵⁰ Lucas Ramon Mendos *Curbing Deception: A world survey on legal regulation of "conversion therapies"* (Geneva: ILGA World 2020) 23-onwards; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Practices of so-called "conversion therapy"' UN.Doc. A/HRC/44/53.

solutions.¹⁵¹ While there is no denial that these practices should be both banned and criminalised, the IE misses an opportunity to engage with some underpinning structures of oppression identified in queer postcolonial approaches, in particular the medicalisation of sexual difference, heteronormativity, and orientalism.

In Section 3.2 above on pathologisation, some key concerns with the IE's approach to medical science were highlighted. More specifically, the lack of engagement with the pathologisation of all sexual diversity both inside and outside medical discourse was critiqued. By not grappling with the pathologisation of sexuality in all contexts, but only for certain sexual identities, the mandate holder also circumvents any discussion of racial-sexual pathologisation. Expanding on some of these critiques from Section 3.2, the following section analyses the approach by the IE to medical science in the context of conversion therapies. As mentioned in the introduction to this section, medical science has been fundamental not only to the development, but also to the continued practice, of conversion therapies. This link between the science and the practices is considered by the IE in the reports. In the report on conversion therapies the IE refers to medical science and medical professionals' complicity in the perpetration of abuse in more detail. In the section of the report called *overview* the IE underscores that pathologisation of sexual and gender diversity is the 'result of late 19th century medical science' and that 'most schools of psychology and psychiatry operated as providers of conversion therapy between 1940s to 1970s'.¹⁵² Further, the IE identifies medical and mental health professionals as the main perpetrators of the practices today (45.8%) as reported by an international survey of survivors (1641 participants).¹⁵³

Later in the report, under *nature of the practices* the IE builds on his critique of the medical practice of conversion therapies.¹⁵⁴ While referring to psychotherapy and medicine separately, the IE points to some underpinning structures of oppression critiqued in queer postcolonial approaches. In relation to psychotherapy the IE explains:

¹⁵¹ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Practices of so-called "conversion therapy"' UN.Doc. A/HRC/44/53.

¹⁵² *Ibid* ¶ 22, 5.

¹⁵³ *Ibid* ¶ 28, 7.

¹⁵⁴ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Practices of so-called "conversion therapy"' UN.Doc. A/HRC/44/53, ¶ 42-45, ¶46-49, 10-12.

The use of psychotherapy as a practice of “conversion therapy” appears to be based on the belief that sexual and gender diversity is a product of abnormal upbringing or experience. Providers claim to rectify deviations and support the development of desire of the opposite sex, which is considered the desirable norm, by having to work through past experiences, like absent paternal or officious maternal figures.¹⁵⁵

In the quote the mandate holder touches upon one of the structures of oppression identified by queer postcolonial approaches, which is that the regulation of domestic lives of the population is central to the ensuring compliance with heteronormativity in the West.¹⁵⁶ In the text above the mandate holder seems to implicitly challenge one of the consequences of the domestication of heteronormativity by rejecting the ‘claim’ by providers of ‘conversion therapy’ that there is a causal link between ‘bad upbringing’ and sexual diversity. Notably, the link between parental failure and ‘incorrect’ gender or sexual identification has constituted the core of much psychoanalytic theory analysing and proposing ‘cures’ for sexual and gender diversity.¹⁵⁷ However, the mandate holder fails to contextualise this practice within the broader structure of heteronormativity that reinforces itself through the micromanagement of domestic lives, a practice that can be traced back to colonialism.¹⁵⁸ Consequently, the mandate holder fails to consider some of the other oppressive consequences that derive from the socio-cultural and psychiatric fixation of heterosexuality in the domestic realm. For example, the mandate holder does not engage with the underpinning psychoanalytic theories that naturalise binary female/male genders and heterosexuality through developmental analysis of the person.¹⁵⁹ Moreover, the IE fails to consider how the (colonial) domestication of heteronormativity has led to the erasure of non-Western non-heteronormative sexual and familiar practices such as matrilineages.¹⁶⁰ Lastly, the IE fails to identify how the domestic heteronormative family not only reproduces sexual scripts but also racialised scripts, that

¹⁵⁵ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Practices of so-called “conversion therapy”’ UN.Doc. A/HRC/44/53, ¶ 42, 10.

¹⁵⁶ Stoler, McClintock and McEwan (n 109).

¹⁵⁷ Jemima Repo *The Biopolitics of Gender* (OUP 2015) 26-49.

¹⁵⁸ Stoler, McClintock and McEwan (n 109).

¹⁵⁹ Repo (n 178).

¹⁶⁰ Stoler (n 109).

were forged through the colonial times.¹⁶¹ Thus, above the mandate holder refers to the pathologisation of ‘absent fathers’ which has in the postcolonial West, in particular the US, often been used to target and pathologise black families in particular for failing to comply with (white) heteronormativity.¹⁶² Therefore from a queer postcolonial perspective, the mandate holder should not only consider some of the effects of the pathologisation of sexual diversity, but the IE should also challenge the medicalisation of sexuality as structured by heteronormativity and fixed in the domestic context, as it restricts and oppresses a range of sexually diverse subjects.

The lack of in-depth engagement with heteronormativity as an underpinning structure of ‘conversion therapies’ can be seen in the IE’s contention that the practices ‘do not work’. At the beginning of the report the IE explains under the section *overview* that according to the World's Psychiatric Association ‘there is no sound evidence that innate sexual orientation can be changed’.¹⁶³ From a queer postcolonial perspective, this assertion by the IE re-engages rather than challenges some of the underpinning assumptions of heteronormativity. Recalling the analysis from chapters 2 and 4, this fixation of sexuality in identity is part of the oppressive structures that erase sexual diversity. The conceptualisation of sexuality as innate forms part of Western epistemological discourse that contends that the truth about an individual can be found in observations of their sexuality. However, a key insight of queer postcolonial approaches is that this ‘truth’ about sexuality is the result of discourse rather than corresponding to any pre-existing reality. Further, these discourses on sexuality are not neutral observations of ‘nature’ but rather correspond to the development of specific Western power regimes.¹⁶⁴ Drawing Foucault’s previous analysis of queer postcolonial approaches situates development of fixed sexual identities within the regimes of modern biopolitical regulation. Foucault’s analysis is that this primarily medical categorisation of sexuality forms part of the diffuse operation of power aimed at securing citizens’ compliance with the reproductive requirements of capitalism.¹⁶⁵ Through this system citizens learn to

¹⁶¹ Thomas, Frazier, Fanon (n 18).

¹⁶² Rodrick A. Ferguson *Aberrations in Black: Toward a Queer of Colour Critique* (University of Minnesota Press: Minneapolis 2004 82-89; Crenshaw (n 13)

¹⁶³ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Practices of so-called “conversion therapy”’ UN.Doc. A/HRC/44/53, ¶ 20, 5.

¹⁶⁴ Foucault (n 61); Stoler (n 109).

¹⁶⁵ Foucault (n 61) 11, 69, 123, 140-159.

discipline their bodies to achieve a level of conformity and normality with heteronormativity.¹⁶⁶ From a queer postcolonial perspective, rather than being ‘innate’, sexuality is a function of discourses that have several oppressive consequences as they force individuals into regimes of normalisation.

By placing emphasis on the innate nature of sexuality that cannot be changed, the IE reinforces rather than challenges this structure of normalisation. From a queer postcolonial perspective sexuality is malleable through discursive regulation, and the operation of heterosexuality as a default is a great example of this. The end goal of conversion therapy is ensuring compliance with heteronormativity and cisgenderism which should be condemned regardless of whether the practices ‘works’ or not. This conflation between discursive fixation of sexuality and naturalisation of sexuality in the report is made evident later in the texts, where the IE explains that conversion therapies are rooted in the belief that sexually diverse persons are inferior.¹⁶⁷ Against this conception the IE asserts that human rights law supports the opposite view, ‘that lesbian, gay and bisexual people are equal to others’ and that their ‘sexual orientation’ is a natural part of their development.¹⁶⁸ Here the structural power of heteronormativity shines through the report as the IE is both condemning and reinforcing aspects of the same discourse. The charge that sexually diverse individuals are inferior is challenged, but not the fact that sexuality constitutes the natural ‘truth’ about the individual, the latter being a condition of the former.¹⁶⁹ In essence the IE misses an opportunity to challenge the underpinning assumptions that support heteronormativity.

The IE’s lack of a more profound engagement with heteronormativity as a structure renders invisible some of the orientalist effects of these discourses underpinning conversion therapies. As discussed in Chapter 4, orientalist medical and other knowledge led to the erasure of non-Western sexual diversity through pathologisation. Therefore, failure to adhere to Western gender and sexual paradigms became either a justification for colonisation

¹⁶⁶ Foucault (n 61) 140-159; Rubin (n 74) 267.

¹⁶⁷ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Practices of so-called “conversion therapy”’ UN.Doc. A/HRC/44/53, ¶63,15.

¹⁶⁸ Ibid.

¹⁶⁹ Foucault (n 61) 53-74.

or incorporation into Western psychosexual narratives such as homosexuality.¹⁷⁰ Local non-Western understandings of sexual and gender diversity that do not follow Western medical conceptualisations are erased in these accounts.¹⁷¹ Through colonialism and imperialism Western epistemology has become the universal standard for knowledge and progress, denouncing any non-Western conceptualisations.¹⁷² The maintenance of this binary between Western ‘modern’ universality and non-Western ‘backwards’ particularity serves to further erase the experiences and knowledge of non-Western sexually diverse individuals and groups. The discursive force of this binary becomes apparent in the IE’s discussion of medicalisation through the opposition between international pathologisation and local pathologisation. In the last section of the report on conversion therapy, during the discussion of medical science the IE explains that: ‘several countries, with their own compendiums of illnesses have not yet incorporated the global classifications into their national system, continue to pathologise non-heteronormative sexual orientations...’.¹⁷³ Again as analysed in other parts of this chapter, non-Western sexual diversity becomes trapped between old colonial narratives and the ‘saving grace’ of universal [Western] paradigms. There is neither a real engagement in the report with the consequences of colonialism when it comes to the spread of patriarchal heteronormativity nor with the continued operation of imperialism through international narratives. A real commitment to analysing the circumstances of non-Western sexually diverse individuals and groups are missing in the accounts. Without a real confrontation of the Western medicalisation of sexual diversity and its imperial use, there is no room for the consideration of non-Western experiences and narratives that could fundamentally challenge these oppressive structures.

The impact of colonialism on the practice of conversion therapies outside the West goes further than the imposition of universal Western medical standards. In the report, medical professionals and religious practitioners are highlighted as the primary perpetrators of conversion therapy. Under the rubric ‘faith based’, the IE refers to a range of religious practices of conversion therapies including exorcisms, restraints, food deprivation, or

¹⁷⁰ Fanon (n 18) 11-117;

¹⁷¹ Bleeker (n 23) 129.

¹⁷² Gandhi (n 22) 23-41, 42.

¹⁷³ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Practices of “conversion therapy”’ UN.Doc. A/HRC/44/53, ¶ 49, 12.

electroshock.¹⁷⁴ Further, the IE refers to a range of countries in which such practices occur, many of which are former colonies such as Bolivia, Brazil, Malaysia, Vietnam, Mexico, Nigeria, and the Philippines.¹⁷⁵ Western religious missionaries played an important role in colonialism's erasure of local practices and understandings as they used sexual diversity to justify the necessity of colonisation.¹⁷⁶ The connection between religion and colonialism is considered in Aniko Imre's analysis of the movie *Yo, la peor de todas* mentioned in chapter 4.¹⁷⁷ In the analysis Imre points to the interplay and fight for 'the right kind of colonisation' between the Spanish Archbishop and the Spanish colonial authorities represented by the Viceroy and his wife. The Archbishop, upon witnessing a flirtatious exchange between Sor Juana, the Viceroy, and his wife, exclaims that 'This is not a convent, this is a bordello'.¹⁷⁸ In another scene the Archbishop explains 'Our responsibly... is to save this new Spain, the innocent people, which Heaven has sent to us.'¹⁷⁹ What is represented in the film by the Archbishop is both the investment and complicity that Western religion and missionaries had in supporting colonial narratives. The need to 'save' the colonised population's souls and minds extends to the erasure of local sexual diversity.¹⁸⁰ Within these discourses, as the archbishop exemplifies, the native population were constructed as 'pure', 'innocent' and 'childlike' in need of being ruled. While at the same time the local population were considered 'deprived' because of some sexually diverse practices and in need of colonial regulation.¹⁸¹ Today, Western religious leaders continue to play a role in impacting and regulating non-Western sexual practices by fuelling nationalistic homophobic narrative. For example, capitalising on these nationalistic heteronormative sentiments, American evangelicals have launched numerous international campaigns in 'defence' of the family.¹⁸² These campaigns claim that Western advocacy groups pour money into Africa to spread homosexuality,¹⁸³ and

¹⁷⁴ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Practices of so-called "conversion therapy"' UN.Doc. A/HRC/44/53, ¶ 50-54, p. 12-13.

¹⁷⁵ Ibid.

¹⁷⁶ Kristen Cheny 'Locating neo-colonialism, "tradition," and human rights in Uganda's "gay death penalty" (2012) 55(2) African Studies Review 77.

¹⁷⁷ Imre (n 100).

¹⁷⁸ Ibid 193.

¹⁷⁹ Ibid 194.

¹⁸⁰ Kristen Cheny 'Locating neocolonialism, "tradition," and human rights in Uganda's "gay death penalty" (2012) 55(2) African Studies Review 77.

¹⁸¹ Ibid .

¹⁸² Ibid.

¹⁸³ Ibid.

rejuvenating the old symbolic battles on the ‘right’ type of colonisation of the soul. Notably the IE specifically highlights the participation of Christian Evangelical churches in the practice of “conversion therapies”.¹⁸⁴ However, there is no discussion of the imperial underpinnings of the use of religion to save the local populations. Thus, from a queer postcolonial perspective, the IE misses engagement with broader structures of imperialism that affect and erase non-Western sexual diversity.

4. Ending Violence and Discrimination

This section examines key ‘solutions’ to end violence and discrimination against sexually diverse individuals and groups proposed by the IE in the reports. These solutions proposed by the mandate holders will be analysed in light of those proposed by queer postcolonial approaches discussed in previous chapters. Firstly, queer postcolonial approaches advance centring non-Western sexual diversity in the analysis of oppression to counter the discursive erasure of these groups in dominant accounts. Secondly, representation of non-Western sexual and gender diverse peoples is considered by queer postcolonial approaches, to be a challenge to dominant Western heteropatriarchal oppressive structures. Lastly, by representing and analysing the lives and experiences of non-Western sexual and gender diverse people, alternative ways of being that resist Western heteronormativity can be identified and supported. In the reports, the mandate holder does not refer explicitly to any of these solutions proposed by queer postcolonial approaches, but identifies non-discrimination legislation, data collection and socio-cultural inclusion, all three being subjected to queer postcolonial analysis in the following sections.

4.1 Non-Discrimination

One of the recurring solutions to end violence and discrimination proposed by the IE in the reports is the adoption of non-discrimination legislation.¹⁸⁵ The right to non-discrimination

¹⁸⁴ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Practices of so-called “conversion therapy”’ [2020] UN.Doc. A/HRC/44/53, ¶153, p.13.

¹⁸⁵ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172, ¶55-56, 16; UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN. Doc/ A/HRC/35/36, ¶49-51, 17; UNHRC ‘Report of the Independent Expert on protection against violence and

under international human rights law is intimately linked with equality. These two [equality and non-discrimination] are normally described as positive and negative statements of the same principle: equality requires that equals are treated equally; the prohibition of discrimination precludes discrimination on unreasonable grounds.¹⁸⁶ The right to equality and non-discrimination is considered a cornerstone of international human rights law and appears in all the major international human rights treaties.¹⁸⁷ In the reports the IE both refers to non-discrimination in general and a solution to specific forms of violence and discrimination. For example, both reports from 2017 discussed the need for anti-discrimination legislation to end violence and discrimination based on sexual orientation.¹⁸⁸ In the report of July 2019, the IE underscores that anti-discrimination legislation that is in line with international human rights provisions is a prime tool to ensure social inclusion.¹⁸⁹ In the report on conversion therapy the IE underscores that the practice breaches fundamental equality and non-discrimination principles of human rights law.¹⁹⁰

Throughout the report the references to non-discrimination legislation are general, in the sense that they are not fixed to any specific international instrument. However, to be compliant with international law, the non-discrimination doctrine requires states to ensure that individuals are not discriminated against on any of the prohibited grounds, both in public

discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152; UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181;¹⁸⁵ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity'' [2019] UN.Doc. A/HRC/41/45; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Practices of so-called "conversion therapy"' [2020] UN.Doc. A/HRC/44/53; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'The law of inclusion'' [2021] UN.Doc. A/HRC/47/27.

¹⁸⁶ Daniel Moneckli, *Human Rights and Non-Discrimination in the 'War on Terror'* (OUP 2008) 58.

¹⁸⁷ Ibid.

¹⁸⁸ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/72/172, ¶55-56, 16; UNHRC "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN. Doc/ A/HRC/35/36, ¶49-51, 17.

¹⁸⁹ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181, ¶65, 16.

¹⁹⁰ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Practices of "conversion therapy"' UN.Doc. A/HRC/44/53, ¶59, 14.

and in private.¹⁹¹ There is a broad range of prohibited ‘grounds’ including race, colour, sex, language, religion political or other status.¹⁹² Anti-discrimination provision must cover both direct and indirect discrimination.¹⁹³ At the same time, because of the requirement that alike are treated alike, if there is an objective difference between individuals, for example a job requiring certain qualifications, there is no discrimination.¹⁹⁴ This raises difficult questions about the ability of non-discrimination legislation to redress historical inequalities that might lead to some people for example being less likely to have opportunities to achieve such qualifications.¹⁹⁵ To remedy the inability of non-discrimination legislation to address historical inequalities, sometimes international human rights mechanisms propose additional state actions such as quota systems for traditionally excluded groups.¹⁹⁶ The mandate has acknowledged the use of such quotas by recognising that ‘affirmative measures have been adopted in the Argentinean province of Buenos Aires, where the legislature adopted a trans quota in workspaces’.¹⁹⁷ However, the mandate holder has not explicitly explored the use of non-discrimination legislation to address structural forms of inequality in more depth. Nonetheless, in essence non-discrimination is a tool under international human rights law, aimed at remedying situations of inequality by for example achieving the removal of discriminatory criminal legislation. In 1994 the Human Rights Committee in the case of *Toonen v. Australia* decided that criminalisation of consensual and private same sex violated the right to privacy and also that sexual orientation was a prohibited ground of discrimination under ‘sex’ in article 2.1 and 26 of the International Covenant on Civil and Political Rights.¹⁹⁸

¹⁹¹ Ilias Bantekas and Lutz Oette *International Human Rights Law and Practice* (3rd ed. Cambridge University Press, Cambridge 2020) 216.

¹⁹² See for example Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2.1; International Covenant on Economic, Social and Cultural Rights (adopted 16 of December 1966, entered into force 3 January 1976) 999 UNTS 3 (ICESCR) art 2.2.

¹⁹³ Ilias Bantekas and Lutz Oette *International Human Rights Law and Practice* (3rd ed. Cambridge University Press, Cambridge 2020) 216.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172 ¶29, p. 11; UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/HRC/38/43 ¶84 p. 18; UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Social inclusion’ [2019] UN.Doc. A/74/181, ¶76 p. 18.

¹⁹⁸ UN Human Rights Committee, Communication No.488/1992, *Toonen v. Australia*, U.N. Doc CCPR/C/50/D/488/1992.

The decision in *Toonen* became an authoritative reference for a series of successful legal challenges to criminal laws around the world, pointing to the positive effects that non-discrimination legislation can have in changing oppressive legislation.¹⁹⁹ Furthermore, non-discrimination legislation can also provide access to goods and services on the ground by for example securing employment for sexual and gender diverse people in circumstances where prejudice or stigma would have prevented them from being hired. Thus, non-discrimination legislation used to remedy the exclusion of sexual and gender diverse people from social and political goods such as education, employment, or political participation, might help challenge the systematic nature of the inequality experienced by these groups as well.

While there are positive outcomes to be achieved by using non-discrimination legislation, from a queer postcolonial perspective there might be some concerns with the ability of this type of remedy to intersectional forms of discrimination. The application of non-discrimination provisions depends on the assignment of an individual or groups into a fixed category of difference which is then determined to matter or not legally.²⁰⁰ In the legal context, categorising people based on characteristics that have social weight, such as race or sexuality, tends to be even more rigid than in other contexts.²⁰¹ The assignment of a category depends on the assertion of difference that tends to suppress intra-group variations.²⁰² This suppression of inter-group differences is one of the primary concerns from a queer postcolonial approach, as historically non-Western sexual and gender diverse people have been rendered invisible under categorical constructions of identities and single-issue politics. As explored in chapter 4, queer theory's overt focus on Western sexual identities has excluded non-Western sexual diversity from the analysis, while postcolonial theory has focused on racial inequality suppressing any sexual and gender inequality existing within forms of racial oppression. Thus, the experiences and lived realities of non-Western sexually and gender diverse people are excluded from being considered part of either analytical or activist frameworks. In the legal contexts, as the analysis by Crenshaw discussed in chapter 4 points

¹⁹⁹ Ignacio Saiz 'Bracketing Sexuality: Human Rights and Sexual Orientation: A Decade of Development and Denial at the UN' [2004] 7.2 Health and Human Rights 49.

²⁰⁰ Nita Iyer 'Categorical Denials: Equality Rights and the Shaping of Social Identity' [1993] 19 (1) Queens Law Journal 179.

²⁰¹ Nita Iyer 'Categorical Denials: Equality Rights and the Shaping of Social Identity' [1993] 19 (1) Queens Law Journal 179.

²⁰² Ibid.

to, there is a risk that oppression and inequality resulting from intersectional identities are excluded from legal protection as the result of restrictive interpretations of these categories prescribed by non-discrimination doctrine.²⁰³ In the cases discussed by Crenshaw employment discrimination experienced by black women was excluded from judicial remedy because the unequal treatment was not found to be based on unfair considerations of race or gender.²⁰⁴ Recalling the analysis in chapter 5, sexual and gender diverse people of colour and migrants are more likely to be subjected to discrimination, marginalisation, and inequality.²⁰⁵ Therefore, it is important that their experiences of inequality are not excluded from protection by non-discrimination doctrines because they cannot be grasped by the legal construction of categories of sexuality or race alone. The concern is that because the IE does not fundamentally consider the limitations of sexual categories, nor does the mandate holder engage in ‘proper’ intersectional analysis, restrictive categorical interpretations of sexuality and gender will be compliant with the standard of non-discrimination legislation under the mandate. Therefore, there might be a risk that the specific forms of discrimination and inequality emerging from intersectional identities are left unchallenged in legal doctrine. A better approach by the mandate holder would be to situate the analysis of oppression in the intersection between sexual, gender and racial categories, and from those discussions highlight key forms of intersectional discrimination that should be remedied by legislation.

Returning to the analysis in chapter 3 postcolonial theory point to the need for changing the values that inform human rights interpretations to account for the different circumstances of sexually and gender diverse subjects around the world. Bhabha in particular, explained the need to change from individually focused human rights law to community-based solidarity

²⁰³ Crenshaw (n 13).

²⁰⁴ Ibid.

²⁰⁵ See for example Transrespect Versus Transphobia (TVT) ‘Trans Murder Monitoring Update- Trans Day of Remembrance 2021’ (TVT 11th of November) available on < <https://transrespect.org/en/tmm-update-tdor-2021/#>> accessed 16 of February 2022; J Shelton, A Ritosa, B Van Roozendaal, K Hugendubel and S.J Todd ‘Perceptions: Addressing LGBTIQ Youth Homelessness in Europe and Central Asia – Findings from a Survey of LGBTI Organisations’ (ILGA-Europe, True Colors United and Silberman Center for Sexuality and Gender at Hunter College 2021) < <https://www.ilga-europe.org/sites/default/files/Perceptions%20-%20ILGA%20Europe%20Compressed.pdf>> accessed 16 of February 2022; UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Covid-19’ [2020] UN.Doc. A/75/258; Human Rights Campaign ‘Research on LGBTQ People and the COVID-19 Pandemic’ < <https://www.hrc.org/resources/research-on-lgbtq-people-and-the-covid19-pandemic> > accessed 16 of February 2022.

among groups.²⁰⁶ It is uncertain if non-discrimination legislation makes such changes possible. As mentioned at the beginning of this section, non-discrimination legislation doctrine requires 'like to be treated alike'. The basis for comparison is individually focused, even if a decision in one individual case could have positive consequences for a group overall. There is no room in this equation to consider inequalities across groups or among communities. Non-discrimination legislation is also nationally focused, which limit its ability to consider inequality emerging from imperial structures of oppression. For example, as pointed to in chapter 5, economic inequality and health inequality is often the result of not only sexual and gender-based exclusions but is compounded by wider considerations of unequal resource distribution that emanates from the international economic system. Non-discrimination legislation might address economic discrimination against or unequal access to healthcare of sexual and gender diverse people within a non-Western country. It does not address the impact of unequal distribution of the world's economic resources or the lack of infrastructure that are the result of a colonial/imperial international economic system.²⁰⁷ Non-discrimination legislation is not set up for grappling with these kinds of structural inequalities. Therefore, from a queer postcolonial perspective, additional tools or mechanisms based on ideas of solidarity, redistribution, and justice rather than direct comparison are needed to remedy inequality and achieve equality for non-Western sexual and gender diversity.

4.2 Statistics and the Structures of Normalisation

One of the main mechanisms to ensure protection of sexually diverse individuals and groups proposed by the IE is 'data collection'. The IE as mentioned above in Section 2 first referred to data collection in relation to negation being a root cause of violence and discrimination.²⁰⁸ Following that, the IE dedicated one of the 2019 reports solely to data collection. Going back to the discussion on violence and discrimination in chapter 1 and 5, lack of data was highlighted as a problem to identifying the real extent of violence and discrimination

²⁰⁶ Homi Bhabha, 'On Writing and Rights: Some thoughts on the Culture of Human Rights' in Matthew J. Gibney (ed.) *Globalizing Rights: The Oxford Amnesty Lectures 1999*, (OUP 1999) 162-183.

²⁰⁷ Robert C.J. Young *Postcolonialism: An historical introduction* (Blackwell 2001) 6.

²⁰⁸ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43, ¶ 62, 14.

committed against sexual and gender diverse people on the ground.²⁰⁹ While the following analysis explores some of the potential negative or normalising effects of data collection, it is worth noting from the outset that better data collection could be beneficial to the protection of sexual and gender diverse people. As mentioned, because of lack of data, it is difficult to gauge the real extent of violence and discrimination committed against sexual and gender diverse people on the ground. A further challenge is understanding the reasons and context for the violence and discrimination committed and identifying specific local, national, regional, and institutional circumstances. Having better data from non-Western countries would help combat the centrality of the West in the analysis of violence and discrimination committed against sexual and gender diverse people. Consequently, better data on violence and discrimination committed against sexual and gender diverse people in non-Western countries could help illuminate the situation on the ground for these groups, and promote better understanding of their circumstances and needs. Notably, a further research agenda emerging from this thesis is the need for empirical research into the experiences of non-Western sexual and gender diverse people and their interaction with the international human rights system. Therefore, while the subsequent sections explore data protection, pointing to some of its potentially dangerous effects, the IE's identification of the need for more knowledge about the situation on the ground is not uncalled for.

The following analysis of data collection draws on Foucauldian paradigms that underpin parts of queer postcolonial analysis discussed in previous chapters. More specifically this section refers to the link theorised by Foucault between knowledge and power resulting in the former enabling oppression of different kinds.²¹⁰ Bal Sokhi-Bully has identified through the use of Foucault's theorisation 'data collection' or 'statistics' as an important modern tool in biopolitical regulation.²¹¹ Biopolitics describes the way that modern governments regulate

²⁰⁹ Transrespect Versus Transphobia (TVT) 'Trans Murder Monitoring Update- Trans Day of Remembrance 2021' (TVT 11th of November) available on < <https://transrespect.org/en/tmm-update-tdor-2021/#>> last accessed 16 of February 2022; Mark Bell 'Analysis and comparative review of equality data collection practices in the European Union: Data collection in relation to LGBTI people' (*European Union 2017*) < file:///Users/isabel/Downloads/report_on_equality_data_and_lgbt_people_7E662C39-037D-E4A0-3B0E67E7ADBFD052_45790.pdf> accessed 16 of February 2022; The World Bank 'sexual orientation and gender identity' < <https://www.worldbank.org/en/topic/sexual-orientation-and-gender-identity#1>> accessed 16 of February 2022.

²¹⁰ Robert J.C. Young *White Mythologies: Writing History and the West* (Second ed. Routledge 2004) 158-180.

²¹¹ Sokhi-Bulley (n 2) 139.

populations through biopower.²¹² Biopower defines the diffuse ways of operating of modern power regimes as reinforced through multiple discourses and institutions that monitor citizens' conformity to social norms.²¹³ Part of this regime is that individual citizens learn to participate in these oppressive processes by self-regulating according to these main social norms.²¹⁴ Governmentality is a concept developed by Foucault that encompasses biopower and biopolitics, situating these within the mechanisms of modern government.²¹⁵ In a broad sense governmentality is a consideration of how governing involves particular representations, knowledge and expertise regarding that which is governed.²¹⁶ Here governmentality draws attention to the complex relationship between knowledge and power discussed previously, whereby the practice of government requires the production of particular 'truths' about that which is to be governed.²¹⁷ At the same time, governmentality refers to a very specific way of thinking and exercising power, emerging in eighteenth century Europe and concerned with the ordering of people and things.²¹⁸ In this sense governmentality refers to the:

...ensemble of formed institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge, ...²¹⁹

²¹² Johanna Oksala 'From Biopower to Governmentality' in Christopher Falzon, Timothy O'Leary and Jana Sawicki (eds) *A Companion to Foucault* (Blackwell 2013) 320; Matthew Coleman, Kevin Grove 'Biopolitics, biopower and the return of sovereignty' [2009] 27 *Environment and Planning D: Society and Space* 489.

²¹³ Johanna Oksala 'From Biopower to Governmentality' in Christopher Falzon, Timothy O'Leary and Jana Sawicki (eds) *A Companion to Foucault* (Blackwell 2013) 320; Michel Foucault "*Society Must Be Defended*" *Lectures at the Collège de France 1975-1976* (English series ed. Arnold I Davidson, Translated by David Macey, Picador 2003) 38-40; Michel Foucault *The History of Sexuality, Volume 1. An Introduction* (Translated from French by Robert Hurley, Phanteon Books 1978) 139-145.

²¹⁴ Richard Edwards 'Actively seeking subjects?' in Andreas Fejes and Katherine Nicoll (eds) *Foucault and Lifelong Learning: Governing the subject* (Routledge 2008) 21; Majia Holm Nadesan *Governmentality, Biopower and Everyday Life* (Routledge 2008) 1-9; Randi Gressgård 'Asexuality: from pathology to identity and beyond' [2013] 4:2 *Psychology and Sexuality* 179.

²¹⁵ Kaspar Villadsen and Ayo Wahlberg 'The government of life: managing populations, health and scarcity' [2015] 44:1 *Economy and Society* 1, 5.

²¹⁶ Wendy Larner and William Walters 'Introduction, Global governmentality: governing international spaces' in Wendy Larner and William Walters eds. *Global Governmentality: Governing International Spaces* (1st ed. Routledge: London & New York 2004) 1, 2.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*, 3.

²¹⁹ Foucault 1978 lecture quoted in Thomas Lemke *Foucault's Analysis of Modern Governmentality a Critique of Political Reason* (Verso: London 2019) 91.

Here governmentality refers to the techniques of government, the technologies, devices, mechanisms, and procedures through which authorities seek to shape and instrumentalise human conduct.²²⁰ Data collection or statistics form part of these technologies of power as they ‘describe reality’, making possible a knowledge of the population required to the exercise of governmentality.²²¹ Data collection render subjects visible, shaping them into forms that can be calculated and regulated, allowing for, in the context of human rights, normalisations of victims of violations and the rights protectors.²²² Data collection has become a key method to monitor compliance with human rights in recent years.²²³ Key institutions, for example the Office of the UN High Commissioner on Human Rights, advocate the use of statistics to ‘implement and measuring human rights at country level’.²²⁴

For the IE, in line with much contemporary rights discourse, data collection constitutes a key technology in gaining knowledge about violence and discrimination. As mentioned in the introduction to this section, more knowledge about the on the ground situation could benefit non-Western sexual and gender diverse people by rendering their experiences visible. However, as Sokhi-Bulley theorises, data collection can potentially be a tool of governmentality, regulating and normalising sexual and gender diverse subjects. In the report on data collection the IE explains:

State and non-State stakeholders, as well as human rights mechanisms at the global, regional and national levels, have recognised that collection and proper management of relevant data is essential to adequately address violence and discrimination.²²⁵

²²⁰ Jonathan Xavier Inda *Targeting Immigrants: Government, Technology and Ethics* (Blackwell Oxford 2005) 6.

²²¹ Sokhi-Bulley (n 2)141.

²²² Ibid.

²²³ David McGrogan ‘The Problem of Causality in International Human Rights’ [2016] 65.3 *The International and Comparative Law Quarterly* 615; Bal Sokhi-Bulley ‘Governing (Through) Rights: Statistics as Technologies of Governmentality’ [2011] 20 (2) *Social & Legal Studies* 139; Sally Engle Merry ‘Measuring the World: Indicators, Human Rights and Global Governance’ [2011] 52.53 *Current Anthropology* S83.

²²⁴ UNOHCHR ‘Human Rights Indicators: A Guide to Measurement and Implementation’ [2012] UN.Doc. HR/PUB/12/5, III.

²²⁵ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Data collection and management as means to create heightened awareness of

A key aspect of data collection for the IE is to render visible the experiences of lesbian, gay, and bisexual individuals and groups and to combat patterns of negation and 'irrational' State policies.²²⁶ Here the IE points to the powerful nature of statistics to provide 'knowledge' about the population so that it can be 'properly managed' in line with the techniques of governmentality. While the IE is concerned about the potential use of statistical knowledge to further violence and discrimination against sexually diverse individuals,²²⁷ there is little concern for the normalising forces of data collection. Any data collection necessarily involves the participation of subjects themselves and therefore a necessary and inevitable part of the practice is self-government.²²⁸ To comply with data collection, the IE requires individuals and groups all over the world to categorise themselves according to the parameters set by the data collection design.²²⁹ Attempting to quantify these within statistical data necessarily involves a process of erasure of difference, as the information required will be limited to identify the existence of individuals with same-sex or bisexuality alone. Because the focus is on the identification of sexual subjects and their experience of violence as defined at a global level, it forces individuals and groups to identify themselves according to dominant Western paradigms. The IE acknowledges the need that data collection respects individuals' self-definitions and the variety of these that might exist.²³⁰ However, as has become evident in the analysis in other parts of this chapter, orientalism continues to underpin dominant understandings in contemporary sexual politics rendering non-Western sexual diversity invisible at an international level. In this way, rather than celebrating and empowering sexual diversity, data collection forces a process of elimination of the differences in experience and conceptualisation between sexual subjects.

violence and discrimination based on sexual orientation and gender identity" [2019] UN.Doc. A/HRC/41/45, ¶12, p. 5.

²²⁶ *Ibid* ¶20, p. 7.

²²⁷ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity" [2019] UN.Doc. A/HRC/41/45, ¶22, p. 8.

²²⁸ Sokhi-Bulley (n 2), 147.

²²⁹ *Ibid*.

²³⁰ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity" [2019] UN.Doc. A/HRC/41/45, ¶26, p.9.

Further, in the report the IE links data collection to victimhood, that is, the main purpose of the activity is to identify victims and types of violence. Sokhi-Bulley explains that through victimising a specific group, statistics forces subjects into an undesirable category.²³¹ By victimising sexually diverse people, they become constructed as non-ideal citizens that are not protected by states in the same way as their heterosexual counterparts.²³² The purpose of data collection then inherently will be to collect enough knowledge about these groups, so they can become 'ideal' citizens. As addressed on multiple occasions of this thesis, for sexual subjects both racialised and otherwise, becoming an 'ideal' subject means adhering to the rules of heteronormativity. In chapter 2 it was explained that this process of normalisation has played an important role in Western sexual politics as certain LGBT identities have become acceptable. The line between acceptable and unacceptable sexualities is drawn by the adherence to heteronormativity through the development of the 'normal gay' who is 'gender conventional, links sex to love and marriage-style relationships, defends family values and personifies economic individualism.'²³³ In Chapter 4, the normalising force of heteronormativity was examined through the multiple ways that sexuality and race are interlinked to erase the experiences of non-Western and non-white subjects regardless of sexuality. Here heteronormativity not only functions to secure adherence to sexual norms but also to the racial prescriptions of whiteness. Because the ideal citizen is both white and straight, data collection forces diverse sexual subjects into a dual process of desexualisation and de-racialisation. The concern is that through data collection sexual and gender diverse people will be forced or persuaded to comply with dominant social norms that are, as identified through this thesis, oppressive to sexual and gender diversity.

Lastly, data collection allows for the normalisation of perpetrators as well. Statistics create knowledge about the different states subjected to human rights institutions. Through this process of data collection, states become 'good' or 'bad' depending on the extent to which they comply with the prescriptions of human rights law. The IE offers several examples on

²³¹ Sokhi-Bulley (2) 147.

²³² Ibid.

²³³ Steven Seidman *Beyond the Closet: The transformation of gay and lesbian life* (Routledge 2002) 133; Christina Santos, 'Are we there yet? Queer sexual encounters, legal recognition and homonormativity' [2013] 22.1 *Journal of Gender Studies* 59.

‘good’ states in the reports by including a list of states that are conducting data collection on sexual orientations, such as Costa Rica, the United Kingdom, Argentina, and Nepal.²³⁴ Here in the text the mandate holder does recognise non-Western states. However, the IE also gives examples of ‘bad’ states in the texts, underscoring the use of data collection for surveillance and harassment of sexually diverse individuals in Egypt, Iran, and Lebanon.²³⁵ The problem with this good/bad approach is that it precludes any critical engagement with the use of data collection per se, and reinforces some of the pre-existing prejudice against certain non-Western states. Building on previous discussions as well as those in this chapter, the Muslim world is considered enemy number one by Western states in terms of the protection of sexual diversity. Thus, it is noticeable that the IEs have felt the need to specifically critique three countries with majority Muslim populations. In sum, while there is a need for better knowledge about the situation for non-Western sexual and gender diverse people on the ground, their data collection might have potentially dangerous and negative effects. For individuals and groups there might be a risk of normalisation through categorical inclusions into dominant structures. At international level there might be a risk that data collection is utilised to promote orientalist understandings or the SVS paradigm. Thus, the IE should not only refer to these risks but should also broaden the approach to knowledge discussion, acknowledge that it means more than just data collection.

4.3 Inclusion, Victimisation and Erasure of Queer Postcolonial Worlds

In 2019, the IE’s report to the General Assembly considered socio-cultural inclusion.²³⁶ In the report the IE underscores a fundamental understanding of the mandate that is: ‘an inclusive society enables people to enjoy protection from violence and discrimination’.²³⁷ Most of the report is dedicated to exploring a range of areas of concern from the perspective of ‘social inclusion’ including education, health, employment, well-being, political participation, and

²³⁴ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity’’ [2019] UN.Doc. A/HRC/41/45, ¶34, p. 11.

²³⁵ Ibid ¶22, p. 8.

²³⁶ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Social inclusion’’ [2019] UN.Doc. A/74/181.

²³⁷ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Social inclusion’’ [2019] UN.Doc. A/74/181, ¶1, p. 3.

personal security and freedom. In contrast, as considered throughout the analysis in Chapters two to four, queer postcolonial approaches resist the ideological idea of inclusion. Because ‘inclusion’ often ends up resulting in the repudiation of difference in favour of ‘normal’ subjects, an uncritical inclusive strategy looks very much like assimilation.²³⁸ A clear way that assimilationist strategies can be appreciated in the texts is through the already discussed favouring of western sexual subjects rather than focusing on the inclusion of all sexual diversity. As in the other reports, the IE privileges western sexual categories in the analysis of social inclusion and rights protection. For example, in relation to education the IE states that ‘LGBT pupils and children of LGBT parents face physical abuse in educational settings’²³⁹ or relating to public spaces, the report explains that ‘social integration relates to the ability of LGBT persons to access and express themselves freely in public spaces.’²⁴⁰ These are only some illustrations of the recurring privileging of LGB identities in the report, as all the discussions follow a similar use of LGB to identify the subjects of protection. Occasionally, as in other reports, there is a reference to sexual orientation as well.²⁴¹ Above in this chapter the boundaries to the protection of non-western sexual diversity embedded in the privileging of western categories have been examined from two perspectives:

1. That these categories cannot possibly represent the experiences and understandings of the majority of sexually diverse individuals and groups, especially outside the West
2. Western sexual categories (without explicit re-working) privilege the experience of certain sexual subjects that are both white and western. Relying on these to achieve subversion from oppression forces sexually diverse subjects to normalise themselves within this narrow construction of sexuality that upholds, rather than challenges, the fundamental structures of white patriarchal imperial heteronormativity.

²³⁸ Steven Seidman *Beyond the Closet: The transformation of gay and lesbian life* (Routledge 2002) 133; Christina Santos, ‘Are we there yet? Queer sexual encounters, legal recognition and homonormativity’ [2013] 22.1 *Journal of Gender Studies* 59; Frantz Fanon ‘Culture and Racism’ in Frantz Fanon *Toward the African Revolution: Political Essays* (Translated from French by Haakon Chevalier, Grove Press 1964) 38; Greg Thomas *The Sexual Demon of Colonial Power: Pan-African Embodiment and Erotic Schemes of Europe* (Indiana University Press, Bloomington and Indianapolis 2007) 66.

²³⁹ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Social inclusion’’ [2019] UN.Doc. A/74/181, ¶ 5, p. 3.

²⁴⁰ *Ibid* ¶ 42, p. 11.

²⁴¹ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Social inclusion’’ [2019] UN.Doc. A/74/181, ¶ 10, p. 5.

Because the analysis starts from and ends with the perspectives of the specific western sexual subject it raises the question about the desirability of social inclusion per se and the type of social inclusion proposed by the IE. Notwithstanding this general privileging of western sexual categories, the IE makes a renewed commitment to intersectionality in this report. The introduction to the report states:

No particular identity will ever encapsulate the entirety of the complexity of the lived human experience, but each of them can nonetheless serve as a point of entry, a prism through which the mandate holder may attempt to describe the indefinite riches of human aspiration and experiences, and the depths of misery to which some persons are sunk by violence and discrimination.²⁴²

Through this quote one of the fundamental gaps in the IE's understanding of intersectionality considered in Section 1 becomes evident. Intersectional analysis requires reframing the analysis of oppression from the perspectives of the most marginalised, not the recentring of already privileged categories as proposed by the Independent Expert in the quote above. The mere acknowledgement of difference in experience is not enough to constitute intersectional analysis. Nonetheless, later in the report the IE makes an attempt at undertaking 'intersectional' analysis by dedicating the middle of the report to 'examples of intersectionality.'²⁴³ Here the IE asserts that the section provides 'glimpses that emerge' when looking at the mandate through certain identities.²⁴⁴ The identities that are highlighted by the IE are women (trans and gender diverse), young persons, older persons, asylum seekers, refugees, migrants and internally displaced persons, and victims of humanitarian disasters.²⁴⁵ Notably absent in the analysis is race. Recalling the analysis in chapter 4 and above in section 1, a queer postcolonial intersectional approach requires linking the analysis of sexual oppression to that of race. As seen throughout this chapter, race and sexuality are inextricably

²⁴² UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity "Social inclusion" [2019] UN.Doc. A/74/181, ¶ 4, p. 3.

²⁴³ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity "Social inclusion" [2019] UN.Doc. A/74/181, ¶ 36-60, p. 10-15.

²⁴⁴ *Ibid* ¶37, p. 10.

²⁴⁵ *Ibid* ¶36-60, p. 10-16.

linked together so that the analysis of sexual oppression is incomplete if it is not joined with the analysis of race and imperialism. The closest the IE comes to engaging with race and imperialism is in the discussion of asylum seekers, refugees, migrants, and displaced persons.²⁴⁶ Here, as in other parts of the report, the IE avoids the analysis of race and sex by centring the analysis of these groups exclusively in their experience of sexuality. Rather than engaging with the multiple and complex systems of race, imperialism and sexuality as they play out in the migratory process, the focus is solely on the potential additional issues faced by LGBT individuals, such as access to healthcare and recognition of asylum claims.²⁴⁷ Because intersectionality is constructed as being only relevant to certain people rather than being the consequence of existing oppressive structures, the IE fails to engage with the marginalisation of non-Western sexually diverse subjects in the reports.

The failure to engage with the experience of the most marginalised subjects leads to the privileging of western paradigms in the reports. Recalling some analysis of chapters 3 and 4, western paradigms are already favoured in universal narratives. This privileging leads to the exclusion of non-western epistemology, philosophy, social and community formations, and other non-liberal understandings and experiences from consideration. This erasure of non-western paradigms occurs through the marginalisation of non-western sexual subjects as discussed. A primary mechanism to challenge this erasure of the non-western paradigms is localising the analysis and representing non-western sexual diversity and their worlds. Non-western sexual diversity fundamentally challenges the primary tenets of western paradigms, as they are not confined by the same epistemological, philosophical and social understandings. For example, Kapur's analysis of Advita makes evident that there are a number of conceptualisations, understandings, and lived experiences that transcend the boundaries of western paradigms. Because western paradigms are rooted in structural forms of oppression identified in queer postcolonial approaches; that is colonial, orientalist, heteropatriarchal, normalising, capitalist, and universal, representing alternatives both re-situates the West as particular and allows for alternative ways of living and being. Against the normalising impulse of universal western narratives that capitalises on sameness, queer

²⁴⁶ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity "Social inclusion" [2019] UN.Doc. A/74/181, ¶153-58, p. 14-15.

²⁴⁷ Ibid.

postcolonial approaches advocate for a celebration of difference. Subversion in this sense means freedom to be different, to want different things and to live differently without having experiences reduced to one thing or channelled through western normalising narratives.

Unfortunately, this type of subversive freedom does not form part of the IE's approach to 'social-inclusion'. In the report on social-inclusion the IE identifies some key mechanisms through which 'social-inclusion' should be reached. The first is the adoption of non-discrimination legislation,²⁴⁸ which favours normative inclusion. The second is political participation, defined as a measure to promote the right to take part in government and access to public services for LGBT peoples.²⁴⁹ Measures in this context seem to point to data collection or 'meaningful consultation' as well securing the existence of LGBT health professionals, teachers, government, representatives, police officers, and parliamentary representatives.²⁵⁰ Further the IE advocates the adoption of 'effective and efficient' public policies,²⁵¹ public awareness and sensitisation campaigns²⁵² and practices concerning access to justice for LGBT peoples.²⁵³ Lastly the IE identifies 'partnership', which broadly translates into the coming together of different sectors; private, business, civil society and religious institutions, to 'promote' acceptance and inclusiveness.²⁵⁴ The reference is only to LGBT peoples, privileging certain sexual subjects in the measures of inclusion. More noticeably, the approach is distinctively top down, that is the onus is on the already privileged to include the underprivileged in their fold. Furthermore, in the section on 'data-collection', inclusion is considered to be dependent on identifying sexually diverse individuals as victims, as 'non-ideal' citizens in need of being transformed into 'ideal citizens'. As underscored in the reports, this transformation can only occur through normalisation, or here through the acceptance by already privileged peoples of the underprivileged. In this conceptualisation there is no room for celebration of difference because the baseline is that existing outside the dominant narratives cannot be anything than bad. Any alternative understandings, ways of living and

²⁴⁸ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181, ¶65-68, p. 16.

²⁴⁹ Ibid ¶69-73, p. 17-18.

²⁵⁰ Ibid.

²⁵¹ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181, ¶74-77, p. 18.

²⁵² Ibid ¶78-81, p. 19.

²⁵³ Ibid ¶84, p.20.

²⁵⁴ Ibid ¶85-92, p. 20-21.

being, philosophies, ethics, forms of community and relationships that emerge among sexually diverse individuals and groups are left outside the consideration of the mandate.

Conclusion

This chapter has analysed key parts of the reports by the IE on the topic on protection of sexual diversity from a queer postcolonial perspective. Section 1 critically examined the IE's definition and use of intersectionality, pointing to the gaps in, reports' approach from a queer postcolonial perspective. Building on the discussion of intersectionality in Chapter 4, the analysis concludes that the IE does not really engage with the fundamental purpose of intersectionality, which is moving the analysis of oppression to those that are the most marginalised. In the global context, the most marginalised subjects are non-Western sexually diverse individuals and groups that should be acknowledged and represented. However, as the analysis of Section 2 concluded, Western sexual categories are privileged in the report to the detriment of non-Western sexual diversity. In Section 2 the privileging of Western sexual categories was examined relating to the general text of the mandate that only refers to lesbian, gay, and bisexual sexual orientation. The negative consequences of the privileging of these sexual categories were further examined in this section, rendering visible the operation of orientalism. This part of the analysis focused on the identification of the negation of existence of sexual diversity and the identification of local perpetrators.

The third part of this chapter focuses the analysis on the 'root causes' of violence and discrimination identified by the IE. The discussion started with an analysis of criminalisation, a well-acknowledged root cause of violence and discrimination in international human rights law. The examination focused on some of the potential restrictive and dangerous effects resulting from the IE's discussion of criminalisation. Further, the IEs overlook a real engagement with heteronormativity, colonialism, and orientalism in the analysis of criminalisation, to the detriment of the protection of non-Western sexual diversity. From the analysis of criminalisation, the chapter moved to a discussion of pathologisation. The examination focused on the International Classification of Disease (ICD) rendering visible its complicity in the pathologisation of sexual diversity in general. By situating the ICD within the

broader structures of sexual regulation, I identified the gaps in the reports' conceptualisation of pathologisation. Because the report is only concerned with the pathologisation of LGBT identities, the multiple ways that all sexual subjects are pathologised, especially racialised sexual subjects, are rendered invisible. The last part of Section 3 examined conversion therapies as discussed by the IE. Even if the IE touched upon some oppressive structures identified by queer postcolonial approaches, the reports fall short of a real engagement with these.

Finally, I moved to the examination of non-discrimination, data collection and social inclusion, identified as solutions to oppression by the IE. The analysis of non-discrimination showed that there are some concerns from a queer postcolonial perspective about this type of legislation addressing inequality emerging from the intersection between race, sexuality, and gender, as well as limits to addressing inequality emerging from international economic and imperial structures. Further, the analysis on data collection underscored how statistics constitute technologies of governmentality that risk normalisation and assimilation of sexual subjects. Lastly, the analysis examined privileging, victimisation, and assimilation in the IE report on social inclusion. As the analysis concludes, none of the solutions proposed by the IE align with those of queer postcolonial approaches. In contrast to the IE's approach, queer postcolonial approaches advocate a celebration of sexual difference. The existence of non-Western sexually diverse individuals and groups fundamentally challenges the dominant imperial heteropatriarchal structures of oppression. Only by celebrating its existence can these structures begin to be dismantled.

From the analysis of this chapter some key themes or structures can be identified in the reports when it comes to the protection of non-Western sexual diversity. Fundamentally, the IE marginalises non-Western sexual diversity in at least three ways: through the privileging of Western categories, as a result of the lack of engagement with the core structures of oppression, namely colonialism, orientalism and heteronormativity, and through the lack of representation and celebration of queer postcolonial worlds. The implications of these conclusions to the further development of the mandate of the IE will be considered in the discussions of findings of chapter 8. The analysis in this chapter has primarily focused on sexual diversity as it has been distinguished by the IE from gender diversity in the report.

However, as seen in the analysis of previous chapters, rather than being separate, non-Western sexual diversity and gender diversity are interlinked and subjected to the same structures of oppression and marginalisation. The IE seems to acknowledge this link to a certain extent by referring to both sexual orientation and gender diversity in some of the texts. Thus, while this chapter might point to some limits or gaps in the IE's general approach to gender diversity, the following chapter give additional insights by examining the reports on gender diversity.

Chapter 7. Critical Analysis of the Protection of Gender Diversity in the Reports

Introduction

This chapter outlines an analysis on the protection of non-Western gender diversity in the two reports by the Independent Expert (IE) focused on gender. As discussed at the end of Chapter 6, the analysis of that chapter was not specifically focused on gender diverse subjects. Often in the texts of the reports the mandate holder refers to both gender diverse and sexually diverse subjects interchangeably. However, the mandate holder has also made a clear distinction between gender and sexuality through the publication of two reports that are focused primarily on gender. Building on insights from previous chapters, I begin with an analysis of the definition of 'gender theory' as given by the IE. In the reports the mandate holder explains that gender theory can be derived from existing human rights interpretations, challenging certain aspects of the socio-cultural constructs of gender. The analysis of this section explores the Western underpinnings of the gender system considered in the reports, that is the binary hierarchal division of gender based on biology. From these discussions I conclude that the mandate holder fails to engage with all the consequences for the regulation of gender diversity and intersectional oppression emanating from the colonial spread of Western gender norms. Building on the conclusions concerning the analysis of biology as the underpinning structure of the binary gender system, section 1 moves to explore the mandate's definition of 'gender identity.' That analysis discusses 'gender identity' as it emerges from Western medical science, and underscores the IE's failure to acknowledge the specific origin of the term and the implications this has for its representability of gender diversity. Lastly, section 1 examines the challenge to biological sex posed by the mandate holder in the discussion of intersex bodies. This analysis concludes that while the critique in the reports opens for further engagements with the Western biological sex system, the mandate holder misses an opportunity to diversify the analysis and interpretation of international human rights law under the mandate.

The second part of this chapter examines the references to gender diverse subjects in the reports. This section examines 'trans' as a category developed by Western activists to

challenge the pathologisation of gender diversity by the medical community. The analysis concludes that the mandate holder fails to consider the context in which trans developed as a category or identity, and its applicability and use outside the West. The second area of analysis in section 2 examines 'gender diversity' as a term used by the mandate holder to refer to un-categorised gender diverse subjects. Gender diversity is defined by the mandate holder as referring to 'non-normative' individuals and groups, with the IE making some references to the content of such norms throughout the reports. From a queer postcolonial perspective, this recognition of an anti-normative, rather than categorical, subject could potentially make a shift towards a more structural based analysis of oppression. However, the analysis of the construction of 'gender normativity' in the reports falls short of engaging with all oppressive structures affecting non-Western gender diverse people. In particular, the lack of engagement with colonialism and imperialism is a notable exclusion in the reports. Consequently, the potential in the report's construction of 'gender diversity' to be more inclusive towards non-Western people is not taken advantage of by the mandate holder in his analysis. The last part of section 2 examines the IE's acknowledgement of non-Western gender diversity. In contrast with the general silence towards non-Western sexual diverse subjects examined in chapter 6, in relation to gender subjects the mandate holder refers to a range of non-Western identities in the report on gender identity and gender theory. By analysing how these identities have been included in the reports, I conclude that the mandate holder in effect re-marginalises the latter groups. In the texts orientalist structures of signification can be identified as operating in the mandate holder's reference to non-Western gender diversity. At the end of this analysis, a brief reference to the use of intersectionality in the reports on gender identity/gender theory explains that nothing has substantially change from the approach by the mandate holder discussed in chapter 6.

Section 3 of this chapter examines pathologisation of as one of the only root causes of violence and discrimination identified by the mandate holder to be specific to gender diversity. In the discussion of pathologisation, the International Classification of Disease (ICD), also discussed in chapter 6 takes a primary place. In relation to gender diversity, the mandate holder critiques the old diagnosis of ICD-10 while celebrating the new ICD-11 diagnosis. Drawing on the queer postcolonial critique of Western medical approaches to gender diversity, the analysis examines in depth the underpinning normalising discourses of the ICD.

Further, by comparing the two diagnoses, the analysis concludes that the mandate holder's celebration of ICD-11 leaves the system of medicalisation of gender diversity intact. Similarly, while the mandate holder expresses concern with the diagnosis for children in the ICD, the reports fall short in its critique of pathologisation. In limiting the analysis of pathologisation to that of only certain subjects, rather than the overall structure of Western gender normativity, the mandate holder misses the multiple ways, in which non-Western subjects are oppressed by these discourses.

The last section of this chapter examines legal recognition as a cause and solution to end discrimination against gender diverse individuals and groups. In comparison to the reports discussed in chapter 6 which discussed a range of 'solutions', legal recognition is considered the key mechanism to end violence and discrimination against gender diverse peoples. In the report the mandate holder both outlines the parameters of the recognition procedure and highlights a number of human rights abuses that should end as a result of having the latter in place. Building on the analysis at the end of chapter 6, section 5 critically examines legal recognition as a tool of biopolitical normalisation that in itself can constitute a form of oppression of non-Western sexually and gender diverse people. As the analysis will show, not only can legal recognition be identified as a tool of governmentality, but it reinforces the exclusion of non-Western diversity under the reports. Because non-Western gender diverse people are not central to the analysis of the reports, in this section I identify some potentially harmful effect of legal recognition which are missed by the IE. The chapter ends with a reflection of the main conclusions of the analysis from a queer postcolonial perspective.

1. Gender Theory as Defined in the Reports

The following sections examines the IE's approach to gender diversity as it can be traced in the mandate's latest report on 'gender theory'.¹ According to Madrigal-Borloz, resistance on behalf of the states and other actors to the use of 'gender theory' creates risks to the human rights of women (including lesbian, bisexual, and trans women).² The mandate holder does not offer an explicit definition of 'gender theory'. However, the document appears to refer to

¹ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27.

² Ibid ¶16, p.3.

existing discourses on the rights of women and gender diverse people by international human rights bodies.³ More specifically the reports states:

Analysis of the sources on international human rights law reveals a robust *corpus iuris* in which gender is the term used to describe sociocultural constructs that assign roles, behaviours, forms of expression, activities, and attributes according to the meaning given to biological sex characteristics. Under this definition, gender and sex do not substitute each other, and gender identity and gender expression are inextricably linked to them as practices of concern in anti-discrimination analysis.⁴

Furthermore, the IE explains that there ‘is nothing that restricts gender to women.’⁵ The text also explains that despite gender appearing first in feminist writings in the 1970s to challenge biological determinism, gender is applicable to anybody who lives in societies where gender plays a primary role in organising social difference and creating hierarchies.⁶ Following the general introduction to gender theory, the IE outlines a range of decisions by international and regional human rights bodies, as well as submissions by government and civil society which acknowledges and challenge different power imbalances deriving from gender normativity.⁷ The mandate holder’s analyses range from recognition of the protection of discrimination for gender diverse peoples,⁸ acknowledgement of the intersectional experiences of women, in particular lesbian, bisexual, and trans women,⁹ and condemnation of forced surgery on intersex individuals.¹⁰

From this outline of the report’s approach to ‘gender theory’ the subsequent analysis explores the text’s implications for the protection of non-Western gender diversity. Central to the oppression of non-Western gender diversity discussed in previous chapters is the imposition

³ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’’ [2021] UN.Doc. A/HRC/47/27, ¶12-35, p.4-9.

⁴ Ibid ¶13, p. 4.

⁵ Ibid ¶14, p. 4.

⁶ Ibid.

⁷ Ibid ¶ 12-48, p. 4-12.

⁸ Ibid ¶ 18-21, p. 5-6.

⁹ Ibid ¶ 25-27, p. 7.

¹⁰ Ibid ¶ 27, 48-49, p.7, 12.

of Western gender norms.¹¹ Because the mandate holder fails to engage with the impact of the Western gender system on the regulation of non-Western sexual and gender diversity and the intersection between gender and race created under colonialism, the IE misses an opportunity to really engage with the structures that underpin the oppression of all gender diversity.

1.1 Challenging the impact of Western Gender Hierarchies

One of the key structures of oppression of gender [and sexual] diversity is the binary division of people into two separate and hierarchically positioned genders. As alluded to by the mandate holder in the discussion of gender theory, this structure of signification operates through the division of people into two binary hierarchically situated sexes that permeate a person's whole existence as male or female, determining aspects of life such as sexuality, dress sense, career, and job prospects among others.¹² Recalling the analysis in chapter 2, one of the main challenges to patriarchy by feminists was dividing gender from sex.¹³ As referred to by the mandate holder, by separating the two feminists could challenge the 'bio-logic' that had ensured the social differentiation between the sexes, instead arguing that gender differences are socially constructed and therefore challengeable.¹⁴ Underpinning this division between sex/gender is the classical Western liberalist assertion that there is a pre-discursive nature, 'sex', that is only represented by the rules of gender.¹⁵ Queer postcolonial approaches reject this binary division of sex and gender, arguing that gender is not a consequence of sex but instead sex is the result of gender.¹⁶ By approaching sex as a pre-discursive reality any theorising grappling with gender difference and inequality is bound to fall back on, rather than challenge, the binary division of genders in sex.¹⁷ As a result, sex and gender are

¹¹ Hema Chari 'Colonial Fantasies and Postcolonial Identities' in John C. Hawley (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 277; Aniko Imre 'Lesbian Representation and Postcolonial Allegory' in Muar Aydemir (eds) *Indiscretions: At the Intersections of Queer and Postcolonial Theory* (Rodopi 2011) 185; Gayatri Gopinath *Impossible Desires: Queer Diaspora and South Asian Public Cultures* (Duke University Press 2005) 1-28; Anne McClintock *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (Routledge 1995) 4-8.

¹² UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27, ¶13, p.2.

¹³ Judith Butler *Gender Trouble: Feminism and the Subversion of Identity* (1st ed, Routledge 2006) 5.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid 4.

¹⁷ Ibid 9.

ultimately discursively conflated and even among social scientists attempting at explaining human society in other than genetic terms, sex appears as the underpinning condition of the conceptualisation of difference.¹⁸ Furthermore, queer postcolonial approaches locate the preservation of heterosexual privilege as the primary cause of gender differences, and identify this structure as specifically Western.¹⁹

Both the hierarchal categorisation of peoples into two biological sexes from which gender follows, and the fundamental organisation of society around gender difference, is uniquely Western.²⁰ Oyèrónké Oyěwùmí explains that in the West, the biological explanations are specially privileged over other ways of explaining differences of gender, race, and class.²¹ As highlighted by Maaïke Bleeker's analysis, discussed in chapter 4, the anatomical body is at the centre of Western approaches to gender diversity.²² The Western body forms are considered expressions of an interior, a soul, a psyche, that in the civilised body forms libidinal flows, sensations, experiences, and intensities into needs and wants.²³ The body becomes a system of signs that can be deciphered, read, read into, and the 'inscriptions and messages between [the body's] external and internal boundaries... generates or constructs the body's movement into 'behaviour', which then [has] interpersonally and socially identifiable meanings and functions within a social system.'²⁴ Oyeronke Oyewumi contends that one of the reasons for bodies having so much presence in the West is because the world is primarily perceived by sight rather than other senses.²⁵ The term 'worldview' which is used in the West to sum up the cultural logic of society captures the West's privileging of the visual.²⁶ The differentiation

¹⁸ Oyèrónké Oyěwùmí *The Invention of Women: Making an African Sense of Western Gender Discourse* (University of Minnesota Press: Minneapolis and London 1997) 1.

¹⁹ Butler (n 13)

²⁰ Oyèrónké Oyěwùmí *The Invention of Women: Making an African Sense of Western Gender Discourse* (University of Minnesota Press: Minneapolis and London 1997) 9; Maaïke Bleeker 'Of Passing and Other Cures: Arjan Ederveen's Born in the Wrong Body and the Cultural Construction of Essentialism' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi: Amsterdam 2011) 129-142.

²¹ Oyèrónké Oyěwùmí *Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997) 11.

²² Maaïke Bleeker 'Of Passing and Other Cures: Arjan Ederveen's Born in the Wrong Body and the Cultural Construction of Essentialism' in Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi: Amsterdam 2011) 129-142

²³ Elizabeth Grosz 'Bodies and Knowledges: Feminism and the Crisis of Reason' in Linda Alcoff and Elizabeth Potter eds. *Feminist Epistemologies* (1994 Routledge: New York) 198.

²⁴ Ibid.

²⁵ Oyèrónké Oyěwùmí *Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997) 2.

²⁶ Oyěwùmí (n 18).

of human bodies in terms of sex, skin, colour, and cranium size are evidence of the power of 'seeing'.²⁷ While Western knowledge has stepped beyond eugenic explanations of social difference, this does not discount the fact that social groups are still defined by the physical presence of different body types such as female, male, workers, blacks, or others.²⁸ The preferred focus has been on the mind, with the body/mind dualism forcing the idea that the body was a trap from which any rational person had to escape. This distinction has historically been used to deny a range of groups; women, primitives, Africans, poor, and others, agency and access to social, political and scientific participation.²⁹ Underlying any social differentiation in Western thought we find the body, and, in these distinctions, we find in it the binary division of sex. Connell notes:

In our [Western] culture, at least the physical sense of maleness and femaleness is central to the cultural interpretation of gender. Masculine gender is (among other things) a certain feel to the skin, certain muscular shapes and tensions, certain postures, certain possibilities in sex.³⁰

Recalling some of the discussions in chapter 3 and 4, a central concern of queer postcolonial approaches is examining the impact of Western colonial gender and sexual structures to the contemporary regulation of sexually and gender diverse subject today. The adoption of Western gender norms by conservative nationalistic elites, as discussed in chapter 4, fuels contemporary policing of gender diversity within postcolonial nations.³¹ For example, in contemporary Bangladesh, Hijras are often used to measure the failure to comply with masculinity.³² Previously, British colonial powers were concerned with the Hijra population as well. Examining British colonial writing on the Indian Hijra population, Anuja Agrawal identifies the incessant preoccupation with these groups' challenging 'acceptable' British

²⁷ Ibid 2.

²⁸ Ibid 3.

²⁹ Ibid.

³⁰ R.W Connell, *Masculinities* (1995 Polity Press: London) 53.

³¹ Adnan Hossain 'The paradox of recognition: Hijra, third gender and sexual rights in Bangladesh' [2017] 19.2 Culture Health and Sexuality 1418.

³² Adnan Hossain 'The paradox of recognition: Hijra, third gender and sexual rights in Bangladesh' [2017] 19.2 Culture Health and Sexuality 1418.

gender behaviour.³³ A great deal of discussion by British researchers centred on whether or not Hijras were males that were biologically malformed, deformed or had ill developed genitalia.³⁴ In these narratives there was a great deal of worry about the genital or bodily status of the Hijras, which derived from the British concern with their ‘feminine’ self-presentation.³⁵ Colonial researchers needed a ‘logical’ explanation for the ‘atypical’ gender behaviour by the Hijras, which they concluded could be explained through their biological ‘abnormality’.³⁶ Similarly, as will be discussed below in section 4 on legal recognition, both the genital situation as well as the feminine self-presentation continue to play a role in the categorisation and treatment of Hijra in contemporary Bangladesh.³⁷ In the reports the IE does refer to colonialism and its impact on the erasure of gender diversity. Discussing the opposition to the recognition of trans and other non-binary women, based on the argument that they threaten the rights of women, the reports explain:

The IE is also concerned that some of these claims appear to reproduce privileged and/or colonial bias which disregards gender diversity around the world. Furthermore, he is concerned that by seeking a regression to sex as rigidly defined through a male/female binary, they ... support notions of biological determinism, in which the mandate holder recognizes grave risk for the rights of all women, among them lesbian, bisexual and trans women.³⁸

Here the mandate holder appears to recognise both the impact of colonialism on gender diversity and the imposition of biological sex differences, identified as an oppressive structure by queer postcolonial approaches. Unfortunately, the mandate holder does not make such a link explicit in the report. Furthermore, colonialism appears as only incidental to the analysis of the gender system critiqued in the report. Rather than colonialism and the spread of Western heteropatriarchy being considered as central to gender-based oppression per se, the

³³ Anuja Agrawal ‘Gender bodies: The case of the ‘third gender’ in India’ [1997] 31.2 Contributions to Indian Sociology 273.

³⁴ Ibid 284.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Adnan Hossain ‘The paradox of recognition: Hijra, third gender and sexual rights in Bangladesh’ [2017] 19.2 Culture Health and Sexuality 1418.

³⁸ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’ [2021] UN.Doc. A/HRC/47/27, ¶ 43, 11.

mandate holder only discusses it in this specific context of opposition to only trans and other non-binary women's rights. In contrast, queer postcolonial approaches have identified multiple effects of the imposition of the Western gender system, including the situation of Hijras discussed above (whose identity is not equal to that of trans-women, as explored further below), its impact on lesbian women as discussed in chapters 4 and 6, and its more general impact on the oppression of racialised people. Rather than being incidental to the analysis of gender oppression, queer postcolonial approaches have identified colonialism as fundamental to the oppression of non-Western gender diversity. Therefore, despite identifying colonialism as a structure of oppression, the IE does not go far enough in the analysis reinforcing the universalisation of the Western gender system in the report.

Furthermore, the reference to colonialism does not engage with some of its consequences for the West racialised others. Because the colonial population was central in the construction of Western gender categories, concepts such as 'manhood' and 'womanhood' forged during the Victorian era were necessarily racist in their configuration.³⁹ Therefore, certain racialised subjects could never attain the access to white Western womanhood or manhood. For example, a respectable bourgeois woman had to be a domesticated one, never a super exploited field worker or otherwise exploited 'house slave'.⁴⁰ Similarly, non-Western men, including black slave workers and black men in general in America have been constructed as feminised (as well as sexually dangerous in the case of black men).⁴¹ Feminisation in this context operates to make non-Western men equivalent in social status and power to women, and therefore less than white men.⁴² In Western discourse, to be white and female is to be 'woman' and to be white and male is to be 'man'.⁴³ Thus, not only does the Western gender system operate to structure society in a hierarchal manner according to constructed gender differences, but it also intersect with racial ones.

³⁹ Greg Thomas *The Sexual Demon of Colonial Power: Pan-African embodiment and the erotic schemes of Empire* (Bloomington 2007) chapter 25-50.

⁴⁰ Thomas (n 53) 44.

⁴¹ Marjorie Garber *Vested Interests: Cross-Dressing and Cultural Anxiety* (Routledge 1992) 271.

⁴² Ibid.

⁴³ Thomas (n 53) 44.

In the report the mandate holder appears to attempt to consider the different effects of race and gender through the references to intersectionality. In the analysis in chapter 6, the mandate holder was critiqued for not significantly engaging with race or imperialism in the analysis of intersectionality. In contrast, in the report on gender theory the IE makes an explicit reference to race as it intersects with gender. More specifically the report states that ‘race and gender together inhibit black women’s advancement to a degree that either factor separately might not.’⁴⁴ The inclusion of race in the analysis allows the mandate holder to point to differences in the experience of poverty between cis white men and black and Latino trans people.⁴⁵ However, the latter analysis is restricted to the discussion of intersectionality in the report, rather than the IE centring the experience of black and Latino trans people in the analysis. From a queer postcolonial perspective intersectionality requires centring the experiences of those most marginalised in the analysis of oppression. Moreover, this brief reference to intersectionality in the text does render legible, or open for critique, the underpinning racial-gender structure discussed above. Consequently, neither in the discussion of colonialism nor of intersectionality does the IE give full account or challenge the multiple ways racialised gendered subjects are oppressed.

In sum, the IE’s approach to gender and ‘gender theory’ falls short from a queer postcolonial perspective. Queer postcolonial approaches require an in-depth analysis of the impact of Western gender and sexual norms on the regulation of non-Western sexual and gender diversity. The IE, despite attempting to bring considerations of colonialism and race to the analysis of gender, does not go far enough in the analysis. In particular, the IE appears to see both colonialism and race as incidental rather than central to the analysis of gender oppression. As explored at length in chapter 4, the colonial population was essential to the construction of Western gender and sexual norms. The lack of real engagement with the latter results in the marginalisation of the analysis of gender oppression of non-Western people in the reports. The following sections explore how the centrality of the West in the reports affect other aspects of the analysis by the mandate holder, to the detriment of non-Western gender diverse people.

⁴⁴ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’’ [2021] UN.Doc. A/HRC/47/27, ¶25, 7.

⁴⁵ Ibid.

1.2 Gender Identity

Beyond the Western gender system, queer postcolonial approaches challenge the centrality of Western medical science in the definition of gender diversity. In particular, the medicalisation of gender diversity resulting in the categorisation and ‘treatment’ on the body of different types of identifiable gender transgressions is restrictive from a queer postcolonial perspective, as outside the West gender diversity is often socially rather than anatomically constructed. Consequently, Western medical categories appear limiting if not reformulated in a non-pathologising and non-medicalised way. In the reports the IE does refer to ‘gender identity’, which while foundational to the mandate also has its origin in Western medical science. As the analysis will show, gender identity refers to a very specific Western normalising approach to gender diversity. It is not clear from the reports if the definition given by the mandate holder substantially challenges its original formulation. Consequently, the mandate holder misses an opportunity to consider non-medicalised approaches to gender diversity by failing to recognise the Euromerican specificity of the approach to gender diversity underpinning the term ‘gender identity’. This failure of recognition is revisited below in section 3, which discusses pathologisation and the IE’s reliance on the International Classification of disease to end pathologisation of gender diversity.

As with ‘sexual orientation’ discussed in chapter 6, ‘gender identity’ has its origin in Western medical science, in particular in the discourses that developed around intersex and transexual bodies mid-20th century.⁴⁶ The term was coined by American psychiatrist Robert Stoller in 1962 to describe ‘[individual] knowledge or awareness, conscious or unconscious that one belonged to one sex and not the other.’⁴⁷ Stoller researched intersex and transexual male individuals to determine the extent to which biology [sex] and culture [gender] affected gender identity.⁴⁸ Together with some of his other contemporary American psychiatrists, such

⁴⁶ Jemima Repo *Biopolitics of Gender* (OUP 2016) 55.

⁴⁷ Robert J. Stoller *Sex and Gender: The Development of Masculinity and Femininity* (Karnac Books: London 1968) 10; Jemima Repo *Biopolitics of Gender* (OUP 2016) 55.

⁴⁸ *Ibid.*

as Money and Benjamin discussed below in section 3, Stoller played an important role in defining contemporary Western approaches to gender diversity.⁴⁹

In the reports, gender identity has been defined several times in similar ways. Gender identity has been defined as ‘a person’s self-perceived identity, which may be different from the sex assigned at birth, as well as the expression of gender identity’⁵⁰ and as ‘an internal dimension — the term refers to how a person self-identifies in regard to his or her own gender, which may be different from the gender assigned at birth.’⁵¹ A more detailed definition was given in the report on gender identity, where the mandate holder explains:

gender identity refers to each person’s deeply felt internal and individual experiences of gender, which may or may not correspond with sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or functioning by medical surgical or other means) and other gender expressions, including dress, speech and mannerisms.⁵²

In the report’s definition of gender identity, the mandate holders echo some of the key elements of Stoller and his contemporaries’ approaches to [Western] gender diversity. Stoller’s research parted from the understanding that there were two binary sexes from which feminine and masculine gender followed and that any variation could be corrected through medical intervention. In this process of normalisation, as analysed by Maaïke Bleeker (discussed in chapter 4), Western medical science has played an important role in framing the problem of gender diversity in a particular way.⁵³ As analysed, in Western philosophy the anatomical body is not only fundamental to the creation of social differences but also central in the Western understanding of personhood.⁵⁴ The Western Cartesian subject depends on

⁴⁹ Jemima Repo *Biopolitics of Gender* (OUP 2015) 49.

⁵⁰ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172, ¶2, p. 3.

⁵¹ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN. Doc/. A/HRC/35/36, ¶2, p.3.

⁵² UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/73/152, ¶2,3.

⁵³ Bleeker (n 20) 131.

⁵⁴ *Ibid.*

the division between the body and the soul, where the former is understood as a mere extension of the latter.⁵⁵ This division between the soul and the body has translated in Western medical approaches into the identification of the gendered ‘soul’, ‘knowledge’ in Stoller’s terms, or ‘deeply felt and internal experiences’ in the language of the reports. If the problem is defined as the [gendered] soul being different to that of the body, the initial gender transgression will be neutralised through corrective interventions on the body.⁵⁶ For Stoller and some of his contemporaries, the nature of the intervention required depended on the age of the subject in question, ranging from psychological interventions to hormonal treatment and/or sex reassignment surgery.⁵⁷

Notably, the IE challenges the more pathologising aspects of Stoller’s research, as there is no explicit requirement in the reports that an individual’s gender identity has to be in congruence with the sex assigned at birth. From the definition by the IE, it is clear that such congruence is only an option, rather than a desired or final outcome of gender identity. However, by maintaining the distinction between the gendered [soul] and the sexed body, the mandate holder implicitly reifies Western epistemological approaches to gender difference, which are based on the anatomical fixation of gender in sex. Furthermore, the mandate holder references other aspects of this anatomical approach to gender by fixing the gender in the ‘personal sense of the body’ as well as bodily appearance and expressions. In this definition of gender identity, there is no room for non-medical, that is, social approaches to gender. Thus, in the definition by the mandate holder it appears that gender identity is synonymous with a Western approach to biological gender. Consequently, the mandate holder effectively universalises Western approaches to gender under the mandate.

1.3 Biology and Intersex Subjects

Because biological sex is central to the definition of gender as outlined by the mandate holder, the reports’ approach to intersex individuals might constitute another way (other than the analysis of colonialism and intersectionality) to challenge the sex/gender system in the reports. In particular, the change in approach by the mandate holder to intersex individuals

⁵⁵ Bleeker (n 20) 131.

⁵⁶ Ibid.

⁵⁷ Repo (n 60) 62-73.

from the first reports to the latest on gender theory points to a progression in the analysis of biological sex in the reports. In the first reports, intersex are considered to be people ‘born with bodies that vary from male or female⁵⁸/have atypical sex characteristics’⁵⁹, that are ‘distinct from sexual orientation and gender identity’⁶⁰ ‘facing different issues’⁶¹ that would only be considered when ‘linked to sexual orientation and gender identity’.⁶² The following section shows how this original approach by the IE is incorrect, as intersex individuals and groups were central to the development of the discourses on gender identity.

As mentioned above, Stoller both researched intersex individuals himself and was very much influenced in his theorisation by Money, who is responsible for creating the institutionalised Western response to intersex people.⁶³ Intersex bodies have been central to Western approaches to gender diversity, as they constituted the blueprint for normalising interventions proposed by Stoller and others. Money argued that intersex individuals almost ‘always’ identified with the gender role and sexuality that corresponded with their reared sex.⁶⁴ Money has been highly influential, as his work still determines the basic principles of sex reaffirming surgery for infants.⁶⁵ Money advocated sex reaffirming surgeries for intersex children as he regarded adult sex reaffirming surgery as risky and unsuccessful.⁶⁶ Depending on the biological variations discovered at birth, the child should be assigned to either gender, and the ‘errors’ of the body should be corrected and surgical and or hormonal treatments should be directed towards maintaining the person in that sex.⁶⁷ Further, Money focused

⁵⁸ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172, ¶7, p.4.

⁵⁹ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN. Doc/ A/HRC/35/36, ¶6, p. 4.

⁶⁰ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172, ¶7, p.4.

⁶¹ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172, ¶7, p.4; UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN. Doc/ A/HRC/35/36, ¶6, p.4.

⁶² UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN. Doc/ A/HRC/35/36, ¶6, p.4.

⁶³ Limor Meoded-Danon and Niza Yanay ‘Intersexuality: On Secret Bodies and Secrecy’ [2016] 17:1 Studies in Gender and Sexuality 57.

⁶⁴ Repo (n 60) 32-33.

⁶⁵ Ibid, 34.

⁶⁶ Jemima Repo ‘The Biopolitical Birth of Gender: Social Control, Hermaphroditism, and the New Sexual Apparatus’ [2013] 38 (3) Alternatives 228.

⁶⁷Repo (n 60) 34-35.

intensely on the nuclear family as a place of ensuring correct gender imprinting on the child.⁶⁸ Parents were fundamental in ensuring correct gender socialisation. Medical practitioners were indispensable to ensuring that the parents made the 'right decision', which more often than not meant genital surgery.⁶⁹ There was a sense of urgency in forcing the parents to make the right decision, as Money believed that correct gender imprinting could only be assured during the first two-and-a-half years of life. If performed later, Money argued that there was a risk of 'poorer life adjustment' and 'psychological disturbance'.⁷⁰ He disregarded the fact that most of his studies on adult intersexed individuals demonstrated that they grew up content with their bodies and themselves and did not find surgery necessary.⁷¹ In similar fashion, it never occurred to Money that children subjected to surgery would find this mutilating or traumatic. Discussing one of his case studies, in which one of his subjects was terrorised and kept repeating 'the nurse cut my wee-wee', Money stated:

In a typical childish way, he [the child] had misconstrued his surgical experiences to signify that his penis was being mutilated... 'I could not find much logical coherence between this and other reiterated sentences... I was left wondering if the child had some kind of cerebral defect, or whether he was simply in the midst of a hospital admission panic...'⁷²

The risk of psychological disturbance and social ostracism that would, according to Money, derive from not being normalised into female or male sex was more important than both the children's experience of surgery and adult's general satisfaction with being intersex. Thus, parents were urged to not take that risk.⁷³ Money also considered parents who disregarded

⁶⁸ Repo (n 60) 34-35.

⁶⁹ Ibid 38-39.

⁷⁰ Ibid 39-40.

⁷¹ Elizabeth Reis *Bodies in Doubt: An American History of Intersex* (John Hopkins University Press 2009) 136-139.

⁷² John Money, Joan G. Hampson, and John L. Hampson 'Hermaphroditism: Recommendations Concerning Assignment of Sex, Change of Sex and Psychological Management (1955) 97(4) Bulletin of the Johns Hopkins Hospital 284, 297 quoted in Repo (n 1530) 46.

⁷³ Repo (n 60) 39.

medical advice on normalising their infants ‘psychotic’,⁷⁴ effectively pathologising parents to win their parental approval to carry out the surgeries.⁷⁵

While it is clear from the brief description of Money’s work above that he had a clear normalising agenda, he used his medical authority to further this, regardless of the actual needs and experiences of the children he subjected to intervention. Nonetheless, since the 1950s, most intersex babies and young children (at least in the West)⁷⁶ have been, and some still are, subjected to immediate intervention by surgical and hormonal treatment to fit into one of the binary genders (male or female) with the consent (the meaning of consent being ambiguous of course) of their parents.⁷⁷ Intersex is perceived as a biological anomaly, so doctors, neurosurgeons, psychologists, social workers and parents (reassured by doctors) strongly believe that surgery followed by treatments can normalise intersex bodies and ‘fix’ their anomaly so the child will be able to grow up as ‘normal’ male or female.⁷⁸ Extended family including siblings will remain ignorant of the intervention and doctors promise parents that with the right socialisation, the child will never know his or her sex and gender assignment.⁷⁹ However, the reality is, as Money observed but ignored, never as simple as that. Secrecy, concealment, and deception are often one of key difficult aspects that the families and intersex adults mention when they speak about the treatments as children.⁸⁰ Intersex activist Cheryl Chase explains that the general silence by her parents and also by the medical community about what had happened to her, both by denial of provision of medical records but also by the general ignorance of psychologists and psychiatrists made the road to self-discovery and understanding much harder.⁸¹ Further, and maybe more importantly, the actual surgeries are experiences by child and adult intersex as violations of their bodies and

⁷⁴Repo (n 60) 39.

⁷⁵ibid.

⁷⁶ Katrina Karkazis *Fighting Sex: intersex, medical authority, and lived experiences* (Duke University Press 2008) 3-7; Melinda Jones ‘Intersex Genital Mutilation – A Western Version of FGM’ [2017] 25 International Journal of Children’s Rights 306; Aileen Kennedy ‘Fixed at Birth: Medical and Legal Erasure of Intersex Variations’ [2016] 39.2 UNSW Law Journal 813.

⁷⁷ Limor Meoded-Danon and Niza Yanay ‘Intersexuality: On Secret Bodies and Secrecy [2016] 17:1 Studies in Gender and Sexuality 57.

⁷⁸Meoded-Danon and Yanay (n 91).

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Peter Hegarty in conversation with Cheryl Chase ‘Intersex Activism, Feminism and Psychology’ in Ian Morland and Annabelle Willox (eds) *Queer Theory* (Palgrave-Mcmillan 2005) 70.

sense of themselves.⁸² Consequently, intersex individuals could be moulded into a gender despite their biological differences through correct surgical, hormonal and psychosocial interventions.⁸³ While Money attempted to separate sex from gender, both are conflated in the normalising interventions on intersex bodies. However, the artificial distinction between sex and gender continue to marginalise intersex bodies, as they are understood to be a problem of ‘biology’ rather than gender as made apparent in the first report. Going back to the text of the report discussed in the beginning of this section, the explicit exclusion of intersex bodies’ gender and sex become conflated so that the intersex body is seen as a ‘natural’ [biological] abnormality, which necessarily places it outside the mandate that is focused on ‘gender’.

The approach to intersex people has changed from the original reference to intersex bodies in the first reports to not only being included but used by the mandate holder to critique biological sex. In the report on gender identity, intersex people, appear in relation to the condemnation of pathologisation of gender diversity, whilst the biggest change in the mandate’s approach to intersex comes in the report on gender theory. In that report the mandate holder explains that:

The gravitational force of binary gender constructions, and the resulting gender expectations, often pull in persons on the basis of their sex characteristics as well, and intersex people suffer damage from attempts or actions that aim to hammer them into sex categories that are inadequate for their lived experience. These violations often entail torture and ill-treatment. Attempts to recognize intersex persons in sex and gender classification systems have often failed to adequately establish the necessary legal and social frameworks to appropriately recognize their status.⁸⁴

⁸² Ellen K. Feder *Making Sense of Intersex: Changing Ethical Perspectives in Biomedicine* (2014 Indiana University Press) 10.

⁸³ Repo (n 60) 35-42.

⁸⁴ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’ [2021] UN.Doc. A/HRC/47/27, ¶11, p.3.

Here the mandate holder appears to challenge the original distinction between sex and gender that originally led to the exclusion of intersex individuals from the mandate. Instead of understanding intersex as only incidentally related to gender and sexuality, as in the first report, the IE appears to recognise that gender structures play a role in the regulation of intersex bodies. Notably, later in the report, the mandate holder continues to critique the fact that intersex people are forcibly subjected to medical procedures because their bodies do not fit sex and gender norms.⁸⁵ In constructing the sex as a norm, the mandate holder challenges the Western liberal approach to the body as being a pre-discursive anatomical reality. The re-introduction of intersex individuals as being subjected to gender normativity on a similar basis to other sexual and gender minorities is a welcome challenge to the original exclusion in the reports, and facilitates further critique of 'biological sex' as an oppressive structure. However, the mandate holder does not challenge 'biological sex' beyond the specificity of intersex bodies. Thus, while progression can be seen, the critique of the effect of binary biological sex falls short of a real rejection of this system per se. Furthermore, the IE does not really acknowledge or engage with the fact that the medicalisation of intersex bodies corresponds to a very specific Western approach to gender diversity. In the quote above, the IE does not explicitly refer to medicalisation or medical interventions, although later in the report there is a reference to 'condemning forced surgery and treatment of intersex adolescents'⁸⁶ and a recognition of 'intersex infants, children and adolescents are subjected to medically unnecessary surgery, hormonal treatment and other procedures in an attempt to forcibly modify their appearance or physical development to be in line with societal expectations about female and male bodies.'⁸⁷ As seen in the discussion above, Western medical practitioners are responsible for the medicalised normalising intervention of intersex bodies, even if Western-medically trained physicians might have brought this practice to other parts of the world.⁸⁸ Therefore while the mandate holder explains that 'around the world, intersex infants, children and adolescents are subjected to medically unnecessary surgery, hormonal

⁸⁵ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27, ¶23, p.9.

⁸⁶ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27, ¶27, p. 7.

⁸⁷ Ibid ¶32, p. 9.

⁸⁸ Shoshana Tell 'Intersex Management in the United States and Non-Western Cultures' [2015] 30 EJBM 6.

treatment and other procedures’,⁸⁹ there is no more consideration of what happens to intersex individuals and groups outside this medical context. Consequently, while there has been a change in approach to intersex individuals that includes a greater scrutiny of ‘biological sex’, the IE does not sufficiently explore the situation of intersex individuals outside the Western medical context. The IE misses an opportunity to transcend the centrality of the West in the interpretation of international human rights norms.

2. Gender Diverse Subjects in the Reports

A key concern of queer postcolonial approaches is how subjects are constructed, recognised, and excluded through law. Recalling the analysis in chapter 6, in the discussion of sexual subjects the IE primarily recognised Western sexual categories to the exclusion of non-Western sexual identities and understandings. When it comes to categories of gender diversity the mandate holder engages and categorises a range of different gender diverse subjects, as explored below.

2.1. Trans Subjects

As with LGB categories, in the first report the mandate holder underscored the close link between the LGBT acronym and the mandate, the T referring to transgender (persons).⁹⁰ The report continues explaining that a transgender man refers to ‘those biologically classified at birth as women but wish to have their self-identity recognised as men’⁹¹ whilst ‘transgender woman refers to those classified biologically as men at birth but wish to be recognised as women.’⁹² Trans as a category has been used and referred to throughout the reports discussed in chapter 6 and here.⁹³ In the report on gender identity the mandate holder underscored that:

⁸⁹ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’ [2021] UN.Doc. A/HRC/47/27, ¶49, p.12.

⁹⁰ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN. Doc/ A/HRC/35/36, ¶6, p.4.

⁹¹ Ibid.

⁹² Ibid.

⁹³ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc. A/72/172; UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2017] UN.Doc/ A/HRC/35/36; UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/HRC/38/43; ‘Report of the Independent Expert on

This report uses the term “trans”, well-established in United Nations and regional human rights documents to refer to persons who identify with a different gender to the one assigned at birth...⁹⁴

In contrast to the categories of transvestitism and transsexualism used by Stoller and other medical professionals, the category ‘trans’ appeared as a term to avoid and surpass medical categories.⁹⁵ The term was introduced in 1976 by activist Victoria Prince, who used ‘transgenderist’ and ‘transgenderal’ to refer to people who lived full-time in a gender different to that assigned at birth but who did not seek sex/gender surgery.⁹⁶ Because surgery is integral to the medical conceptualisations of gender proposed by Stoller and Money discussed above, the use of the word trans appeared as both an oppositional and more inclusive term. The term trans-gender then took hold to encompass a wide range of identities; both those moving across from one pre-existing gender category to another (permanently or temporarily) and the idea of (trans)cending gender altogether.⁹⁷ Because trans appeared as a category to challenge Western medical conceptualisations of gender it appears more open ended and inclusive. The latter is largely because the term is not necessarily fixed by reference to biological sex but as a rejection of the entire system in itself. However, the definition of trans given by the mandate holder does not appear open ended. Notably the definition cited above clearly links identification with a gender that necessarily has to be different to that assigned at birth, reinforcing rather than challenging the medicalised approach to gender discussed above.

protection against violence and discrimination based on sexual orientation and identity ‘Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity’ [2019] UN.Doc. A/HRC/41/45; UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Social inclusion’ [2019] UN.Doc. A/74/181; UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Practices of so-called “conversion therapy”’ [2020] UN.Doc. A/HRC/44/53.

⁹⁴ UNGA ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity’ [2018] UN.Doc. A/73/152, ¶ 5, 3-4.

⁹⁵ Richard Ekins and Dave King ‘Towards a sociology of transgender bodies’ [1999] 47.3 *The Sociological Review* (Keele) 580, 581.

⁹⁶ Richard Ekins and Dave King ‘Towards a sociology of transgender bodies’ [1999] 47.3 *The Sociological Review* (Keele) 580, 581.

⁹⁷ *Ibid.*

Furthermore, while more open ended in its original conception, trans is located in its development and conceptualisation within the West and is therefore dependent on the Western gender system, even if it is solely based on the rejection of it. Importantly, trans categories have often been used to assimilate non-Western gender diversity or equate it with that of the West.⁹⁸ For example Nancy Nangeroni, in searching for *mahu* (a Polynesian term for gender liminal) in Hawaii, equates the experiences of the *mahu* she meets to that of the American transgender.⁹⁹ The subjects of Nangeroni's study do not clearly state or discuss that they understand themselves as equivalent to the American transgender. Furthermore, despite one of them identifying as homosexual rather than trans, Nangeroni presumes that their identities, while being at a different stage of cultural evolution, (*mahu* existing in a precious paradise) are interchangeably the same. Because Western categories of sexuality and gender are not automatically applicable to non-Western peoples, the mandate holder should recognise the specific historical and geopolitical development of the term trans, considering its lack of applicability outside the West. However, the mandate holder does not make such an acknowledgement, reinforcing the centrality of Western approaches to gender under the mandate.

2.2. Gender diverse subjects

A fundamental insight from queer postcolonial approaches is that the use of Western categories marginalises the diversity of peoples subjected to structures of sexual and gender oppression. In chapter 6, one of the main critiques of the IE's approach to sexual categories was the lack of recognition of both their exclusive nature and that such categories often privilege white subjects. However, in the report on gender theory the mandate holder references the representational limits of identity categories by stating:

The widely used acronym LGBT (lesbian, gay, bisexual and trans) and the term gender-diverse, as well as terms such as queer, questioning, and asexual, are reflections of political and legal identities, and persons impacted by violence and

⁹⁸ Evan B. Towle, Lynn Marie Morgan 'Romancing the Transgender Native: Rethinking the Use of the 'Third Gender' Concept' [2002] 8.4 GLQ 469.

⁹⁹ Ibid.

discrimination based on sexual orientation and gender identity may identify themselves in ways that do not coincide with them.¹⁰⁰

Notably, Madrigal-Borloz does not make any reference to non-Western ‘political’ or ‘legal identities’ but at least the mandate holder underscores that the experience of oppression happens regardless of how a subject identifies. Further, the report on gender theory affirms that: “The present report uses the term gender-diverse to refer to persons whose identity/and expression are at odds with what is enforced as a gender norm in a particular context in a particular point in time.”¹⁰¹ A key to challenge the general exclusion and marginalisation of non-Western peoples identified by queer postcolonial approaches is shifting the analysis from subjects of oppression to structures of oppression. In the texts cited, the mandate holder appears to hint towards the importance of such structures of oppression, recognising the impact of violence and discrimination regardless of how the subject identifies. Rather than taking for granted the existence and content of these categories, the mandate holder identifies they are conditional to specific political contexts. The latter is significant to queer postcolonial analysis because it could open the mandate up to a more structural rather than identity-based analysis. However, as seen in the discussions above, the mandate holder has not really challenged the structural oppression of non-Western peoples emanating from Western gender constructions. On the contrary, the IE has reinforced some of these by not engaging with the underpinning Western nature of many of the concepts the mandate holder analyses. Nonetheless the mandate holder has attempted to define ‘normativity’ in the reports, but unfortunately the analysis neither touches on the structural underpinnings of the Western gender system nor does it consider all its effects.

In the report on gender theory, the mandate holder touches upon aspects of the Western gender system in the analyses. He explains that ‘a common feature of persons affected by violence and discrimination based on sexual orientation and gender identity is their resistance to dominant ideologies’, to which categories of gender are ascribed.¹⁰² What the mandate

¹⁰⁰ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’ [2021] UN.Doc. A/HRC/47/27, ¶19, p.3.

¹⁰¹ Ibid ¶18, p.3.

¹⁰² UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’ [2021] UN.Doc. A/HRC/47/27, ¶10, p.3.

holder considers the content of these dominant ideologies and categories to be is less clear in the texts. But the mandate holder makes several references to the ‘resistance to gender stereotypes’¹⁰³ , which seems to encompass ‘sociocultural constructs that assign roles, behaviours forms of expressions, activities and attributes according to the meaning given to biological sex’ as well as sexual conduct.¹⁰⁴ This resistance is located primarily in nonconforming women, which includes trans, bisexual, lesbian and other gender diverse women as well as ‘women’ in general.¹⁰⁵ The mandate holder further points to ‘structural and historical sexism and prejudice towards non-normative sexual orientations and gender identity.’¹⁰⁶ The ‘norm’ here appears to refer to gender as socially constructed, based on preconceptions attached to the sex assigned at birth.¹⁰⁷

Having outline the main part of the report’s structural analysis it becomes apparent that while the mandate holder touches upon elements of queer postcolonial insights the analysis does not go far enough. As pinpointed above, what is missing in the IE’s account is a real engagement with Western heteropatriarchy and its effect on non-Western subjects. Similarly, the mandates holder’s critique of gender normativity does not consider the intersections with racial and imperial normativity. As discussed in section 1 above, Western gender norms are embedded in racial considerations, binding non-Western gender subjects in ways that are not accounted for in the analysis by the mandate holder. Furthermore, the IE does not engage with the root causes of this gender system. For example, prejudice against non-normative people is highlighted as a cause of violence and discrimination. However, there is no discussion in the text of how this prejudice stems from the naturalisation of heterosexuality, against which gender and sexual diversity is measured. Similarly, biological sex appears to be challenged when it affects intersex individuals and women, but it is not explicitly considered

¹⁰³ | UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’ [2021] UN.Doc. A/HRC/47/27 ¶13, p.4.

¹⁰⁴ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’ [2021] UN.Doc. A/HRC/47/27, ¶10, 13, p.3, 4; UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’ [2021] UN.Doc. A/HRC/47/27, ¶29, p. 8.

¹⁰⁵ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’ [2021] UN.Doc. A/HRC/47/27, ¶10, p.3;

¹⁰⁶ UNHRC ‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity ‘Gender Theory’ [2021] UN.Doc. A/HRC/47/27, ¶21, p.6.

¹⁰⁷ Ibid ¶29, p.8.

as a socially constructed structure that oppresses, excludes and marginalises non-Western gender diversity as explored in section 1. At the same time, the mandate holder does refer to colonialism as a potential cause of repression of gender identity outside the West. However, the fact that the mandate holder has to point out that ‘only some’ submissions have referred to colonialism and imperialism raise question regarding whether or not this is a universal concern. Further, colonialism and imperialism are referenced just in passing, rather than being central to the development of gender and sexual norms as identified by queer postcolonial approaches. Consequently, the mandate holder highlights certain aspects of the Western gender system, such as biological determinism, sexism, and prejudice against gender diversity, but fails to engage with its root cause. There is no real recognition in the texts of either the Western centric nature of these norms nor their spread throughout the world through imperialism and colonialism.

Beyond the references to non-Western gender diversity discussed below there is no explicit engagement with the diversity in experiences of gender oppression that exists around the world. In the texts summarised above as well as throughout the report there is a continued reference to categories such as lesbian, bisexual, trans and women. While the mandate holder acknowledges that these categories might not be representative of the experience of all gender diversity, as discussed, the invocation of such categories themselves tends to privilege Western subjects. There is no attempt anywhere in the report to look beyond the prescription of Western universal narratives to examine how gender norms and gender subjects might differ locally in coexistence with Western narratives. In effect the mandate holder does not engage with a full structural analysis but rather only gives a nod or hint to aspects of oppressive structures, which renders the underpinning system invisible and therefore the majority of its consequences too.

2.3. Recognition of non-Western Gender Identity

The first two sections of this chapter have highlighted the privileging of Western gender paradigms in the reports. A major concern for queer postcolonial approaches is the universalisation of Western knowledge, which is inherently exclusionary to non-Western people. Chapter 6 critiqued the lack of engagement with and representation of non-Western

sexual diversity in the reports. That analysis concluded that in doing so, the reports support rather than challenge Western imperialistic narratives that erase the legibility of non-Western sexual diversity. Contrary to the approach observed in chapter 6, in the reports on gender, the mandate holder does acknowledge that gender categories are not necessarily representative of all gender diversity. The latter extends explicitly to non-Western diversity in the text where the IE explains:

Concepts of gender identity vary greatly across the world and a wide range of gender identities and gender expressions exists in all regions... some of the terms used include *Hijra* (Bangladesh, India and Pakistan), *travesti* (Argentina and Brazil), *waria* (Indonesia) *okule and agule* (DRC and Uganda), *muxe* (Mexico), *fa'afafine* (Samoa), *kathoey* (Thailand) and two-spirit (indigenous North America). Some of these and other identities transcend Western concepts of gender identity, gender expression or sexual orientation and, depending on the language, the terms 'sex', 'gender', 'gender identity' and/or 'sexual identity' are not always used or distinguished. Cultures and countries from all over the globe including Australia, Bangladesh, Canada, India, Nepal, New Zealand and Pakistan - together representing a quarter of the world's population - recognize law and in cultural traditions genders other than male and female.¹⁰⁸

A similar reflection is given in the report on gender theory, acknowledging a range of non-Western categories, underscoring that these identities might or might not correspond with categories of sexual orientation or gender identity.¹⁰⁹ From a queer postcolonial perspective such a recognition, if coupled with a critique of the universalisation of Western paradigms could lead the mandate to be more open to non-Western sexual diversity. Furthermore, the mandate holder's recognition of non-Western sexual diversity in the reports appears as a progression towards challenging the marginalisation of non-Western peoples within global gender narratives. However, building on Spivak's analysis at the end of chapter 3, the mere

¹⁰⁸ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶3, p. 3.

¹⁰⁹ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27, ¶ 9, p. 3.

inclusion of non-Western gender diversity in international discourse does not counter the general marginalisation and lack of agency of non-Western gender subalterns. Instead, such inclusions might reinforce these groups' marginalisation within the global episteme, as they become assimilated into Western narratives, rather than being considered on their own.

From a previous analysis of this thesis, several structures of orientalism have been identified. One of these structures is the construction of the non-West as culturally particular against the universalised West. Drawing on analysis from chapter 3, in orientalist narratives the non-West can only exist as a mirror against which the West can imagine and inscribe difference. Because the non-West is constructed as cultural it becomes particularised and therefore invisible or irrelevant to the universal which is represented by the West. In the text of the report quoted, this orientalist structure can be identified. In the text above, mandate holder underscores the existence of a great range of diversity in the world, but neither 'gender identity' nor trans are conceptualised as forming part of that diversity. Rather, these Western approaches to gender identity are implicitly constructed as universal against which all these different non-Western categories exist as particulars, and therefore universally irrelevant. As the texts state, these categories have in common transcending 'Western categories', but there is no attempt by the mandate holder to critique the use of Western categories as a reference point. Consequently, the mandate holder uses these categories to assert the specificity of the West against its 'other'. While there is an argument for analysing how Western categories have been imposed through colonialism and imperialism, as analysed above the mandate holder does not engage with such a critique, reinforcing the centrality of the West as the universal narratives. Furthermore, no attempt is made by the mandate holder to engage with these categories beyond acknowledging that they are non-Western. There is no discussion or consideration of the value of this diversity to the mandate or to the universal definition of gender diversity. Therefore, the mandate holder implicitly supports the orientalist narrative that non-Western understandings, thoughts, and experiences only hold value as a comparison to those of the West.

Significantly, in Western narratives non-Western gender diversity has always been conceptualised in that way – as a comparison to the West and Western gender categories. From the 1970s onwards the terms 'third gender' and 'trans' appeared in anthropological

writings in response to the ethnographic evidence that gender categories in some cultures could not be explained within a two-gender framework.¹¹⁰ In these accounts, non-Western diversity was constructed in contrast to the Western gender system rather than as socio-political categories on their own. These comparisons lay the foundations for challenging the binary medicalised approach to gender diversity in the West. Many trans activists and allies, invoking examples of non-Western diversity, provide an alternative to the medical psychopathologising of gender diversity in the West.¹¹¹ In these narratives, the transgender 'native' appears not as a normal human being living within gender constraints of their own societies but as an imagined transcendent being.¹¹² For example in *True Selves*¹¹³ the authors assert when describing cross-dressing ancestors that 'Shamans and medicine men were thought to hold special powers and were considered 'twin souls' with knowledge of both female and male secrets...'.¹¹⁴ Here the idea is an assumed pre-modern primitive social value of gender diverse peoples as special beings, which is supposed to translate into a greater acceptance of Western gender diversity.¹¹⁵ In many of these accounts non-Western gender diversity is given an idealised existence in a utopian place and time without regard for the actual experiences of the imagined gender diverse 'native'.¹¹⁶ As with all orientalist discourse, the 'native' can only exist as both cultural and pre-modern.¹¹⁷ They remind 'us' Westerners of an idealised cultural past in which gender diverse individuals could exist freely without any consideration of the specificity of their experiences and conditions of possibility.¹¹⁸ Situated as pre-modern, these identities can only serve as a validation for the 'modern' Western categories of gender diversity and are not seen as social and political identities in themselves.

¹¹⁰ Towle and Morgan (n 112) 469.

¹¹¹ Towle and Morgan (n 112) 473.

¹¹² Ibid 477.

¹¹³ *True selves* is a book by clinician Mildred Brown and journalist Chloe Ann Rounsley aimed at offering insights into the experience of trans people, including the meaning of trans and the 'trans experience'. See Mildred L. Brown and Chloe Ann Rounsley *True Selves: Understanding Transsexualism – For Families, Friends Co-workers and Helping Professionals* (San Francisco: Jossey-Bass 1996).

¹¹⁴ Mildred L. Brown and Chloe Ann Rounsley *True Selves: Understanding Transsexualism – For Families, Friends Co-workers and Helping Professionals* (San Francisco: Jossey-Bass 1996) 2.

¹¹⁵ Towle and Morgan (n 112) 469.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

In the reports the mandate holder engages in a similar type of erasure as the activists, by conflating non-Western diversity with greater acceptance. In the text above, the IE references a range of former colonies (Australia, Bangladesh, Canada, India, Nepal, New Zealand and Pakistan) explaining that they recognise in law and in cultural traditions genders other than male and female. Here the mandate holder falls into the same trap as the activists discussed above, whereby these categories are imagined to be somehow more accepted culturally and legally and therefore not in need of protection under the mandate. Notably, as will be discussed further in section 5, one of the key root causes and 'solutions' proposed by the mandate holder to end violence and discrimination is legal recognition. By suggesting that non-Western gender diversity is more accepting and recognised, the mandate holder almost implies that their experiences of oppression are non-existent or at least less than those of Western subjects, implicitly centring the latter in the mandate. Consequently, rather than signifying a shift towards making the reports less exclusionary towards non-Western people, the IE's mention of non-Western gender diversity only serves to marginalise these groups even more in international human rights law.

3. Pathologisation and Stigma

Throughout the reports discussed in chapter 6, as well as the one on gender identity, pathologisation has been highlighted by the mandate holders as a main cause of oppression of sexual and gender diversity. In the reports analysed, the focus is particularly on the International Classification of Disease (ICD). As discussed in the previous chapter with regard to sexuality, the mandate holder celebrated the removal of homosexuality from the ICD and critiqued the lack of removal in national diagnostic manuals.¹¹⁹ However, as the analysis in chapter 6 concluded, the removal of homosexuality from the ICD did not significantly challenge the pathologisation of sexuality beyond specific lesbian and gay identities. In relation to gender, the first reports of the mandate underscored the difficulty of trans and intersex persons as they still fell under the ICD (ICD-10) in the chapter on mental and behavioural disorders.¹²⁰ However at the time of the report on gender identity, a revised version of the ICD (ICD-11) was being discussed internationally in which gender diversity is

¹¹⁹ UNHRC "Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity" [2017] UN. Doc/ A/HRC/35/36, ¶58, p.17.

¹²⁰ Ibid.

included under the chapter on 'sexual health'.¹²¹ In the report on gender identity, the mandate holder celebrates the shift in diagnosis, highlighting that the inclusion of gender diversity in ICD-11 is to facilitate gender reaffirming treatments.¹²² With the subsequent adoption of the ICD-11, pathologisation does only appear in the report on gender theory in relation to intersex individuals and as a reminder to states to 'redouble their efforts to dismantle any remnants of pathologisation'.¹²³ Thus, from the reports it appears that the ICD features as both a cause and a solution to pathologisation of both sexuality and gender diversity.

Analysis in previous chapters has pointed to the multiple queer postcolonial insights critical of the type of Western medical discourse that, as the following analysis explores in depth, underpins the ICD. The ICD has its origin in the work of French and American physicians that from the mid-1700s began to classify different diseases, in particular deadly disease.¹²⁴ From 1898 the 'International List of Causes of Death' was presented in the United States and throughout the 1900s this list was updated and published once per decade.¹²⁵ In 1948 the WHO took charge of the classificatory system, publishing ICD-6 in that same year. Most significantly to the analysis below, ICD-6 was expanded by the WHO to include psychiatric disorders, opening up to the inclusion of sexual and gender diversity within the classification.¹²⁶ The centrality of Western medical approaches to gender diversity is taken for granted, as the Independent Expert justifies the focus on the ICD instead of grappling with the many 'medical traditions' and the 'processes of national implementation of classification of diseases.'¹²⁷ While the mandate holder explains that 70% of the world's psychiatric practitioners use the manual, it is not certain that this same percentage use the ICD to diagnose gender diverse subjects. From a queer postcolonial perspective, the creation of the different diagnosis for gender diverse individuals corresponds to a very Western approach to

¹²¹ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶10-16, p. 4-6.

¹²² *Ibid.*, ¶14. P.5

¹²³ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27, ¶ 49, 92, p. 12, 19.

¹²⁴ J.A Hirst, G. Nicola, G. McGinty, R.W. Liu, R.M. Barr, M.D Chittle and L. Manchikanti 'ICD-10: History and Context' [2016] 37.4 American Journal of Neuroradiology 596.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶10, 4-5.

both the anatomical body and to gender that is inherently normalising. Notably the ICD holds a range of other mental health diagnoses, and it is not automatically clear to what extent it is applied to interventions for non-Western gender diverse individuals. At the same time, as discussed above, the IE appear to consider gender diversity as more readily accepted in non-Western countries. By primarily focusing on the ICD, the IE fails to contextualise the use of the manual to oppress gender diversity. Consequently, the mere extension of the ICD approach to gender diversity around the world should inherently be challenged by the mandate holder, rather than only as it affects certain subjects. Again, as discussed throughout this chapter, the failure by the mandate holder in recognising the Western-centric nature of the forms of oppression analysed means that the experiences of non-Western peoples are further marginalised throughout the reports.

3.1. Examining the Diagnosis in the ICD

In contrast to ‘sexuality deviations’, which first appeared in the ICD in 1948, the inclusion of gender within the ICD is relatively recent.¹²⁸ Before ICD 10 (1990) there was no diagnosis to refer to cross gender identification, although transvestitism and transvestism were in ICD 8, and 9 considered sexual deviations independent from homosexuality.¹²⁹ In the ICD-10 a different diagnostic appeared in relation to gender diverse individuals, encompassing:

1. Transsexualism defined as a desire to live and be accepted as a member of the opposite sex¹³⁰
2. Dual-role transsexualism: wearing of clothes of the opposite sex to enjoy temporary but not permanent experience of membership in the opposite sex¹³¹
3. Gender identity disorder in childhood: characterised by a persistent and intense distress about assigned sex¹³²

¹²⁸ Jack Drescher, Peggy Cohen-Kettenis and Sam Winter ‘Mining the body: Situating gender identity diagnosis in ICD-11’ [2012] 24 (6) *International Review of Psychiatry* 568.

¹²⁹ Ibid.

¹³⁰ World Health Organization (WHO), *The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (World Health Organization 1990) available at: <<https://icd.who.int/browse10/2019/en>> last accessed 15th of September 2021, F64.0.

¹³¹ Ibid, F64.1.

¹³² Ibid. F64.2.

As Maaïke Bleeker pointed to (discussed in chapter 4), with the increased possibilities of medical transformations of the body, Western medical discourse has been incredibly concerned with making the exterior anatomical body fit the interior 'soul'.¹³³ Since early 20th century Western medical professionals began to propose origin theories, diagnosis and treatments for mainly effeminate men. In 1910, the German physician and sexologist Hirschfeld first invented transvestism as an independent category from homosexuality that included cross-gender identification.¹³⁴ Hirschfeld identified as a homosexual and considered homosexuality, as well as what he categorised as hermaphrodites, androgynes and transvestites as types of natural variations rather than deviants. Against the dominant binary division between the sexes, held by the Victorians and touched upon previously in this thesis, Hirschfeld and colleagues grounded their interventions in a theory of human bisexuality. They understood transsexuality as one version of the normal mixed-sex condition that explained the occurrence of some masculine and feminine traits in both sexes. As Christian Hamburger, a Danish endocrinologist, stated at the time:

It...is impossible to fix any definite border between what is normal and what is not. A 100 per cent man or a 100 per cent women does not exist. We all have rudiments of the hermaphrodite (dual sex) within us.¹³⁵

While these scientists did not discount psychological origins entirely, they repeatedly returned to 'deeper somatic causes'.¹³⁶ They argued that surgical intervention and hormonal treatment was justified based on the physical nature of the condition.¹³⁷ If all humans had both male and female components that could be inhibited or promoted, the fact that some humans had unusual proportions of maleness, and that there were females who did not accord with their genitals, did qualify some apparent women as men and some men as

¹³³ Bleeker (n 20).

¹³⁴ Joanne J. Meyerowitz *How Sex Changed: a history of transsexuality in the United States* (Harvard University Press 2004) 15.

¹³⁵ Quoted in Joanne J. Meyerowitz *How Sex Changed: a history of transsexuality in the United States* (Harvard University Press 2004) 101.

¹³⁶ Joanne J. Meyerowitz (n 134).

¹³⁷ *Ibid* 103.

women.¹³⁸ Surgery would only make life easier for such individuals.¹³⁹ European scientists succeeded in incorporating the gender diverse body within a system of normalisation that while rooted in the idea of human bisexuality could never transgress the boundaries of gender normativity. Their approach however stands in contrast to the psychopathologising of gender diversity happening a bit later in the US that found its way to the ICD-10.¹⁴⁰

Originally, and in contrast to their European counterparts, American scientists firmly understood transsexuality to be an issue of the mind rather than of biology. For example, the clinical psychologists Mash and Worden concluded that their transsexual male subjects found that their desire for surgery did not acknowledge the possibility that their wishes were symptoms of a disorder within themselves, and that real problem was one of personality that 'could not be cured by amputation of the genitals'.¹⁴¹ Nonetheless, by the mid-20th century the transexual body had emerged within the public imagination, as when the sensationalist story of Jorgensen hit the North American press.¹⁴² Jorgensen had travelled to Denmark as a 'natal man' and return to America as a 'woman'.¹⁴³ As the gender diverse body became more publicly visible, support for transitioning at least in certain cases became more mainstream.¹⁴⁴

A key figure in this process of change was Harry Benjamin.¹⁴⁵ Benjamin has been described as the founding father of Western transsexualism, and in recent years the Harry Benjamin International Gender Dysphoria Association has gained increased prominence as a key medical and clinical voice of Western transsexualism.¹⁴⁶ Benjamin was a sexologist and had his first transsexual patients at age 63 when he was a well-established practitioner.¹⁴⁷ Benjamin distinguished himself from other practitioners as he had taken some tentative steps towards securing 'sex change' surgery for his patients even before the publicity of Jorgensen's

¹³⁸ Joanne J. Meyerowitz (n 134).

¹³⁹ Ibid 104.

¹⁴⁰ Drescher, Cohen-Kettenis and Winter (n 142).

¹⁴¹ Meyerowitz (n 148) 108.

¹⁴² Drescher, Cohen-Kettenis and Winter (n 142).

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Richard Ekins 'Science, Politics and Clinical Intervention: Harry Benjamin, Transsexualism and the Problem of Heteronormativity' [2005] 8(3) *Sexualities* 306.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

case. In his early work he further distinguished himself from other influential figures at the time, such as Stoller, discussed above, as he did believe there might be hidden biological causes for transsexuality.¹⁴⁸ He did not discount environmental influences, but he believed that there had to be some prenatal disposition,¹⁴⁹ and was critical of those who argued that transsexualism was a matter of 'nurture' over nature'.¹⁵⁰ Benjamin distinguished the transvestite from the transsexual and considered the latter to encompass people who 'wanted to belong to the opposite sex and correct nature's anatomical 'error'.¹⁵¹ Benjamin further argued that no clinical intervention, including psychotherapy or psychoanalysis could 'cure' the transsexual wish for reassignment, so that in appropriate cases the intervention should take the form of sex reassignment surgery.¹⁵²

Nonetheless, Benjamin still regarded transsexualism as a sexual deviation.¹⁵³ However, he distinguished transsexuals from transvestites through establishing that for the former the genital organs (body) were source of pain, while for the latter a source of pleasure.¹⁵⁴ Benjamin continued to argue for both medical and legal recognition of transsexuals.¹⁵⁵ In his later work his understanding of transsexualism became more normative.¹⁵⁶ During the final years of his working life he makes much more emphasis on the reassigned transsexual taking their place as 'normal' members of their preferred sex.¹⁵⁷ 'Normal' in this context meant heterosexual in their assigned sex, often seeking (and capable of) marriage and a settled family life.¹⁵⁸ Benjamin also changed his approach, furthering a gender based understanding of transsexualism rather than the more biological understanding discussed earlier. In a 1973 article he stated that 'transsexualism is a disorder of gender identity'.¹⁵⁹ Further he affirms

¹⁴⁸ Ekins (n 145)

¹⁴⁹ Ibid; Meyerowitz (n 148) 103.

¹⁵⁰ Ekins (n 145).

¹⁵¹ Ibid.

¹⁵² Ekins (n 145); Meyerowitz (n 148) 103; Harry Benjamin 'Transsexualism and Transvestitism as Psycho-Somatic and Somato-Psychic Syndromes' [1954] 82 *American Journal of Psychotherapy* 219 reprinted in Susan Stryker and Stephen Whittle (eds) *The Transgender Studies Reader* (Routledge 2006) 45, 52.

¹⁵³ Ekins (n 159).

¹⁵⁴ Ibid; Harry Benjamin 'Transsexualism and Transvestitism as Psycho-Somatic and Somato-Psychic Syndromes' [1954] 82 *American Journal of Psychotherapy* 219 reprinted in Susan Stryker and Stephen Whittle (eds.) *The Transgender Studies Reader* (Routledge 2006) 45, 46.

¹⁵⁵ Ekins (n 145).

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

that 'gender identity is so firmly established by the age of four that traditional psychotherapeutic approaches have been quite unsuccessful in resolving adult gender identity conflict'.¹⁶⁰ Thus, Benjamin did change his stand towards a more heteronormative understanding of transsexualism. Benjamin, together with some of his other contemporaries, changed medical and social conceptions of gender diverse individuals. Much of their work can be seen reflected in the ICD-10 diagnosis outlined above.

Examining the work by Benjamin and other Western medical professionals intervening on the gender diverse body, it is clear that their diagnosis and treatment played an important role in creating and maintaining structures of oppression identified by queer postcolonial approaches. First of all, the preoccupation with normalising any expressions of gender diversity within the female/male binary runs throughout the work by all these practitioners. Their patients could only exist as female or male, for whom interventions were prescribed. Even more pathologising and restrictive of gender diversity were North American practitioners, who went to great lengths to ensure that any gender diversity was corrected to fit within the female and male binary. Underpinning the discourses is the clear turn to biology, critiqued in chapter 4 and above. The biological body constitutes the place where expressions of gender diversity that threaten Western prescriptions of female and maleness can be solved.¹⁶¹ In essence, the diagnosis plays an important role in constructing the problem, which is that the original gender transgression needs to be corrected through neutralising interventions on the body.¹⁶² Unfortunately, the new diagnosis celebrated by the IE does not really free itself from this distinct normalising Western approach to gender diversity.

In the report the mandate holder celebrates the new category as being neither 'binary nor stereotyping' and states that it only applies to ensure access to medical treatment for those that want to transition.¹⁶³ The new diagnosis reads: "Gender incongruence is characterised by a marked and persistent incongruence between an individual's experienced gender and the assigned sex. Gender variant behaviour and preferences alone are not a basis for assigning

¹⁶⁰ Ekins (n 145).

¹⁶¹ Bleeker (n 20).

¹⁶² Ibid.

¹⁶³ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶10-16, 4-6.

the diagnoses in this group.”¹⁶⁴ From a queer postcolonial perspective, it is not immediately obvious why the mandate holder celebrates this new inclusion as being less binary or pathological. Not only is the sex/gender system intact in the diagnosis, there is no questioning of the inclusion of gender diversity within the manual in the first place. This biological and normalising approach to gender diversity is neither universally applicable nor representative of all social differentiations. In the West, categories of gender are social categories. Only in the West has gender diversity had to be historically solved through the biological body.¹⁶⁵ Leaving the sex/gender system intact reinforces the female/male binary, which it is inextricably dependent upon. The ready acceptance of this diagnosis by the mandate holder stands in contrast to his critique of the female/male binary examined above. However, running through the report, as analysed in relation to the definition of gender identity, there is a very clear acceptance of the Western construction of the essentialised sexed biological body. By not seeing the sexed body as a result rather than a cause of gender, the oppressive structure of Western gender prescriptions is allowed to remain intact in the reports. Thus, in effect there is a tacit legitimisation of the discourses underpinning the medicalised biological approach to gender diversity in the reports. This is highlighted in the mention of access to medical treatments, which reflects an inherent contradiction in the approach to surgical modifications of the body. As Marjorie Garber points out, it is significant that we do not consider the singer Cher or other celebrities and people who undergo surgeries to alter their physical appearance to ‘become other people’.¹⁶⁶ Instead, it appears that it is the change of pronouns, rather than the surgery change itself that makes such a profound difference in the West.¹⁶⁷ Thus, rather than challenging the binary sex/gender system and the medicalisation of gender diversity, the mandate holder ultimately reinforces these structures by celebrating their continued inclusion in the ICD.

¹⁶⁴ World Health Organization (WHO), *The ICD-11 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (World Health Organization 2019) available at:

<<https://icd.who.int/browse11/l-m/en>> last accessed 15 of September 2021, 17.HA60.

¹⁶⁵ Bleeker (n 20).

¹⁶⁶ Marjorie Garber *Vested Interests: Cross-Dressing and Cultural Anxiety* (Routledge 1992) 117.

¹⁶⁷ *Ibid.*

3.2. Diagnosing Children: Ensuring Normative Adults

Children... reminds us of time. But timing isn't everything, and so children are also forced to solicit our anxieties, our delights, our ethics, our love, or really any form of attention, especially when politics and moral values are made an issue. In fact, when it comes down to it, and it always seems to come down to it, children can be most anything, rather than themselves. And because they are pressured to do the work of placeholders for so much political, cultural, affective anxiety, they are everywhere and they're very important.¹⁶⁸

Michael Cobb's quote [above] emphasises the importance of children as objects of normative interventions in the Western world. It is a significant quotation as childhood was central to the theorisation of gender formation and children as main targets of strategies to ensure correctly gendered adults. Childhood as a site of heteronormative intervention entered queer theory through Eve Sedgwick's 1991 essay 'How to Bring Your Kids Up Gay'.¹⁶⁹ In this essay Sedgwick argued that most [if not all] societal institutions are oriented towards preventing the development of gay individuals. For Sedgwick, the inclusion of Gender Identity Disorder in Childhood (GIDC) in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DMS) III in 1980 was just another way of securing compulsory adult heterosexuality.¹⁷⁰ To underscore this point, Sedgwick referenced the work of psychiatrists such as Green and Freidman, who argued that securing the right masculine identification in young boys would effectively maximise the possibility of a heterosexual outcome.¹⁷¹ With the removal of homosexuality in 1973 from the DMS, Sedgwick was one of the first to hint that GIDC acted as a 'backdoor manoeuvre' to keep homosexuality under the control of psychiatry.¹⁷² Sedgwick was not the first to question the homophobic underpinnings of GIDC diagnosis. As early as the 1970s, Morin and Schultz argued: 'The most

¹⁶⁸ Michael Cobb 'Childlike: Queer Theory and Its Children' [2005] 47.1 Criticism 119.

¹⁶⁹ Hannah Dyer 'Queer futurity and childhood innocence: Beyond the injury of development' [2017] 7(3) Global Studies of Childhood 290; Eve Kosofsky Sedgwick 'How to Bring Your Kids Up Gay' [1991] 29 Social Text 18.

¹⁷⁰ Eve Kosofsky Sedgwick 'How to Bring Your Kids Up Gay' [1991] 29 Social Text 18, 20.

¹⁷¹ Ibid

¹⁷² Karl Bryant 'In Defence of Gay Children? 'Progay' Homophobia and the Production of Homonormativity' [2008] 11(4) Sexualities 455.

insidious attempt to stamp out the development of gay identity in young children is the treatment program developed by the Gender Identity Project at UCLA.¹⁷³ Nonetheless, the full force of such critique did not arrive until the 1990s, with Sedgwick being at the forefront of such an assessment of the GIDC. Following Sedgwick, others have argued that the GIDC diagnosis is there to prevent homosexuality, largely because effeminate boys were the primary target of intervention under the GIDC diagnosis.¹⁷⁴ Nonetheless, most of the later critics focus their work on questions of sexuality, while most GIDC research clinicians understand their work as being primarily about gender.¹⁷⁵ As such, GIDC targets gender variance regardless of its relationship with sexual orientation, and today practitioners apply the term to a number of gender nonconforming children.¹⁷⁶ Gender variant children can develop in a number of ways, and more often than not during the first 50 years of work on gender variant children the sometimes explicit but more often implicit goal has been to encourage acceptable and discourage unacceptable outcomes.¹⁷⁷ While the placement of homosexuality in the hierarchy of acceptable/unacceptable outcomes has been complicated, the persistently least acceptable outcome has always been the development of transsexual adults.¹⁷⁸ As a consequence, often homosexual and in particular a gender conforming homosexual outcome has been seen as a success under GIDC.¹⁷⁹ According to Richard Green:

... the natural course of boyhood femininity when left unattended by parents or professional authorities may be the adult picture of transsexualism and in some cases transvestitism. However, when the natural course is interrupted in the preadolescent years, the outcome may be a masculine adult.¹⁸⁰

¹⁷³ Stephen F. Morin and Stephen J. Shultz 'The Gay Movement and the Rights of Children' [1978] *Journal of Social Issues* 142.

¹⁷⁴ Bryant (n 186).

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ Richard Green 'The Significance of Feminine Behaviour in Boys' [1975] 16(4) *Journal of Child Psychology and Psychiatry and Allied Disciplines* 341, 343.

Green was another influential practitioner working on gender variance at around the same time as Money and Stoller.¹⁸¹ Green extensively researched the literature on gender variant boys, arguing that clinicians were actually treating three different components of what Green termed 'sexual identity'. These components were 1) gender identity, 2) gender role or behaviours and 3) sexual orientation. According to Green, different configurations of these components resulted in three different outcomes; transsexuality, transvestism, and homosexuality.¹⁸² Transsexuals were atypical in all these three sexual identity components, while homosexuals were only atypical in the last category of sexual orientation.¹⁸³ For Green only the two first components of sexual identity (gender identity and gender role) were areas of concern, as children did not 'have' sexual orientation yet. Green's distinction between sexuality and gender is consistent with that of Stoller and Money who, as seen elsewhere in this chapter, did not consider sexuality as a significant site of intervention. Thus, the development of GIDC was not only about curing gays but about shaping them in their preferred form, as gender conforming 'very straight' gays.¹⁸⁴ The logic of preventing adult transsexuality of Green's work continues to live in GIDC work today, with many clinicians working towards reducing or eliminating gender nonconforming behaviours.¹⁸⁵ The GIDC diagnosis aims not only to prevent homosexuality as identified by Sedgwick but also to ensure gender conforming behaviours in all cases, regardless of sexuality.¹⁸⁶

In light of the above, the existence of a diagnosis of GI for children becomes questionable from a queer postcolonial perspective, as it is underpinned by the desire to ensure gender conforming adults. With reference to children and the diagnosis of GI, the mandate holder refers to the controversy surrounding the replacement of 'gender identity disorder of children' with 'gender incongruence in childhood' in ICD-11. The IE expresses a concern about the "potential harmful effect" that this classification will have to the full enjoyment of human rights by trans people, due to the potential of this diagnosis to perpetuate pathologisation of

¹⁸¹ Karl Bryant 'Making Gender Identity Disorder of Childhood: Historical Lessons for Contemporary Debates' [2006] 3.3 Sexuality Research and Social Policy 23.

¹⁸² Bryant (n 195). Richard Green 'Dimensions of Human Sexual Identity: Transsexuals, Homosexuals, Fetishists, Cross-Gendered Children and Animal Models' in Marc Haug, Richard E. Whalen, Claude Aron and Kathie L. Olsen (eds) *The Development of Sex Differences and Similarities in Behaviours* (Springer 1993) 477.

¹⁸³ Ibid.

¹⁸⁴ Bryant (n 186).

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

gender diversities.¹⁸⁷ It is not completely clear from the text in the reports whether the IE is questioning the change in diagnosis or the actual existence of a diagnosis in the first place. However, it seems that the latter is the case, as the actual diagnosis does not fundamentally change despite the change in denomination and placement under ICD-11. As with the diagnosis for adults, it has been included under the new rubric of 'Conditions relating to sexual health' in ICD-11, rather than 'mental and behavioural disorders' as it was in ICD-10. Despite these changes, the key element in diagnosis continues to be the same. The former GIDC diagnosis included in ICD-10 reads as follows:

A disorder, usually first manifest during early childhood (and always well before puberty), characterized by a persistent and intense distress about assigned sex, together with a desire to be (or insistence that one is) of the other sex. There is a persistent preoccupation with the dress and activities of the opposite sex and repudiation of the individual's own sex. The diagnosis requires a profound disturbance of the normal gender identity; mere tomboyishness in girls or girlish behaviour in boys is not sufficient. Gender identity disorders in individuals who have reached or are entering puberty should not be classified here but in F66.¹⁸⁸

While the new diagnosis of gender incongruence in childhood is:

Gender incongruence of childhood is characterized by a marked incongruence between an individual's experienced/expressed gender and the assigned sex in pre-pubertal children. It includes a strong desire to be a different gender than the assigned sex; a strong dislike on the child's part of his or her sexual anatomy or anticipated secondary sex characteristics and/or a strong desire for the primary and/or anticipated secondary sex characteristics that match the experienced gender; and make-believe or fantasy play, toys, games, or activities and playmates that are typical of the experienced gender rather than the assigned sex. The incongruence must have persisted for about 2 years.

¹⁸⁷ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶16, p.6.

¹⁸⁸ WHO (n 144) F64.2.

Gender variant behaviour and preferences alone are not a basis for assigning the diagnosis.¹⁸⁹

The key condition for giving the diagnosis remains the same in the ICD-10 and 11, despite the change in the language used to describe the condition. In both, the following requirements are present: it has to be a pre-pubescent child, and the level of identification with the sex as well as experience and behaviour according to the gender opposite to the one the child was assigned at birth has to be substantial, to the extent the child should dislike their own sexual autonomy. As a consequence, it seems that IE does not so much refer to the change in diagnosis, which is unsubstantial, but rather the actual inclusion of a diagnosis in the first place. As the IE welcomes the changes to the diagnosis for adults in ICD-11, arguing that it is de-pathologising, his questioning of the diagnosis for children seems to be more implicitly in line with a queer postcolonial critique of the diagnosis. The IE states that the diagnosis might perpetuate pathologisation for gender diversities. This seems to point to a concern with the fact that diagnosing children has negative effects on gender diversity. However, the IE could have been somewhat clearer in his discussion of this issue and could have taken a stronger stand against the diagnosis, or at least against the core problem with the diagnosis, that is, ensuring gender conforming adults.

4. Legal Recognition

The other cause of violence and discrimination identified by the mandate holder is the lack of legal recognition of gender diversity, which also figures as the only solution to end violence and discrimination in the reports on gender.¹⁹⁰ In both the reports on gender identity and gender theory, the IEs explain that there is an international obligation on states to provide access to gender recognition procedures.¹⁹¹ The mandate holder underscores that this

¹⁸⁹ WHO (n 178) 17, HA61.

¹⁹⁰ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶ 21, p.8; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27, ¶36, p.10.

¹⁹¹ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶ 21, p. 8; UNHRC 'Report of the Independent Expert on

recognition procedure needs to be in compliance with human rights, such as by being non-discriminatory and not being based on abusive requirements such as medical certification.¹⁹² The report also establishes some minimum conditions for the actual procedures, such as being a simple administrative process based on self-determination.¹⁹³ Further, in the reports, legal recognition is considered to solve a range of human rights abuses, such as employment discrimination, exclusion from housing, healthcare, and other social services,¹⁹⁴ as well as extrajudicial executions, forced disappearances, and additional forms of torture and ill treatment.¹⁹⁵ From the mandate holder's account, legal recognition appears to be a powerful tool for ending violence and discrimination against gender diverse people. However, from a queer postcolonial perspective, as the following analysis explores, legal recognition does not constitute the ultimate mechanism of protection of gender diversity, in particular non-Western gender diversity.

A primary queer postcolonial tool against oppression is challenging dominant discursive structures that bind, marginalise and exclude gender and sexual diversity. Legal recognition on the other hand does not constitute such a challenge to the status quo. While the mandate holder specifically instructs that there must be recognition of non-binary genders, this does not fundamentally question the original practice of sexing people at birth,¹⁹⁶ that underpins the hierarchical male/female system that the mandate holder critiques, as discussed above. While the practice of sexing people at birth might not hold the same weight as a principle of

protection against violence and discrimination based on sexual orientation and identity 'Gender Theory' [2021] UN.Doc. A/HRC/47/27, ¶36, p. 10.

¹⁹² UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶ 21, 28-32, p.8, 9-10; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27, ¶36-37, p.10.

¹⁹³ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶ 39, p.13; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27, ¶36, p.10.

¹⁹⁴ UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/73/152, ¶ 24, p.8; UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27, ¶41, p.11.

¹⁹⁵ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27, ¶41, p.11.

¹⁹⁶ Damian A. Gonzalez-Salzberg 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of the Sex/Gender binary by the European Court of Human Rights' [2014] 29.4 American University International Law Review 797.

social distinction and differentiation in all places, there is no broader discussion or consideration by the mandate holder that this practice in itself might be repressive of gender diversity. From a queer postcolonial practice, the binary inscription of sex on the body can be restrictive and oppressive as it reinforces heteronormativity through female and male gender structures. Furthermore, the relationship between sex and gender affects non-Western peoples in postcolonial Western states in a distinctive and oppressive way. The link between race and gender forged during colonialism has, as explored previously, been used to deny non-Western people's (in particular women and gender nonconforming individuals) subjectivity and agency.¹⁹⁷ Within these narratives non-Western peoples were seen as less female or less male, and therefore unable to be considered 'fully human'.¹⁹⁸ This link between gender and recognition of people as subjects that have both agency and rights is a consistent feature of the West. As discussed above, intersex individuals have consistently been medicalised and intervened upon because their bodies were unintelligible before they could become gendered. The mandate holder's celebration of legal recognition as a primary tool to end violence and discrimination reinforces gender as a precondition for achieving sufficient subjectivity to be considered a recognisable 'person' before the law and the state. While the mandate holder explains that there has to be recognition of 'non-binary identities', the approach does not significantly challenge the structure of gendering in the first place. The latter is significant as it fixes the solution in the individual who will then need to ask for recognition, rather than rejecting the subjugation to gender in the first place. This need for self-identification and subsequent legitimation by the state raises further questions from a queer postcolonial perspective.

Drawing on previous analysis using the Foucauldian paradigm that links knowledge to power, techniques of governmentality such as data collection are considered tools of oppression because they allow sexually and gender diverse subjects to become normalised. As tools of governmentality, that is those institutions and procedures that have as targets the populations as its principal form of knowledge, recognition procedures allow the government or authority to shape and instrumentalise human through acquiring knowledge about

¹⁹⁷ Chari (n 11) 277; Imre (n 11) 185; Gopinath (n 11) 1-28; Hossain (n 45).

¹⁹⁸ Thomas (n 53) 44.

them.¹⁹⁹ Further, the acquisition of such knowledge by the State necessarily requires a level of participation of the subjects themselves, being an inevitable part of self-government.²⁰⁰ As discussed, these processes of governing by the state and the self are the result of specific modern Western power regimes aimed at normalising individuals through their compliance with dominant discursive structures. Significantly, legal recognition bears some characteristics of being a tool of governmentality, as it allows for the compilation of knowledge about the population. Because the process is based on self-determination it requires participation by subjects themselves as well falling in line with the self-regulation of Western biopolitical normality. At the same time, the mandate holder reinforces the centrality of Western paradigms in the identification of legal recognition as a primary tool to end violence and discrimination. Going back to the discussions in section 3, the mandate holder has already established that because numerous non-Western gender diverse groups are recognised, and therefore they are presumed to not be oppressed. However, this presumption prevents any real engagement with the oppression of non-Western gender diverse people and their experiences of oppression. As the following examples renders evident, legal recognition can be a tool of oppressive normalisation, even in those places where the mandate holder assumes that there is some pre-existing acceptance of gender diversity. Furthermore, this example considers another aspect of contemporary global politics that as discussed in previous chapters; that is the impact of Western and international NGOs and organisations imposing Western narratives to non-Western populations, rendering their voices imperceptible.

The following discussion centres around the 2013 legal recognition of Hijras by the Bangladeshi government.²⁰¹ In Bangladesh the Hijras define themselves by their ability to conduct 'Hijrajri', which refers to the ritual conduct of blessing and mastering their secret language.²⁰² There are Hijras both with a penis and without, and while there are contestations within the community over genital status, the authenticity or realness of one's Hijra status

¹⁹⁹ Bal Sokhi-Bulley 'Governing (Through) Rights: Statistics as Technologies of Governmentality' [2011] 20 (2) *Social & Legal Studies* 139, 141.

²⁰⁰ *Ibid.*

²⁰¹ Hossain (n 45).

²⁰² *Ibid.*

stems largely from the ability to conduct Hijrajri rather than one's genital status.²⁰³ However, in line with Western colonial prescriptions outside the Hijra community, Hijras are often used by the mainstream to mark, police and describe digression from the normative protocols of masculinity.²⁰⁴ They are also often seen as impotent, born with missing or ambiguous genitals and devoid of any sexual desire.²⁰⁵ Additionally in Bangladesh, Hijras are specifically located in the lower class and are often victimised based on considerations of both gender and class by the middle and upper classes.²⁰⁶ Nonetheless, as the result of a workshop funded by Norwegian donors that brought together numerous NGOs representing sexually and gender diverse groups, activists began framing their request through a rights language drawing attention to the human rights violations of sexually and gender diverse people in Bangladesh.²⁰⁷ The adoption of rights language and a new focus on legal justice led various groups, including NGOs (especially those with transnational networks) and government officials to conclude that the lack of legal recognition of Hijras was the root cause of discrimination against them.²⁰⁸ The campaign and later policy that established legal recognition of third gender had several consequences. Firstly, there was a specific impetus to consolidate the definition of Hijra as sexually and genitally handicapped with the legal definition of third gender being 'individuals sexually disabled since birth.'²⁰⁹ This view consolidated the view of Hijras as disabled persons.²¹⁰ Paradoxically, very few Hijra-identified persons were either actively involved or at the forefront of the campaign for legal recognition. This was not because they did not want legal recognition or rights, but because they were unsure of what such recognition might ultimately mean for the Hijras.²¹¹ Nonetheless, in the process of recognition and afterwards the Hijras became the symbol used by the government to claim a progressive-minded and pro-minority position and NGOs largely unrepresentative of Hijras have claimed to be the primary cause for the government's recognition. Further, international organisations such as the UNDP insist on following

²⁰³ Andan Hossain 'Beyond Emasculation: Being Muslim and Becoming Hijra in South Asia' [2012] 36 (4) Asian Studies Review 495.

²⁰⁴ Hossain (n 31).

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Hossain (n 31).

²¹⁰ Ibid.

²¹¹ Ibid.

governmental definitions of Hijra in their work, and UNAIDS have been a part of Hijra Pride, an event that remains culturally unintelligible to the majority of people in Bangladesh with the 'pride' being used to attract international donors.²¹² Contrary to what is envisioned by the mandate holder, the legal recognition of a third gender created new forms of violence and discrimination against Hijras.²¹³ The new legislation on third gender was justified based on the genital difference of the Hijras, in line with the kind of biological explanatory grid rooted in colonialism.²¹⁴ In contrast to gay or homosexual groups, who are perceived to have an element of choice, in Bangladesh the bodily difference of Hijras or bodily handicap as it was also constructed, was used to persuade the majority population that they needed recognition.²¹⁵ Thus, the recognition of a third gender for Hijras in Bangladesh operates on the assumption that they are disfigured and sexually disabled since birth.²¹⁶ In line with the new recognition of Hijras, the Ministry of Social Welfare in Bangladesh recruited 14 Hijras as 'low-ranking' office assistance or clerks. In the selection process each candidate had to undergo a medical examination. When it was discovered that all of the Hijras were in fact male, and the only candidate without a penis admitted to having undergone surgery, the Ministry terminated the project. As we have seen above, it is the ability to perform the rituals and speak the language, and not genitalia, that defines Hijras, so the Ministry effectively excluded from consideration individuals traditionally belonging to the Hijra category. Not only has the legal recognition emphasising bodily difference further stigmatised and marginalised Hijras, but it has not resulted in any additional rights protection for this group.²¹⁷ As a consequence, the straightforward use of legislation to recognise a third gender might not be a desirable strategy to secure rights protection under the mandate. It is true that the mandate holder denounces the use of biological criteria which would probably cover the law's recognition of Hijra as genitally handicapped. However, the mandate holder does not grapple with the multiple and complex structures of oppression that appear in the example. These structures include international [Western] activism, old and new colonial biases, class-structures, and historical and contemporary erasure of the agency of Hijra, and therefore it is difficult to see

²¹² Hossain (n 31).

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

how legal recognition would automatically solve all these structures of oppression. Even if the biological criterion disappeared from recognition, it is difficult to know whether legal recognition would make any significant difference to the life of the Hijras. As discussed, the Hijra community were sceptical and unsure to what extent legal recognition would bring any significant changes to their circumstance. Notably, legal recognition might not be desirable or wanted by non-Western gender diverse peoples and groups, and it is impossible to know without the IE engaging with the communities subjected to legal protection.

The above discussion points to another aspect of the report that is linked to legal recognition; namely, that of victimisation. The construction of sexually and gender diverse peoples as victims have already been critiqued in chapter 6 for constructing sexually and gender diverse people as non-ideal subjects. In the reports on gender diversity, a similar victimising approach happens as the mandate holder only refers to gender diverse peoples as victims, whose only form of salvation is legal recognition. Within this narrative there is no room for celebration of gender diversity on its own without having to impose a pre-established [Western] gendered system.

Throughout this chapter a key structure has emerged in the reports, which is the central place that the Western gender system occupies in the analysis of the mandate holder. In many ways the IE critiques at times several aspects of the Western gender system, such as biological determinism, pathologisation of gender diversity and the hierarchal distinction between women and men. However, because the mandate holder does not engage with the latter as a specifically Western phenomenon that has been exported by colonialism and adopted by postcolonial elites, the reports exclude and marginalise non-Western people and their experience in the analysis of gender oppression. Furthermore, there seems to be an assumption in the reports that non-Western gender diversity is generally tolerated outside the West, and therefore there is no attempt by the mandate holder to analyse the experiences of gender diversity outside the West. At the same time, certainly it is assumed that their experiences can be equated with those of Western subjects through the reports' consideration of pathologising and as well as legal recognition. Because only in the West, and because of Western colonialism, being gendered or having a gender identity is a pre-requisite for being recognised, it is unclear to what extent legal recognition would be desirable for non-

Western gender diversity. This conclusion is particularly true as it might reinforce the structure of gender as well as biology as a primary category of social differentiation in places where it does not hold the same significance as in the West. Thus, rendering subjects legible through legal recognition as proposed by the mandate holder might be more oppressive than liberatory of Western gender diversity.

Conclusion

This chapter has analysed key parts of the reports by the IE on the topic of gender. Section 1 examined the specific recognition and acceptance of the sex/gender binary by the IE in the report on gender theory. It drew on queer postcolonial insights from chapters 2 and 4, to analyse the IE's definition of 'gender theory'. As explored by the analysis in section 1, the mandate holder does not sufficiently consider the consequences of the colonial spread of the Western sex/gender system to the oppression of gender diversity today. At the same time the mandate holder reaffirms the privileging of Western paradigms under the mandate through the definition of gender identity. Furthermore, while the challenge towards biological sex in relation to intersex could signify a step in the right direction, the mandate holder misses an opportunity to reorient the analysis away from Western perspectives. The analysis in section 2 of the report examined the recognition of certain gender subjects under the report. The section began with a discussion of the term 'trans' as used by the IE, concluding that it is a Western gender category and therefore does not automatically represent non-Western gender diversity. Further in section 2 of the analysis I turned to the definition of 'gender diverse' as an anti-normative reference to a non-specific gender diverse subject. While this reference was acknowledged as potentially opening the mandate up to a structural analysis that would benefit non-Western peoples, it was concluded that the mandate holder does not sufficiently engage with colonialism and imperialism in the analysis to mark such a shift in the reports. I subsequently examined how orientalist structures of signification impact the mandate holder's approach to non-Western subjects. The analysis in this part of the chapter examined how gender diverse individuals have been included in the mandate in a way that erases their experiences from consideration. Furthermore, the mandate holder becomes complicit in maintaining the orientalist structures through which non-Western gender diversity can only exist as a comparison to that of the West.

Section 3 of this chapter examined the IE's approach to pathologisation as a cause of violence and discrimination of gender diversity. The analysis builds on the critiques voiced against the ICD and the mandate holder's ready acceptance of this instrument beyond the pathologisation of certain subjects. In this section the multiple medical discourses developed around intersex and gender diverse peoples were examined, highlighting their normalising and restrictive nature. Further, the analysis continued pointing to the multiple ways that the ICD is a tool of oppression. Significantly, by not critiquing the medicalisation of gender diversity in itself, the mandate holder misses the multiple ways in which non-Western subjects are subjected by the Western gender system. Finally, the report moved to exploring legal recognition as the mechanism proposed by the mandate holder to end violence and discrimination against gender diverse peoples. In this section, legal recognition was identified as a tool of biopolitics and therefore normalising in nature. Further, the analysis considered how legal recognition might be used to oppress, highlighting the potentially harmful effect of the latter to non-Western gender diversity. To conclude, building on the analysis of chapter 6, this chapter gives additional insights into the exclusion and marginalisation of non-Western people in the reports, having identified the centrality of the Western gender system to the analysis of the IE.

Chapter 8. Conclusion and Future Research Prospects

This thesis set out to examine the treatment of non-Western sexually and gender diverse peoples under international human rights law. One of its aims was to identify specific insights from queer and postcolonial theories that can be applied to international human rights law. This objective was achieved in the thesis's opening chapters, which culminated in chapter 4's analysis of queer postcolonial approaches which help to bring into proper perspective the structural oppression, exclusion, and marginalisation of non-Western sexually and gender diverse peoples. The remainder of this thesis then used queer postcolonial approaches to critically analyse the treatment of non-Western sexually and gender diverse peoples under international law. By centring non-Western sexually and gender diverse people in the analysis, this thesis has completed another objective, namely, to analyse the operation of the Independent Expert (IE). Over the course of this research, the treatment of non-Western sexually and gender diverse peoples under international human rights law has been explored both institutionally and in the interpretation of human rights.

1. Research Overview

Chapter 1 of this thesis introduced the background and context of this research, formulating the following opening research question: ***What insights do queer postcolonial approaches give into the nature, content, and boundaries of human rights protection for non-Western sexually and gender diverse peoples?***

Chapters 2 and 3 began to answer this research question by examining queer theory and postcolonial theory, and their application to human rights law more specifically. Chapter 2 pinpointed that through queer analysis it is possible to identify the multiple and complex ways that scientific, social, cultural, institutional, and political discourses favour certain gender and sexual subjects and repudiate others. More specifically, heteronormative (includes both gender and sexually normative) subjects are privileged in the West whilst others are bound by discourses of abnormality and abjection, resulting in marginalisation and exclusion. Furthermore, chapter 2 underscored that the assimilation by sexually and gender diverse groups into heteronormativity (homonormativity) reinforces rather than challenges these

structures of signification. Building on this, chapter 2 identified how human rights law can reproduce heteronormative discourses by reinforcing rather than challenging systemic gender and sexuality-based oppression. chapter 3 emphasized how postcolonial theory renders visible the multiple ways that universal discourses and institutions favour Western cultural paradigms. Through postcolonial deconstructive analysis, it is possible to discern how Western epistemology and knowledge erase non-Western people's agency, understandings, thought and lived experiences, privileging the West in universal discourses. Like queer theory, postcolonial theory rejects the assimilation of non-Western people as a reinforcement of the racist imperial system. From the analysis of postcolonial theory and human rights law, chapter 3 concluded that Western cultural paradigms can be privileged in human rights interpretations to the detriment of non-Western peoples. Taking these two chapters together, this thesis determined that queer theory and postcolonial deconstructive analysis can help to render legible the reproduction of oppressive [heteronormative and imperial] discourses in human rights interpretations. Therefore, so this thesis argued, it is compelling to apply these two theories to identify the nature, content, and boundaries of human rights law for sexually and gender diverse and non-Western peoples. However, whilst offering important insights, neither of the theories explored in chapters 2 or 3 examined the overlap between gender, sexuality, and imperialism, which then led to the pursuit, in chapter 4, of what this thesis terms queer postcolonial approaches.

This then was the context for the thesis's second research question, namely ***what insights into the oppression of sexually and gender diverse people can be drawn from existing research using both queer and postcolonial theories?*** In responding to this question, chapter 4 established the content and meaning of queer postcolonial approaches before beginning to consider their application in the context of human rights law. The chapter began building on the analyses in chapters 2 and 3 to give a more in-depth exploration to each theory's approach to non-Western sexually and gender diverse individuals and groups. In that analysis, it was seen that queer theory had yet to engage with colonialism and imperialism in the analysis of gender and sexuality, while postcolonial theory is often underpinned by heteronormativity. Therefore, neither theory is well placed to account for the oppression and marginalisation of non-Western sexually and gender diverse peoples in their respective deconstructive analyses. Second, used together, these theories can begin to trace the ways that heteronormative and

imperial structures of signification render non-Western sexually and gender diverse people invisible. The second part of the chapter identified queer postcolonial approaches by examining existing literature to see how reading these theories together could generate specific insights into the structural exclusion of non-Western sexually and gender diverse peoples. From this the following key queer postcolonial insights were identified:

1. Sexual categories such as gay and lesbian do not automatically represent the experiences of non-Western people. However, these categories are sometimes used and redefined by non-Western people, taking on different meanings and content that need to be acknowledged and recognised.

2. Orientalism has always been sexual and gendered, but today it has been reconfigured to pit Western gay and lesbians against non-Western peoples, making non-Western sexual and gender diversity an impossibility. Homonationalism and pinkwashing are terms used to describe contemporary orientalist sexual and gender narratives operating in international and national discourses.

3. Western heteropatriarchy was imposed in the colonies, and postcolonial nationalism is sometimes embedded in old colonial masculine and heteropatriarchal anxieties, legitimising the old colonial oppression of non-Western sexual and gender diversity.

4. Heteronormativity has always been racialised. Non-Western subjects have been excluded, marginalised, oppressed and exploited based on their 'inability' to comply with Western gender and sexual norms, and continue to be so through the contemporary iteration of these discourses.

5. Western knowledge is inherently exclusionary towards the non-Western world, so the universalisation of Western sexual and gender paradigms necessarily erases non-Western peoples from consideration.

Because these different discourses render invisible non-Western sexually and gender diverse people, chapter 4 established that this erasure can be countered through structural rather

than subject based analysis, and by reorienting the investigation from the universal to the local. Lastly, chapter 4 connected queer postcolonial approaches to the mandate of the IE and international human rights law more generally through the discussion of intersectionality. From that analysis, chapter 4 argued that in the global context, when analysing sexual and gender diversity, intersectional analysis requires human rights interpretations to consider insights from queer postcolonial approaches and to identify the specific ways that non-Western sexually and gender diverse peoples have been excluded, marginalised, and oppressed through colonialism and today.

Chapter 5 examined the IE as a human rights monitoring mechanism, answering the third research question of this thesis, which was *what institutional challenges and opportunities does the Independent Expert face in the analysis of oppression of sexually and gender diverse peoples?* Chapter 5 began discussing the special procedures system. From this examination, two key characteristics emerged: first, the political nature of the system; and second, the relative autonomy of the mandate holders such as the IE in determining the direction of the mandate. The second part of chapter 5 considered the complex political negotiations leading to the adoption of the mandate of the IE. Section 2.2 discussed some of the main arguments against the IE and changes in the state's attitude when renewing the mandate. Section 2.3 explored the widespread and systematic nature of violence and discrimination against sexually and gender diverse people. The analysis concluded with a reflection on challenges addressing the widespread and systematic violence and discrimination in the face of limited resources allocated to the IE, and the importance of using intersectional analysis when considering inequalities faced by sexually and gender diverse people. The last part of chapter 5 explored the mandate of the IE to date. This analysis considered how the work of the IE has given greater depth to the international understanding of violence and discrimination committed against sexually and gender diverse people. From the analysis in chapter 5, the institutional challenges faced by the IE identified are the political nature of the system and the lack of resources in light of the widespread and systematic nature of violence and discrimination. The opportunities identified are the flexibility in interpreting the mandate, the engagement with NGOs and civil society and conducting country visits.

Building on this, chapters 6 and 7 then subjected the reports by the IE to a deconstructive analysis using queer postcolonial insights, answering the main research question of this thesis outlined at the beginning of this section on the research overview. chapter 6 examined key parts of the reports by the IE on the topic on sexual diversity. It began by analysing the mandate holder's definition of intersectionality, arguing that the IE missed the fundamental purpose of the concept. More specifically the IE understands intersectionality as referring to the awareness of the multiplicity of experiences by different sexual and gender subjects rather than as a tool for reorienting the analysis towards marginalised subjects. As a result, the mandate holder did not centre non-Western sexual subjects in the analysis but rather favoured Western sexual categories in the reports. Moreover, the analysis of the use of Western categories, as well as the discussion of diversity in the reports, identified the operation of orientalist structures. More specifically, linking diversity only to the perpetrators of violence reinforces existing orientalist narratives in which non-Western peoples can only exist when assimilated into Western categories. chapter 6 then moved to the analysis of the 'root causes' of violence and discrimination as defined by the IE including criminalisation, pathologisation and conversion therapy. This part of the chapter concluded that heteronormative and imperial structures that exclude and marginalise non-Western sexual subjects are missed in the analysis of root causes. The discussion of criminalisation considered some of the boundaries to the IE's analysis considering the situation of non-Western sexually and gender diverse people. The analysis of pathologisation pointed to the lack of engagement with heteronormativity and with the pathologisation of non-Western sexually and gender diverse people. Furthermore, the discussion of conversion therapy in the 2020 report did not go far enough in its confrontation of heteronormative imperialism. The mandate holder located the main problem with conversion therapy in the fact that sexuality cannot be changed, rather than challenging the practice's heteropatriarchal underpinnings. Similarly, there was no discussion of the impact of [imperial] Western missionary practices in the spread of the underpinning 'civilising' ideas of conversion therapy. Furthermore, chapter 6 considered the 'solutions' proposed by the mandate holder in ending violence and discrimination against sexually diverse peoples. The analysis of non-discrimination pointed to some potentially limiting effects of this doctrine. In particular, the potential failure of the non-discrimination doctrine to consider intersectionality. Moreover, the inability of non-discrimination legislation to grapple with effects of certain forms of inequality for non-

Western sexually and gender diverse people. Data collection was identified as a tool that can give a better knowledge of violence and discrimination but also can have negative normalising effects. Lastly, in the IE report on social inclusion, sexual subjects were constructed only as victims, rather than celebrated as queer postcolonial approaches require.

Chapter 7 examined key parts of the reports by the IE considering human rights protection of gender diversity. The analysis started examining the mandate holder's latest report on 'gender theory' exploring the definition of gender given by the IE. In particular, the IE fails to recognise the Western centric construction of gender rooted in biology used in the reports. The IE is unable to engage in depth with some of the colonial and racial consequences of the Western gender system in the examination of gender oppression, excluding from the analysis some of the specific forms of oppression of non-Western gender subjects. In section 1 also examined some additional consequences of the privileging of the Western gender system in the definition of gender identity under the reports. Lastly, section 1 examined the change in approach by the IE to biological sex with regard to intersex individuals, concluding that this change is not sufficient to challenge the centrality of the West in the mandates approach to gender. Part 2 of this chapter examined gender subjects under the reports considering the categories of trans and gender diverse identified by the IE. This analysis concluded that in recognising these categories, the mandate holder does not sufficiently acknowledge their Western centric nature, to the detriment of the visibility of non-Western gender diversity. Furthermore, section 2 examined the explicit reference to certain non-Western gender categories in the report. This analysis identified how this inclusion re-marginalises non-Western diversity in the reports by implicitly situating these groups outside the mandate. Furthermore, the chapter discussed pathologisation as the main root cause of oppression against gender diverse peoples identified by the mandate holder. In this discussion, I examined the different discourses underpinning the International Classification of Disease (ICD) before concluding that the mandate holder limits the discussion to only some gender diverse subjects, rather than challenging the medicalisation of gender diversity and the overall structure of Western gender normativity. Finally, the chapter examined legal recognition as a solution to violence and discrimination proposed by the mandate holder. From that analysis I argued that legal recognition reinforces the exclusion of non-Western

peoples under the reports by not considering the potential harmful effect the latter can have on non-Western gender diversity.

In conclusion, this thesis has answered the research questions set out in the introduction through applying queer postcolonial insights in deconstructive readings of the reports by the IE. In doing so, this thesis has been able to identify the reproduction of Western heteronormative paradigms in the human rights interpretations by the mandate holder. Moreover, the analysis has pointed to the privileging of Western subjects in the discussion of the reports, including in the outline of root causes and solutions. Because the Western approach to sexual and gender diversity is centred in the reports, non-Western peoples continue to be marginalised and excluded under the mandate. Furthermore, this thesis has given insights into some of the strengths and weaknesses of the IE in protecting non-Western sexually and gender diverse peoples. Through the analysis of this thesis insights into the nature, content, and boundaries of human rights law for non-Western sexually and gender diverse peoples have been given from a queer postcolonial perspective.

2. Research Findings

One of the main research findings of this thesis is that the analysis of sexuality and gender cannot be separated from that of race and imperialism. Chapter 4 located the origin of Western heteronormativity in the colonial contexts through which gender, sexuality and race and imperialism became inextricably linked. The results of this interconnection are multiple and complex, binding different sexual, gender and racialised subjects through structures of oppression, exclusion, and marginalisation that cannot be grasped by the analysis of sexuality and gender alone. As discussed above, neither queer theory nor postcolonial theory on their own grapple with this overlap, and thus risk contributing to the discursive illegibility of non-Western sexually and gender diverse peoples and their experiences. Consequently, to address non-Western sexually and gender diverse peoples, the intersection between sexuality, gender and race and imperialism must be centred in the analysis. The latter entails not only identifying and acknowledging structures of oppression such as orientalism and heteronormativity, but also challenging the universalisation of Western paradigms and Western subjects in the analysis of sexuality and gender.

The second key findings of this research are that Western paradigms are privileged in the analysis of the reports by the IE. Chapters 2 and 3 pointed to the way that traditional human rights interpretation privileges Western paradigms, including heteronormativity and to the exclusion of non-Western sexually and gender diverse peoples. Chapter 6 and 7 considered how these existing and other discursive structures, such as orientalism, influence the interpretations of human rights by the mandate holders. The consequences for the mandate's applicability to non-Western sexually and gender diverse peoples is far-reaching. The analysis shows that the IE privileges western gender subjects, and marginalise non-Western sexually and gender diverse peoples under the mandate. Furthermore, the missing acknowledgement of non-Western sexual identities and understandings reinforces rather than challenges the orientalist Western assimilationist and conservative nationalistic exclusions that render non-Western diversity a discursive impossibility. At the same time, even when the mandate holder refers to non-Western gender identities, the impact of Western orientalism in the reports results in the exclusion of non-Western gender diverse peoples from the actual analysis in the reports. This displacement and erasure of non-Western sexually and gender diverse peoples is another consequence of Western discourse as explored in chapters 3 and 4. Consequently, by centring Western categories and narratives in the analysis, the mandate holder misses the experiences and circumstances of non-Western sexually and gender diverse people in the analysis. The analysis by the mandate holders is not only incomplete, but reinforces the marginalisation and illegibility of non-Western sexually and gender diverse peoples under the mandate. The analysis in this thesis has shown that because these groups are already marginalised and excluded, the mandate holder must in fact seek to transcend Western narratives in the analysis to grapple with their oppression. However, because the IE relies on Western narratives in the interpretation of the mandate, the solutions to end violence and discrimination proposed by the IE fails to contextualise human rights standards of protection to be responsive to non-Western sexually and gender diverse people. Some solutions might be directly harmful to non-Western peoples, such as the use of legal recognition for non-Western gender diverse peoples discussed in chapter 7. Others, such as non-discrimination, miss specific structures of inequality affecting non-Western sexually and gender diverse people, while data collection have potentially normalising effects. Despite the limits of the reports discussed above, a key conclusion of this thesis is that the IE can challenge the

universalisation of Western sexual and gender paradigms through the mandate. Not only does the mandate holder have flexibility and autonomy in defining and implementing the mandate, but there is also no all-encompassing human rights doctrine on the rights of sexual and gender diversity, which means that the approach taken by the mandate holder will in itself play an important role in the definition of these rights. Finally, the IE can interact with non-Western sexually and gender diverse people on the ground through country visits and civil society submissions. Moreover, there are very specific ways that the IE can transcend the limits of Western paradigms in the interpretation of the mandate. These are explored below in section 2.1.

The findings of this research are significant considering the broader debates concerning the applicability of human rights to the struggles of non-Western sexually and gender diverse peoples outlined in the introduction of this thesis. Recalling the discussion in chapter 1, scholars such as Ratna Kapur argue that non-Western sexually and gender diverse peoples should separate from the human rights project because it is limited by the Western Eurocentric frameworks. This thesis supports Kapur's contention, in the sense that IE is heavily reliant on Western paradigms in the interpretation of rights for sexually and gender diverse peoples, impacting their applicability for non-Western peoples. Furthermore, this thesis has identified specifically how Western prescriptions impact the human rights interpretations by the IE to the detriment of non-Western sexually and gender diverse peoples. However, the findings of this research also suggest that there is room for a re-interpretation of human rights under the mandate of the IE. If the mandate holder utilised the tools available to him to transcend the boundaries of Western narratives and influence, there could be room for non-Western sexually and gender diverse people under human rights law. The latter would include considering the insights from queer postcolonial approaches outlined above to ensure a shift in the analysis to centre non-Western peoples within the analysis. However, until the mandate holder does so, the reports on balance contribute to, rather than challenge, the oppression of non-Western sexually and gender diverse people, and do not solve the question about the applicability of human rights to these groups.

2.1 Implications of findings and conclusions for policy discussions and further development of the work of the IE and other key stakeholders

Recalling some of the discussions in chapters 2-4, a key insight of queer postcolonial approaches is that from deconstructive critique alternative starting points can emerge to support revisions of international human rights law. In this section I consider how the key findings of this thesis, in particular from chapters 6 and 7 but also as outlined above, can impact not only the IE, but also reform the way human rights bodies and key stakeholders such as states and civil society approach and account for the rights of non-Western sexually and gender diverse people.

2.1a) Developing the role of the IE through discursive changes based on the analysis in chapters 6 and 7.

The analysis of chapters 6 and 7 was primarily focused on the discursive limitations to the approach by the IE. Therefore, there are some very key discursive changes that the IE can make to develop the mandates role in protecting non-Western sexual and gender diversity. Furthermore, these changes should not significantly impact the work of the IE from a resource perspective, as they only require a change in the approach to the analysis of violence and discrimination and human rights standard setting. To begin with, the IE should reconsider the mandate's approach to intersectionality as an addition to the general analysis rather than as a starting point for the discussion and human rights standards setting. This requires the IE to reconceptualise intersectionality from an 'awareness' of multiple identities and forms of oppression to a commitment to challenge the differences that emerge from these instead. The latter only makes more sense when going back to the analysis of violence and discrimination against sexually and gender diverse people in chapter 5, which pointed to the

way that non-white, migrant, and non-Western sexually and gender diverse people are subjected to a higher level of violence and discrimination and inequality than their white and Western counterparts. Furthermore, instead of considering the intersections between sexuality, gender, race, and xenophobia to be unexplored, the mandate holder should acknowledge the work by Crenshaw, Audre Lorde, Anzaldua and other sexually and gender diverse authors and activists of colour, and show a commitment to further the analysis of these issues through working with civil society in non-Western countries and affected groups in the West. In sum, the IE should redirect the analysis of the reports to those sexually and gender diverse groups that are most excluded and marginalised and account for the reasons why there are significant inequalities between groups of sexually and gender diverse people based on their race and geopolitical locations. In addition, when identifying standards for human rights protection the IE should account for the differences between the groups and adapt the responses to violations and discrimination accordingly. In doing so the IE would achieve a much better approach to the analysis of violence and discrimination, as well as its root causes, by really accounting for the differences in experience between sexually and gender diverse people.

Another change that the IE should implement, is provincializing the West within the mandate which would benefit non-Western sexually and gender diverse. This requires the IE to make sure that the mandate does not conflate the universal with the West. Thus, instead of using Western sexual categories to identify subjects of violence and discrimination, the mandate holder should consider it as a positioning against structures of oppression based on sexuality, gender as well as race and imperialism. Like the subaltern of postcolonial theory, the subject of protection under the mandate should be heterogenous enough to accommodate a range of sexually and gender diverse subjects, rather than only a few, or being based on a specific approach to sexuality and gender. Therefore, instead of connecting the mandate to Western categories and then briefly mentioning that the experiences of identities are diverse, the IE should effectively connect the mandate with that diversity. Instead of referring to any categories or identities, the mandate holder could consider approaching it as a positioning such as the subaltern, that is defined by the effects of structures of oppression, exclusion, marginalisation, violence, and discrimination. If the IE wanted to refer to categories by way of representation, the mandate holder should acknowledge the origin and use of Western

categories, highlighting their boundaries for representation. Furthermore, the IE should discuss the diversity that already exists within these categories, with specific reference to the re-use by non-Western sexually and gender diverse groups, and should highlight that these are mere examples of a range of others that should be represented and consistently referred to in the mandate as well. What the IE must stop doing is to position both explicitly and implicitly Western identities as the universal, and non-Western ones as particular, and therefore less relevant to the mandate. For example, non-Western gender identities should not be grouped together as being 'non-Western' and situated against 'gender identity' as the universal category. Instead, the mandate holder could explain that there is a great gender diversity around the world, and while their self-definition and experiences might be different, they have in common being potential victims of violence and discrimination due to failing to comply with dominant gender and sexual norms. By doing so, the IE would transcend the limit of categories and focus the analysis on the reasons for oppression which would hopefully lead to a more well-rounded discussion touching upon all the structures of inequality affecting sexual and gender diversity.

Engaging with a more structural rather than categorical approach to the human rights protection of sexual and gender diversity should lead the IE to better account for the ways in which the West underpins and affects the regulation of sexuality and gender internationally. Instead of filling the universal with Western prescriptions such as the sex/gender system critiqued in chapter 7, Western cultural and knowledge paradigms should be seen in themselves as hegemonic structures that exclude and marginalise the non-West. For example, instead of defining gender identity based on the sex/gender binary, the IE could explain that 'gender identity' is a category that has been developed according to Western medical science which fixes gender in the anatomical body. The IE would have to explain that this anatomical fixity of gender is a specific Western approach, that due to colonialism has been imposed all over the world to the detriment to non-Western gender diversity and to other social approaches to gender. By taking such an approach the IE would achieve postcolonial provincialisation through recognising Western specificity but also critically engaging with the impact of the West around the world. In addition, by reflecting on the hegemonic impact of Western culture and knowledge the IE would have an opportunity to identify and challenge the operation of oppressive structures such as orientalism as well as

heteronormativity within those discourses. By actively disconnecting the universal from the West, the IE would challenge the exclusion of non-Western sexually and gender diverse people from human rights analysis and discussions. Moreover, such a change could lead to a more in-depth analysis of root causes that would better consider the impact of Western sexual and gender hegemony, as it underpins much contemporary oppression of sexual and gender diversity around the world. Thus, instead of identifying pathologisation and the ICD as both a root cause and as a potential solution to violence and oppression, the IE could reframe the discussion to consider medical regulation of sexual and gender diversity as an oppressive structure per se. In doing so, the IE would be able to recognise the impact of Western medicine on the regulation of sexual and gender diversity while at the same time considering how this knowledge coexists with local knowledge, understandings and approaches to sexual and gender diversity. This might or might not increase or decrease stigma and oppressive regulation towards the latter groups. Furthermore, it could lead to a re-orientation of the analysis of human rights violations to better account for local differences and challenges. For example, instead of identifying gender recognition procedures as the primary tool for protecting gender diversity, the IE could acknowledge that the gender recognition procedure has been an effective tool against discrimination in certain countries and give example of where this has been the case, and could also point to the fact that it might not be desired or seen as useful to all gender diverse peoples. This turn towards the local constitutes a primary site of intervention for change, which I will discuss further in section 2.1b, below.

From the discussions in this section, 3 core principles (intersectionality, provincialisation, and localisation) for discursive change can be identified, all of which could be used to develop and diversify approaches by the IE and other human rights bodies. While this thesis has focused on the specific situation of non-Western sexually and gender diverse peoples, these principles could be adapted to each context for the purpose of combatting exclusion and marginalisation within human rights discourse. Starting with the analysis of violence, discrimination and remedies must begin from the perspective of those who are the most marginalised, to combat exclusion and re-marginalisation within human right doctrines. After that, the universal needs to be actively disconnected from the West to ensure that human rights do not foster orientalist and heteronormative interpretations creating new structures of exclusion and oppression for non-Western sexually and gender diverse people. Moreover,

the analysis of oppression should become localised, so the different forms of oppression and human rights standards identified are appropriate and useful to make changes in the places they are expected to be applied. As stated at the beginning of this section, such discursive changes should not require too much of the IE or other similar human rights bodies. Fundamentally, all UN Human Rights bodies, both the special procedures and treaty monitoring bodies, are responsible for identifying violations and setting standards for human rights protection. These principles offer us a change in perspective that would hopefully develop human rights interpretations to better account for the diversity that exists all over the world, and therefore become truly universal.

2.1b) Development of the mandate through dialogue and cooperation: implications for the human rights system and key stakeholders

In addition to the principles discussed above, from the analysis in this thesis dialogue and cooperation emerges as another principle that can support the revision and development of the IE. Running through many of the discussions in this thesis is the need to diversify human rights interpretations to better account for and respond to the multiple and varied experiences of gender, sexuality as well as oppression, inequality, and violence all over the world. In this section I suggest that beyond the discursive changes discussed above, what is really needed is a change in the location from which human rights discourses emerge and are formed. Going back to the discussions in chapter 3, Bhabha identified heterogeneous groups and communities as the primary location from which human rights interpretations and new human rights standards should be developed and established. For Bhabha, these groups could work together in solidarity to support each other's challenge to inequality and oppression, rather than competing to give the final judgements of human rights standards. As further discussed in chapter 3, Bhabha's approach to human rights challenges Eurocentrism and Western centrism in human rights interpretations and give agency to groups usually marginalised or excluded in institutional and political processes, such as sexually and gender diverse people. Using Bhabha's theorisations, concrete changes are identified to the way that actors participate in the human rights dialogue that should develop the protection of sexually and gender diverse people under international human right law.

Numerous actors participate in the protection of international human rights law, some of whom were identified and discussed in chapter 5. States are engaged through the establishment of international legislation for human rights protection as well as in the creation of international human rights monitoring bodies. States are also primarily responsible for the implementation of international human rights standards within their territory through legislation, policy and instructions, including creating national human rights bodies. NGOs and civil society bring local, national, regional, and global human rights issues to international attention and participate in the adoption of human rights instruments through lobbying in international forum. NGOs and civil society are also responsible for bringing human rights violations to the attention of international monitoring bodies through, for example, cooperating with special procedures mandate holders such as the IE. In addition, NGOs and civil society provide the driving force for local activism, using and adapting international human rights law to make changes on the ground. Lastly, international human rights bodies such as the IE identify human rights violations and set standards of protection to be implemented by states and used by activists to better the human rights situations on the ground. Within this matrix, the groups that best connect to Bhabha's ideal 'heterogenous communities of human right agents' are NGOs and civil society. Both groups represent directly or indirectly people on the ground, and are connected to the local situation so they can contextualise human rights according to local circumstances. Through this process of engaging with the local and human rights, NGOs and civil society can form and develop human rights law in each context; a bottom up rather than top-down approach. Furthermore, these groups can utilise existing knowledge, understandings, and traditions. While the latter might not follow the individualised Western approach to human rights critiqued by Bhabha, they give answers to questions of social justice, inequality, and protection for everybody, such as Advita which I discussed in chapter 4, and which can be considered human rights on their own merit.

Having identified NGOs and civil society as the primary agents for human rights interpretations and standards setting, the IE and other human rights bodies should adapt their dialogue with these groups to better reflect the insights that these groups have to the diversification of human rights. Significantly, NGOs and civil society should be considered as collaborators in the development of universal human rights standards, and not only as

informants of human rights violations. The establishing of a reciprocal dialogue between those responsible in interpreting human rights at a universal level and those that work to better the situation of people on the ground. This dialogue should not be aimed at achieving final judgements on the meaning and standards of human rights protection. Rather, its aims should be to focus cooperation between the IE and other human rights bodies, civil society, and NGOs in developing human rights standards that are appropriate for each local context. By establishing such a reciprocal relationship, some existing limitations to the protection of non-Western sexually and gender diverse people can be remedied. As pointed to throughout this thesis, a key boundary to the protection of non-Western sexually and gender diverse people is the conflation between the West and the universal. By opening the dialogue between these different stakeholders, the approach should change from a top-down to a bottom-up approach. For example, in the reports, the IE could reflect on the insights received from civil societies and NGOs to contextualise violence and discrimination and to identify human rights standards in accordance with different local circumstances. In this way, instead of relegating global diversity as unimportant to the universal, the former could be centred as the expression of the universal by the IE, through collaborations with NGOs and civil society. National human rights institutions that are responsible for monitoring human rights nationally as well as engaging with international human rights institutions could play an important role in making more contextualised human rights interpretations as well. This cooperation among different stakeholders could potentially further the protection of sexual and gender diversity more generally, as the identification of standards for human rights protection would respond to local circumstances and render visible the diversity that exists around the world.

Nonetheless, NGOs and civil society groups might experience inequality in access to and opportunity to participate in the international human rights processes. Non-Western NGOs report that they are disproportionately affected by resource constraints when it comes to interacting with international institutions such as the UN.¹ Bringing ‘non-traditional’

¹ Dodo Karsay ‘How far has SOGII advocacy come at the UN and where is it heading?’ [2014] ARC International 23 available at: <<https://arc-international.net/wp-content/uploads/2013/09/How-far-has-SOGII-for-web.pdf>> (access 10 of August 2021); Eduard Jordaan ‘The Challenge of Adopting Sexual Orientation Resolutions at the UN Human Rights Council’ [2016] 8 Journal of Human Rights Practice 298.

interpretations of human rights such as that of Advita to international forums might be a challenge to the more established doctrines. However, as Bhabha explains, between the heterogeneous groups invested with human rights agency there should be solidarity, dialogue, and cooperation rather than final judgements. Therefore, NGOs and civil society should support each other in accessing international forums as well as being heard in their interpretation of international human rights law. These principles of solidarity and cooperation should further extend to engagements with and between states. Recalling some of the analysis in chapter 5, states often position certain human rights such as those of sexually and gender diverse people as 'impositions' by other states. Here Bhabha's focus on solidarity and cooperation rather than final judgments could help inform a less binary approach, bringing the attention towards combatting human rights violations on the ground. Furthermore, States can also participate in the process of diversification through enabling local interpretations of human rights through funding of civil society and NGO initiatives and policy changes, and voicing local understanding when negotiating human rights mechanism or legalisation internationally. As with the changes suggested in section 2.1 a) the changes in the approach to cooperation suggested between the different human rights stakeholders are utilising mechanisms that are already in place. NGOs and civil society already engage with international human rights bodies and play an important role in bringing human rights issues to their attention. What this thesis suggests is primarily for that role to be expanded, so these groups can participate in the development and establishment of human rights standards in accordance with local contexts, needs and understandings. By doing so, I hope that the international human rights system could, through the diversification of human rights interpretations, become truly universal.

3. Contribution to Literature

While there has been research exploring queer or postcolonial critique of international human rights law, the latter has not engaged in depth with the intersection between race, imperialism and gender and sexuality. Existing research drawing on queer postcolonial theories offers important insights into the multiple and complex ways in which non-Western

sexual, and gender diverse subjects are oppressed, marginalised, and excluded.² However, existing research has not considered human rights law, nor does it engage with the reproduction of these structures under international law. This thesis contributes to both international human rights law, and queer literatures, and postcolonial literatures by systematising queer postcolonial approaches and applying these to the IE. In doing so, this thesis explores how structures of sexuality, gender, race, and imperialism bind non-Western subjects in a way that is left unexplored by the analysis of sexuality alone. Through the analysis of queer postcolonial approaches and the application of these to the reports, this thesis also outlines how non-Western sexually and gender diverse people can and should be centred in the analysis of international law.

To date, most research on the IE has been limited to considering the political controversies surrounding the adoption of the mandate.³ As discussed in Chapter 5, special procedures are in themselves under-researched, with the focus usually on individual mandates.⁴ This thesis contributes to this area of investigation by examining the IE as a special procedures mechanism for the protection of sexually and gender diverse peoples. Through this analysis, this thesis has offered insights into the specificity of this special procedure, outlining the mandate holders' approaches and contributions to the development of international human rights law. The latter analysis identified some of the unique challenges faced by the IE deriving from the controversial nature of the rights of sexually and gender diverse peoples. At the same time the analysis discovered some opportunities for the mandate holder in reaching those that are marginalised in the international and local context. Consequently, this thesis

² See Gayathri Gopinath *Impossible Desires: Queer Diaspora and South Asian Public Cultures* (Duke University Press 2005); Murat Aydemir (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011); John C. Hawley (eds) *Postcolonial, queer: Theoretical Intersection* (State University of New York Press 2001).

³ M. Joel Voss 'Contesting Sexual Orientation and Gender Identity at the UN Human Rights Council' [2018] 19:1 *Hum Rights Rev* 1; Eduard Jordaan 'The Challenge of Adopting Sexual Orientation Resolutions at the UN Human Rights Council' [2016] 8 *Journal of Human Rights Practice* 298.

⁴ Aoife Nolan, Rosa Freedman and Therese Murphy 'Introduction' in Aoife Nolan, Rosa Freedman and Therese Murphy eds. *The United Nations Special Procedures System* (Brill 2017) 1-2; Elvira Dominguez-Redondo *In Defence of Politicization of Human Rights: The UN Special Procedures* (OUP 2020) 3; Ingrid Nifosi 'The UN Special Procedures in the field of human rights. Institutional history, practice and conceptual framework' [2017] 2 *Deusto Journal of Human Rights* 131; Christophe Golay, Claire Mahon and Ioana Cismas 'The Impact of the UN special procedures on the development and implementation of economic, social and cultural rights' [2011] 15.2 *The International Journal of Human Rights*, 299, 300.

Elvira Dominguez-Redondo *In Defence of Politicization of Human Rights: The UN Special Procedures* (OUP 2020) 3-4.

adds to the literature on the special procedures by examining the IE in the context of protection of non-Western sexually and gender diverse peoples.

There has not been any systematic analysis of the reports by the IE using queer postcolonial approaches. The closest is the work by Sandra Duffy in 2021.⁵ In this work, Duffy refers to the mandate holder's 2019 report on socio-cultural inclusion and the 2018 report on gender identity, outlining some of the main content of the report including reference to non-Western identities, pathologisation, and criminalisation.⁶ However, in the critical analysis part of the texts, Duffy only mentions the IE in relation to victimisation of gender diverse peoples, considering a range of other human rights mechanism as well.⁷ Thus, the analysis is not an in-depth exploration of the reports of the IE including the latest report on gender theory, and also specifically considering gender diverse subjects. Moreover, while Duffy draws on insights from queer, feminist, and postcolonial theory, the analysis is oriented towards the privileging of certain gender normative subjects in the discourse on gender diversity.⁸ Thus, while Duffy touches upon issues discussed in this thesis, such as victimisation and Western-centrism, her analysis falls short of centring non-Western subjects in the analysis and does not touch upon the other ways that these subjects are excluded in the reports beyond categories. In contrast, this thesis has a broader focus and contributes to the literature by:

- 1. Providing insights into the specific treatment of non-Western sexually and gender diverse people under international law, in the context of the IE.*
- 2. Identifying means to centre non-Western sexually and gender diverse people in the analysis of human rights discourse by using queer postcolonial approaches.*
- 3. Illustrating how such an analysis can be completed in the context of human rights law through the analysis in Chapters 6 and 7.*

⁵ Sandra Duffy 'Contested Subjects of Human Rights: Trans and Gender-variant Subjects of International Human Rights Law' [2021] 84.5 MRL 1.

⁶ Duffy (n 5), 12-13.

⁷ Ibid

⁸ Ibid.

4. Limitations of this Study

The limitations of this study stems from the use of the theories, the focus on the IE, and on the textual analysis of the reports. The choice has been to use numerous insights from queer postcolonial approaches that examine the structural oppression of non-Western sexually and gender diverse people in general. While this has allowed this thesis to show how non-Western sexually and gender diverse people are excluded under international human rights law, it does not engage in depth with any specific subjects or experiences. If anything, this research has underscored the importance of resisting homogenising or categorising the great diversity of non-Western sexual and gender subjects. However, the specificity of their experiences depending on the context in which they live, how they identify, and the impact of local/global currents has not been explored in depth in this research. As mentioned in the introduction to this thesis, critical approaches to gender and sexuality are as varied as the subjects they seek to represent. While this thesis has attempted to outline some of this diversity, it has not been at the centre of the analysis. So, for example, while some of the queer postcolonial approaches discussed critique the imposition and restrictive nature of Western gender norms, they do not consider all the diversity and variety of non-Western gender identities that exists outside the West. Thus, in the attempt to give a comprehensive analysis of the treatment of non-Western subjects in general, this thesis has had to forgo some of the differences between different non-Western sexual subjects in the analysis.

The second limitation stems from having exclusively focused on the IE in the analysis. The choice to examine the IE was based on several considerations. Firstly, it is the only UN human rights mechanism that focuses exclusively on sexually and gender diverse peoples, and both mandate holders have addressed a range of topics (beyond those addressed by other bodies) that could be analysed. Secondly, the IE mandate is not limited by geographical considerations or State ratifications of a specific treaty, meaning that there are no exclusions or limitations to which non-Western sexually and gender diverse people are considered. Lastly, as a special procedure, the IE should have more direct access to non-Western sexually and gender diverse people, because of their independence and experiences as human rights experts and because of the specific working methods of the special procedures. However, there is no guarantee that the mandate holder would be more inclusive towards non-Western

sexually and gender diverse peoples than other human rights mechanisms. Furthermore, most of the human rights bodies today have rendered decisions on the human rights of sexually and gender diverse peoples.⁹ Consequently, while this thesis has sought to generate insights into the nature, content, and boundary of the human rights protection of non-Western sexually and gender diverse peoples, there might be decisions by other human rights bodies that challenge or add to those of the IE.

The last limitation of this research stems from the analysis of the reports, which has been oriented by the insights from queer postcolonial approaches identified in Chapter 4. Because these insights are focused on deconstructing the text to render visible the operation of some key structures, such as orientalism and heteronormativity, there are parts of the reports that have not been considered in depth. For example, there is no extensive exploration of the type of violence and discrimination identified by the IE. Yet, there might be types of violence and discrimination that are committed especially towards non-Western sexually and gender diverse subjects because of their race as well as sexuality or gender. However, by focusing on the structural discursive aspect of the reports, the analysis has not explored potential marginalisation and exclusion in the mandate discussion of violence. Consequently, there might be other parts in the texts which, when subjected to a more in depth queer postcolonial analysis, would give additional insights into the treatment of non-Western sexually and gender diverse people in the reports.

⁹ See for example Ignacio Saiz 'Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN' [2004] 7.2 Health and Human Rights 48, and UNOCHR 'Born Free and Equal' (2019) UN Doc. HR/PUB/12/06/Rev.1 available at: <https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx> both referring to and discussing a range of decisions by UN Human Rights Bodies; Laurence R. Hefner and Erik Voeten 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' [2014] includes a qualitative overview over the LGBT case law of the European Court of Human Rights; African Commission on Human and Peoples Rights 'Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations' [2016] Pretoria University Law Press (PULP) available at https://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf > accessed 9th of September 2021 for an overview of cases and human rights norms from the African, Inter-American and the UN human rights system.

5. Future Research Prospects

From this thesis several opportunities emerge for further research. Recalling the discussion of violence and discrimination committed against sexually and gender diverse people in chapter 5, the COVID-19 pandemic and the IE's response require further exploration from a queer postcolonial perspective. As indicated in chapter 5, the economic impact of the pandemic illuminates existing global inequalities emanating from the international economic system. Given the likelihood of sexually and gender diverse people being economically worse off, it would be of interest for research to explore the intersections between the economic inequality of the latter groups, the global economic system, and the pandemic in general and to consider the IE's COVID-19 report. Furthermore, there is scope for more exploration of the impact of human rights law on the treatment of different non-Western sexually and gender diverse subjects using queer postcolonial approaches. One specific opportunity for future research in this context is the treatment of non-Western sexually and gender diverse women under the mandate, as these individuals have already been identified by queer postcolonial theories as being particularly vulnerable to exclusion and marginalisation. The IE, in the newest report on gender theory, focuses a great deal on women, with the next report by the mandate holder confirmed to continue developing this topic.¹⁰ Therefore, future research could consider applying queer postcolonial approaches to examine the specific position of non-Western women in deconstructive analysis of the report on gender theory and the forthcoming report by the IE.

Another area of future research is the application of queer postcolonial analysis to other human rights bodies. As discussed, the IE is not the only human rights body making decisions on the rights of sexually and gender diverse peoples. It would be compelling to apply a queer postcolonial framework to other human rights bodies focused on similar topics, for example gender, such as the Committee on the Elimination of Discrimination Against Women, or with a focus on race for example Special Rapporteur on contemporary forms of racism, racial

¹⁰ UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27.

discrimination, xenophobia, and related intolerance.¹¹ Moreover, the Inter-American Commission and Court of Human Rights operate in postcolonial contexts and are actively making human rights decisions for sexually and gender diverse peoples.¹² Thus, by applying queer postcolonial insights to these different human rights bodies' decisions, future research can render insights into the different ways non-Western sexually and gender diverse peoples are treated by separate mechanisms. Building on the above, a third area for future research could be the re-writing of human rights decisions using queer postcolonial approaches. The re-writing of judgement is used particularly by feminist legal researchers to highlight alternative judicial reasonings that are more inclusive towards women.¹³ By using the tools given in queer postcolonial approaches to shift the analysis towards non-Western sexually and gender diverse subjects, future research could explore critical re-readings of human rights interpretations to demonstrate how these could be more inclusive towards non-Western sexually and gender diverse peoples.

Lastly, an area of research emerging from this research would involve moving the analysis from critical scholarship to empirical research, testing some of the conclusions reached in this thesis. Such research would focus on studying the experiences of non-Western sexually and gender diverse peoples in interacting with the human rights framework. This research would be socio-legal, working with anthropological research methods such as participant observation of non-Western sexually and gender diverse peoples engaged in local activism

¹¹ The Committee on the Elimination of Discrimination against Women (CEDAW) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women more information available at the Office of the High Commissioner on Human Rights webpages available at: <<https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>> and the Special Rapporteur on contemporary forms of racism responsible for monitoring contemporary forms of racism, its causes and manifestations. More information available at the Office of the High Commissioner on Human Rights webpages available at: <<https://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/IndexSRRacism.aspx>>.

¹² See for example Inter-American Commission 'State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion' OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017), available at: <http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf> Advisory opinion 001/2018; *Atala Riffo and Daughters v. Chile* (Inter-Am Comm. HR, Case 12.502; Inter-American Court of Human Rights, advisory opinion OC-24/17).

¹³ Rosemary Hunter, Clare McGlynn and Erika Rackley eds. *Feminists Judgements: From Theory to Practice* (Hart 2010); Rosemary Hunter 'Can feminists judges make a difference?' [2008] 15.1-2 *International Journal of the Legal Profession* 7; Rosemary Hunter 'The power of feminists judgements' [2012] 20 *Feminist Legal Studies* 135.

over a longer period of unstructured fieldwork. In summary, there are a range of important questions that can be raised for research, in order to centre non-Western sexually and gender diverse people within international human rights law.

Bibliography

Table of cases

UN human rights Committee

Toonen v. Australia, Communication No. 488/1992, U.N.Doc. CCPR/C/50/D/488/1992(1994)

European Court of Human Rights

Dudgeon v UK (1981) 4 EHRR 149

Table of legislation

United Nations 'Charter of the United Nations' 24 October 1945 1 UNTS XVI

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

International Covenant on Economic, Social and Cultural Rights (adopted 16 of December 1966, entered into force 3 January 1976) 999 UNTS 3 (ICESCR)

Table of UN Resolutions

UN Economic and Social Council

UN ECOSOC Res. 1235 (XLII), 6th of June 1967

Former human Rights Commission

UN Human Rights Commission Resolution 2(XXIII) 6th of March 1967, E/EC.4/RES/2 (XXIII)

UN Human Rights Commission Res. 6 (XXV) 4th of March 1969, E/CN.4/RES/6(XXV)

UN Human Rights Commission Res. 1984/23 (6 March 1984) UN Doc E/CN.4/RES/1984/23

UN Human Rights Commission Res. 1987/27 (10 March 1978) UN Doc E/CN.4/RES/1987/27

UN General Assembly

UNGA Res 33/176 (10 of December 1978) UN Doc A/RES/33/176

UNGA 'Resolution adopted by the General Assembly on 15 March 2006. Human Rights Council' [2006] UN.Doc. A/RES/60/251

Human Rights Council

Human Rights Council 'Resolution 5/1 18 of June 2007' UN.Doc. A/HRC/RES/5/1

UNHRC 'Resolution adopted by the Human Rights Council. Review of the work and functioning of the Human Rights Council' [2011] UN. Doc. A/HRC/RES/16/21

UNHRC 'Resolution Adopted by the Human Rights Council on 30 of June 2016 'Protection against violence and discrimination based on sexual orientation and gender identity'' [2016] UN.Doc. A/HRC/RES/32/2.

UNCHR 'Resolution adopted by the Human Rights Council on 12 July 2019. Mandate of the IE on protection against violence and discrimination based on sexual orientation and gender identity' [2019] UN. Doc. A/HRC/RES/41/18.

Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, Uruguay 'Protection against violence and discrimination based on sexual orientation and gender identity' (UNHRC 28 of June 2016) UN.Doc. A/HRC/32/L.2/Rev.1, < <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/135/00/PDF/G1613500.pdf?OpenElement>>

UNCHR .Pakistan on behalf of the OIC amendment to draft resolution A/HRC/32/L.2/Rev.1. Protection against violence and discrimination based on sexual orientation and gender identity' (29 of June 2016) UN.Doc. A/HRC/32/L.4, < https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/L.74>

UNHRC 41st Meeting 32nd Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/32/L.2/Rev.1 - 'Protection against violence and discrimination based on sexual orientation and gender identity', webcast available< <https://media.un.org/en/asset/k1f/k1f9u3lv8e>>

HRC 40th Meeting 41st Regular Session of Human Rights Council, Vote on Draft Resolution A/HRC/41/L.10/Rev.1 - 'Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity', webcast available < <https://media.un.org/en/asset/k1z/k1ztl1xy6v>

UNHRC 'Resolution Adopted by the Human Rights Council on 12 of July 2019 'Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity'' [2019] UN.Doc. A/HRC/RES/41/18, < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/221/62/PDF/G1922162.pdf?OpenElement> >

OHCHR 'Human Rights Council holds an urgent debate on current racially inspired human rights violations, systemic racism, police brutality and violence against peaceful protesters' (17 of June 2020)

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25971&LangID=E>

Independent Expert on protection against violence and discrimination based on sexual orientation and identity

UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/HRC/35/3

UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2017] UN.Doc. A/72/172

UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity' [2018] UN.Doc. A/HRC/38/43

UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Legal recognition of gender identity and depathologisation'' [2018] UN.Doc. A/73/152

UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Data collection and management as means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity'' [2019] UN.Doc. A/HRC/41/45

UNGA 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Social inclusion'' [2019] UN.Doc. A/74/181

UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Practices of so-called "conversion therapy"' [2020] UN.Doc. A/HRC/44/53

UNHRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and identity 'Gender Theory'' [2021] UN.Doc. A/HRC/47/27

End of mission statements Independent Expert on protection against violence and discrimination based on sexual orientation and identity

Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity 'End of Mission Statement on Argentina' available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21343&LangID=E>

Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity 'End of Mission Statement on Mozambique' available at: <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24002&LangID=E>>

Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity 'End of Mission Statement on Tunisia' available at: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27174&LangID=E>>

Other international documents

African Commission on Human and Peoples Rights 'Ending violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations' [2016] Pretoria University Law Press (PULP) available at: <https://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf>

International Commission of Jurists (ICJ) 'Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity' (March 2007) available at: <<http://yogyakartaprinciples.org/>>

Inter-American Commission on Human Rights 'Recognition of the Rights of LGBTI Persons' [2018] Inter-American Commission on Human Rights available at: <<http://www.oas.org/en/iachr/reports/pdfs/LGBTI-RecognitionRights2019.pdf>>

UNOHCHR 'Human Rights Indicators: A Guide to Measurement and Implementation' [2012] UN.Doc. HR/PUB/12/5, III available at: <https://www.ohchr.org/documents/publications/human_rights_indicators_en.pdf>

UNOCHR 'Born Free and Equal' (2019) UN Doc. HR/PUB/12/06/Rev.1 available at: <<https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>>

World Health Organization (WHO), *The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (World Health Organization 1990) available at: <<https://icd.who.int/browse10/2019/en>>

World Health Organization (WHO), *The ICD-11 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (World Health Organization 2019) available at: <<https://icd.who.int/browse11/l-m/en>>

Books

Anzaldúa, G *Borderlands/La Frontera: The New Mestiza* (1st ed. Aunt Lute Book Company 1987)

Aydemir, M, (eds.), *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011)

Bantekas, I, and Oette, L, *International Human Rights Law and Practice* (3rd ed. Cambridge University Press, Cambridge 2020)

Barker, M-J, *Queer: A graphic history* (Icon Books 2016)

Beam, J, (eds) *In the life: A black Gay Anthology* (2nd ed. Redbone Press 2008)

Bhabha, H, K, *The Location of Culture* (Routledge 1994)

Brown, M, L, and Rounsley, C, A, *True Selves: Understanding Transsexualism – For Families, Friends Co-workers and Helping Professionals* (San Francisco: Jossey-Bass 1996)

Butler, J, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge Classics 2006)

Chakrabarty, D, *Provincializing Europe: postcolonial thought and historical difference* (Reissue with new preface by the author, Princeton University Press 2008)

Connell, R, W, *Masculinities* (1995 Polity Press: London)

Crimp, D, *Melancholia and Moralism – Essay on AIDS and Queer Politics* (Cambridge Mass. 2004)

Davies, M, *Asking the Law Question* (2nd ed. Thomson Reuters 2002)

Davis, T, *Humanism* (Taylor and Francis Group 1996)

de Beauvoir, S, *The Second Sex* (translation E.M Parsley, Vintage 1973)

Delgado R, Stefancic, J, Harris, A, *Critical Race Theory: An Introduction* (3rd ed. New York University Press 2017)

- Derrida, J, *Of Grammatology* (Translator Gayatri Chakravorty Spivak, John Hopkins University Press 1976)
- Dominguez-Redondo, E, *In Defence of Politicization of Human Rights: The UN Special Procedures* (OUP 2020)
- Edelman, L, *No Future: Queer Theory and the Death Drive* (Duke University Press 2004)
- Evans, E, *the Politics of Third Wave Feminism: Neoliberalism, Intersectionality, and the State in Britain and the US* (Palgrave Macmillan 2015)
- Evans, M, D, *International Law* (third ed. OUP 2010)
- Fanon, F, *Black Skin, White Masks* (translated by Charles Lam Markmann, new edition, Pluto Press 2008)
- Fanon, F, 'Culture and Racism' in Fanon, F, *Toward the African Revolution: Political Essays* (Translated from French by Haakon Chevalier, Grove Press 1964)
- Fanon, F, *The Wretched of the Earth* (Translated by Richard Philcox, Commentary by Jean-Paul Satre and Homi K. Bhabha, Grove Press 2004)
- Feder, E, K, *Making Sense of Intersex: Changing Ethical Perspectives in Biomedicine* (2014 Indiana University Press)
- Fergusson, R, A, *Ferguson Aberrations in Black: Toward a Queer of Colour Critique* (University of Minnesota Press: Minneapolis 2004)
- Flood, P, J, *The Effectiveness of UN Human Rights Institutions* (Prager 1999)
- Foucault, M, *Archaeology of Knowledge* (Translated by Alan Sheridan, Routledge 2002)
- Foucault, M, *The History of Sexuality, Volume 1. An Introduction* (Translated from French by Robert Hurley, Phanteon Books 1978).
- Foucault, M, "Society Must Be Defended" *Lectures at the Collège de France 1975-1976* (English series ed. Arnold I Davidson, Translated by David Macey, Picador 2003) 38-40
- Frazier, F, E, *Black Bourgeois: The Rise of a New Middle Class* (Collier Books: 1962)
- Freud, S, *Civilisation and Its Discontents* (W.W. Norton 1961)
- Fuss, D, (eds.) *Inside/Out Lesbian Theories, Gay Theories* (Routledge 1991)
- Garber, M, *Vested Interests: Cross-Dressing and Cultural Anxiety* (Routledge 1992)
- Gandhi, L, *Postcolonial Theory: A Critical introduction* (Columbia University Press 2019)

Garcia, D, G, *Theoria Queer: Reflexiones sobre sexo, sexualidad, e Identidad. Hacia una politizacion de la sexualidad* (2nd ed. Egales. Editorial Gai y Lesbiana 2005)

Go, J, *Postcolonial Thought and Social Theory* (OUP 2016)

Gonzalez-Salzberg , G, A, *Sexuality and transsexuality under the European Convention on Human Rights: a queer reading of human rights law* (Heart 2019)

Gopinath, G, *Impossible Desires: Queer Diaspora and South Asian Public Cultures* (Duke University Press 2005)

Guha, R, (ed.) *Subaltern Studies III: Writings on Indian History and Society* (OUP 1984)

Guha, R, Arnold, D, Hardiman, D, *Subaltern Studies Vol.8 Writings on South Asian History and Society* (OUP 1994)

Gutter, J, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community* (Intersentia 2006)

Haberstam, J, *In a Queer Time and Place: Transgender Bodies, Subcultural Lives* (New York University Press 2005)

Han, E, and O'Mahoney, J, *British Colonialism and the Criminalisation of Homosexuality: Queens, Crime and Empire* (Routledge: New York 2018)

Hawley, J. C, (eds) *Postcolonial, queer: Theoretical Intersection* (State University of New York Press 2001)

Hooks, b, *Ain't I a woman: Black women and feminism* (Pluto 1982)

Hunter, R, McGlynn, C, and Rackley, E, (eds) *Feminists Judgements: From Theory to Practice* (Hart 2010)

Inda, J, X, *Targeting Immigrants: Government, Technology and Ethics* (Blackwell Oxford 2005)

Jagose, A, *Queer Theory: An Introduction* (Melbourne University Press 1996)

Johnson, P, R, *Homosexuality and the European Court of Human Rights* (Routledge 2012)

Kapur, R, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing 2018)

Karkazis, K, *Fighting Sex: intersex, medical authority, and lived experiences* (Duke University Press 2008)

- Kay, J, *Trumpet: A Novel* (Picador: London 1998)
- Klages, M, *Literary Theory: A Guide for the Perplexed* (Bloomsbury Publishing 2007)
- Lehmiller, J, J, *The Psychology of Human Sexuality* (Second ed. John Wiley and Sons 2017).
- Lorde, L, *Sister Outsider: Essay and Speeches* (Crossing Press Feminist Series 1984)
- Massad, J, *Desiring Arabs* (Chicago University Press 2007)
- McCann H, and Monaghan, W, *Queer theory now: From foundations to futures* (Red Globe Press 2019)
- McClintock, A, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (Routledge 1995)
- Memmi, A, *Dominated Man: Notes Toward a Portrait* (Orion Press 1968)
- Memmi, A, *The Coloniser and the Colonised* (Expanded edition foreword by Jean-Paul Sartre, afterword by Susan Gilson Miller, Beacon Press 1991)
- Meyerowitz, J, J, *How Sex Changed: a history of transsexuality in the United States* (Harvard University Press 2004)
- Moeckli, D, *Human Rights and Non-Discrimination in the 'War on Terror'* (OUP 2008)
- Morgana, C, and Anzaldúa, G, (eds) *This bridge called my back: Writings by radical women of colour* (Kitchen Table:Women of Colour Press 1983).
- Muñoz J, E, *Disidentifications: Queers of Color and the Performance of Politics* (University of Minnesota Press 1999)
- Muñoz J, E *Cruising Utopia: The Then and There of Queer Futurity* (New York University Press 2009)
- Nadesan, M, H, *Governmentality, Biopower and Everyday Life* (Routledge 2008)
- Nolan, A, Freedman, R, and Murphy, T, (eds) *The United Nations Special Procedures System* (Brill 2017)
- Oyěwùmí, O, *Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997)
- Oliver, K, *The Colonization of Psychic Space: A Psychoanalytic Theory of Oppression* (University of Minnesota Press 2004)

Piccone, T, J, *Catalyst for Change: how the UN's independent experts promote human rights* (Brookings Institution Press 2012)

Puar, J, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press 2007)

Rao, R, *Third World Protests: Between Home and the World* (OUP 2010)

Reid-Parr, R, F, *Black Gay Man: Essays* (Foreword by Samuel R. Delany (New York University Press 2001)

Reis, E, *Bodies in Doubt: An American History of Intersex* (John Hopkins University Press 2009)

Repo, J, *The Biopolitics of Gender* (OUP 2016)

Said, E, W, *Culture and Imperialism* (Vintage Books 1993)

Said, E, W, *Orientalism* (Reprinted with new preface Penguin Books 2003)

Sedgwick, E, K, *Epistemology of the Closet* (New Preface 2008 ed. University of California Press 2008)

Sedgwick, E, K, *Tendencies* (Routledge 1994)

Sedgwick, E, K, *Touching Feeling: Affect, Pedagogy and Performativity* (Duke University Press 2003)

Seidman, S, *Beyond the Closet: The transformation of gay and lesbian life* (Routledge 2002)

Sen, A, *The Idea of Justice* (Paperback 2011)

Sommerville, S, B, *Queering the Colour Line: Race and the Invention of Homosexuality in American Culture* (Duke University Press 2000)

Sosa, L, *Intersectionality in the Human Rights Legal Framework on Violence Against Women* (Cambridge University Press 2017)

Stoler, A, L, *Race and the education of desire: Foucault's History of Sexuality and the colonial order of things* (Duke University Press 1995)

Stoller, R, J, *Sex and Gender: The Development of Masculinity and Femininity* (Karnac Books: London 1968)

Spargo, T, *Foucault and Queer Theory* (Icon Books 1999)

Spivak, G, C, *Outside the Teaching Machine* (Routledge Classics 2009)

- Sterling, A, F, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books 2000)
- Sullivan, N, *A Critical Introduction to Queer Theory* (New York University Press 2003)
- Thomas, G, *The Sexual Demon of Colonial Power: Pan-African Embodiment and Erotic Schemes of Empire* (Indiana University Press 2007)
- Turner, W, B, *Genealogy of Queer Theory* (Temple University Press, Philadelphia 2000)
- Varela Castro, M, M, Dhawan, N, and Antke Engel, A, (eds.) *Heteronormativity and Hegemony: Revising 'the Political' in Queer Politics* (Routledge 2016)
- Warner, M, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Paperback edition Harvard University Press 2000)
- Witting, M, *The Straight Mind and Other Essays* (Beacon Press 1991)
- Williams, J, *Understanding Poststructuralism* (Acumen Publishing 2005)
- Willox, A, and Morland, I, (eds.) *Queer Theory* (Palgrave MacMillan 2005)
- Wilton, T *Sexual (Dis-) Orientation: Gender, Sex, Desire and Self-Fashioning* (Springer 2004)
- Young, R, C, J, *Postcolonialism: An historical introduction* (Blackwell 2001)
- Young R, C, J, *White Mythologies: Writing History and the West* (Second ed. Routledge 2004)

Book chapters

- Anzaldúa, G, 'To(o) queer the writer – Loca escritora y chican' in Keating A, L, ed. *The Gloria Anzaldúa Reader* (Duke University Press 2009) 163
- Arnold, D, 'Gramsci and Peasant Subalternity in India' in Chaturvedi, V, (ed) *Mapping Subaltern Studies and the Postcolonial* (Verso: London 2000) 24
- Ayoub, P, M, Ayoub 'Perils of success: Backlash and resistance to LGBT rights in domestic and international politics' in Brysk, A, and Stohl, M, (eds.) *Contracting Human Rights: Crisis, Accountability, and Opportunity* (Edward Elgar Publishing Limited 2018) 89
- Baderin, M, A, and Ssenyonjo, S, 'Development of International Human Rights Regime Before and After the UDHR' in Baderin, M, A, and Ssenyonjo, M, (eds) *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 1

Berland, L, and Freedman, E, 'Queer Nationality' in Berlant, L, *The Queen of American goes to Washington City* (Duke University Press) 145

Benjamin, H, 'Transsexualism and Transvestitism as Psycho-Somatic and Somato-Psychic Syndromes' [1954] 82 *American Journal of Psychotherapy* 219 reprinted in Stryker, S, and Whittle, S, (eds) *The Transgender Studies Reader* (Routledge 2006) 45

Bhabha, H, K, 'Cultures in Between' in Bennet, D, (ed.) *Multicultural States Rethinking Difference and Identity* (Routledge 1998) 29

Bhabha, H, K, 'On Writing and Rights: Some thoughts on the Culture of Human Rights' in Gibney, M, K, (ed.) *Globalizing Rights: The Oxford Amnesty Lectures 1999*, (OUP 1999) 162

Bhabha, H, K, 'Foreword' in Werbner, P, and Modood, T, (ed) *Debating Cultural Hybridity: Multicultural Identities and the Politics of Anti-Racism* (Ebook edition, Zed Books 2015)

Bleeker, M, 'Of Passing and Other Cures: Arjan Everdeen's Born in the Wrong Body and the Cultural Construction of Essentialism' in Aydemir, M, (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 129

Boone, J, 'Vacation Cruises; Or, The Homoerotics of Orientalism' in Hawley, J, C, (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 43

Brennan, T, 'Places of mind, occupied lands: Edward Said and philology' in Sprinkler, M, *Edward Said a Critical Reader* (Blackwell 1992) 47

Califia, P, 'Gay Men, Lesbian and Sex: Doing It Together' in Willox, A, and Morland, I, (eds) *Queer Theory* (Palgrave MacMillan 2005) 22

Chari, H, 'Colonial Fantasies and Postcolonial Identities' in Hawley, J, C, (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 277

Chatterjee, P, 'Reflections on 'Can the Subaltern Speak: subaltern studies after Spivak' in Morris R, C, (eds) *Can the Subaltern Speak: Reflections on the History of an Idea* (Columbia University Press 2010) 81

Conerly 'Are Your Black First or Are You Queer?' D. Simms ed. *The Greatest Taboo: Homosexuality in Black Communities* (Alyson Books, 2000) 1

Connor, J, 'Special Procedures: Independence and Impartiality' in Nolan, A, Freedman, R, Murphy, T, (eds) *The United Nations Special Procedures System* (Brill 2017) 54.

Connors, J, 'Special Procedures: Independence and Impartiality' in Nolan, A, Freedman, R, Murphy, T, (eds) *The United Nations Special Procedures System* (Brill 2017) 52

Dominguez-Redondo, E, 'Human Rights through the Backdoor: The Contribution of Special Procedures to the Normative Coherence and Contradictions of International Human Rights

Law' in Buckley C. A, et. al (eds) *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill 2016) 548

Dominguez-Redondo, E, 'The History of the Special Procedures: A 'Learning-by-Doing' Approach to Human Rights Implementation' in Nolan, A, Freedman, R, Murphy, T, (eds) *The United Nations Special Procedures System* (Brill 2017), 28

Duggan, L, 'The New Homonormativity: The Sexual Politics of Neoliberalism in Nelson, D, D, and Castronovo, R (eds) *Materializing Democracy: Toward a Revitalized Cultural Politics* (Duke University Press 2002) 175

Dankwa, S, O, 'The One Who First Says I Love You; Love Seniority, and Relational Gender in Postcolonial Ghana' in Nyeck, S, N, and Epprecht, M, (eds) *Sexual Diversity in Africa: Politics, Theory and Citizenship* (2013 McGill-Queen's University Press) 170

Edkings, J, 'Poststructuralism' in Griffiths, M, (ed) *International Relations Theory for the Twenty-First Century* (Routledge 2007) 89

Edwards, R, 'Actively seeking subjects?' in Fejes, A, and Nicoll, K, (eds) *Foucault and Lifelong Learning: Governing the subject* (Routledge 2008) 21

Enteen, J, 'Tom, Dii and Anjaree: Women Who Follow Nonconformist Ways' in Hawley, J, C, eds. *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 99

Fong, R, D, 'Weaving a Different Kind of Tartan: Musicality Spectrality and Kinship in Jackie Kay's *Trumpet*' in Aydemir, M, (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 243

Foucault, M, 'Two Lectures' in Gordon, C, (ed) *Power/Knowledge: selected interviews and other writings 1972-1977* (Harvester Press 1980) 82

Gaer, F, D, 'Picking and Choosing? Country Visit by Thematic Special Procedures' in Nolan, A, Freedman, R, Murphy, T, (eds) *The United Nations Special Procedures System* (Brill 2017) 89

Gonzalez-Salzberg, D, A, 'A Queer Approach to Advisory Opinion 24/2017 on LGBT Rights' in Gonzalez-Salzberg, D, A, and Hodson, L *Research Methods for International Human Rights Law Beyond the Traditional Paradigm* (Routledge 2020) 98

Gonzalez-Salzberg, D, A, and Hodson, L, 'Introduction' in Gonzalez-Salzberg, D, A, and Hodson, L (eds). *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge 2020) 1

Green-Simms, L, "'Just to See': Fanon, National Consciousness, and the Indiscreet Look in Post-Third Cinema' in Aydemir, M, (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 203

Green, R, 'Dimensions of Human Sexual Identity: Transsexuals, Homosexuals, Fetishists, Cross-Gendered Children and Animal Models' in Haug, M, Whalen, R, E, Aron, C, and Olsen, K, L, (eds) *The Development of Sex Differences and Similarities in Behaviours* (Springer 1993) 477

Grosz E, 'Bodies and Knowledges: Feminism and the Crisis of Reason' in Alcoff, L, and Potter, E, (eds) *Feminist Epistemologies* (1994 Routledge: New York) 198

Guha, R, 'On Some Aspects of the Historiography of Colonial India' in Guha, R, and Spivak, G, C, ed. *Selected Subaltern Studies* (OUP 1988) 39

Halley, J, 'Take a Break from Feminism?' in Knop, K, *Gender and Human Rights* (OUP 2006) 57

Hayes, J, 'Queer Resistance to (Neo-) colonialism in Algeria' in Hawley, J, C, (eds.) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 79

Hegarty, P, in conversation with Chase, C, 'Intersex Activism, Feminism and Psychology' in Morland, I, and Willox, A, (eds) *Queer Theory* (Palgrave-McMillan 2005) 70

Huddart, D, 'Hybridity and Cultural Rights: Inventing Global Citizenship' in Kuortti, J, and Nyman, J, (ed.) *Reconstructing Hybridity: Post-Colonial Studies in Transition* (Rodopi 2007) 21

Imre, A, 'Lesbian Representation and Postcolonial Allegory' in Aydemir, M, (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 185

Kapur, R 'De-radicalising the rights claims of sexual subalterns through 'tolerance'' in Leckey R, and Brooks K, (eds.) *Queer Theory: Law, Culture and Empire* (Routledge: London 2010) 39

Kramer, B, 'The Double Nature of the Love Triangle: Sedgwick, Greene and Achebe' in Aydemir, M, (eds) *Indiscretions: At the Intersection of Queer and Postcolonial Theory* (Rodopi 2011) 115

Larne, W, and Walters, W, 'Introduction, Global governmentality: governing international spaces' in Larner, W and Walters, W, (eds) *Global Governmentality: Governing International Spaces* (1st ed. Routledge: London & New York 2004) 1.

Lennox, C, and Waites, M, 'Human rights, sexual orientation and gender identity in the Commonwealth: from history and law to developing activism and transnational dialogues' in Lennox, C, and Waites, M, (eds) *Human Rights Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (Institute for Commonwealth Studies, London 2013) 1

- Lykke, N, 'Intersectional Analysis: Black Box or Useful Critical Feminist Thinking Technolog' in Lutz, H, Vivar, M, T, H, Supik, L, (eds) *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (Ashgate 2011) 207
- McLaughlin, J, Casey, M, E, Richardson, D, 'Introduction' in Jane McLaughlin, J, Casey, M, E, Richardson, D, (eds.) *Intersections Between Feminist and Queer Theory* (Palgrave MacMillan, New York 2006) 1
- Mulé, N, J, 'Regulation of Kink and BDSM: Pathologisation through Diagnostic Tools' in Dodd, S, J, (ed) *The Routledge International Handbook of Social Work and Sexualities* (Routledge 2021) 527
- Nicolson, D, 'Critical Approaches in Halliday', S. (ed), *An Introduction to the Study of Law*, (W. Green, Sweet & Maxwell, 2012) 43
- Oksala J, 'From Biopower to Governmentality' in Falzon, C, O'Leary, T, and Sawicki, J, (eds) *A Companion to Foucault* (Blackwell 2013) 320
- Queen, C, 'The Leather Daddy and the Femme' in Willox, A, and Morland, I, (eds) *Queer Theory* (Palgrave MacMillan 2005) 40
- Rubin, G, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Vance C, S, (eds) *PLEASURE and DANGER: Exploring Female Sexuality* (Routledge 1985) 267
- Seidman, S, 'Identity Politics in a Postmodern 'Gay Culture' in Warner, M, (eds.) *Fear of a Queer Planet? Queer Politics and Social Theory* (University of Minnesota Press 1993) 105
- Spivak, G, C, 'Can the Subaltern Speak?' in Williams, P, and Chrisman, L, ed. *Colonial Discourse and Postcolonial Theory: A Reader* (1st ed. Routledge 1994) 66
- Spivak, G, C, 'The New Subaltern: A silent Interview' in Chaturvedi, V, (ed) *Mapping Subaltern Studies and the Postcolonial* (Verso: London 2000) 324
- Spurlin, W, J, 'Broadening Postcolonial Studies/Decolonizing Queer Studies' in Hawley, J, C, (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 186
- Stryker, S, '(De)subjugated knowledges: an introduction to transgender studies' in Stryker, S, and Whittle, S, eds. *The Transgender Studies Reader* (2006) 1
- Tan, C, K, 'Transcending Sexual Nationalism and Colonialism: Cultural Hybridization as Process of Sexual Politics in 90s Taiwan' in Hawley, J, C, (eds) *Postcolonial Queer: Theoretical Intersections* (State University of New York Press 2001) 123
- Vakulenko, A, 'Gender and international human rights law: the intersectionality agenda' in Joseph, S, and McBeth, A, (eds) *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 196

Lennox, C, and Waites, M, 'Human rights, sexual orientation and gender identity in the Commonwealth: from history and law to developing activism and transnational dialogues' in Lennox, C, and Waites, M, (eds) *Human Rights Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (Institute for Commonwealth Studies, London 2013) 1.

Journal Articles

Ahmad, A, 'The politics of literary post coloniality [1995] 36.3 Race and Class 1

Alessandrini, A, C, 'The Humanism Effect: Fanon, Foucault and Ethics without Subjects' [2009] 7 Foucault Studies 64

Agrawal, A, 'Gender bodies: The case of the 'third gender' in India' [1997] 31.2 Contributions to Indian Sociology 273

Alpana, R, 'Postcolonial Theory and Law: A Critical Introduction' [2008] 29 Adel. L Rev. 315

Ammaturo, F, R, 'The Council of Europe and the creation of LGBT identities through language and discourse: a critical analysis of case law and institutional practices' [2019] 23:4 The International Journal of Human Rights 575

Angelides, S, 'Feminism, Child Sexual Abuse, and the Erasure of Child Sexuality' [2004] 10:2 GLQ 141

Arimoro, A, E, 'The Criminalisation of Consensual Same-Sex Conduct in Nigeria: A Critique' [2019] 4 Journal of Human Rights and Social Work 257

Balasubramanian, S, 'Contextualising the Closet: Naz, Law, and Sexuality in Postcolonial India' [2016] 30 Political Power and Social Theory 135

Berlant, L, and Freeman, E, 'Queer Nationality' [1992] 19.1 Boundary 2 149

Bhabha, H, K, 'The Other Question- the Stereotype and Colonial Discourse' [1983] 24.6 Screen 18

Bhabha, H, K, 'Signs taken for Wonders: Questions of Ambivalence and Authority under a Tree outside Dheli, May 1817' [1985] 12.1 Critical Inquiry 144

Bhabha, H, K 'Democracy de-racialised' [2003] 50.1 Diogenes 27

Biroli, F, and Caminotti, M, 'The Conservative Backlash against Gender in Latin America' [2020] 16 Politics and Gender 1

Black, A, 'Casting the First Stone: The significance of Brunei Darussalam's Syariah Penal Code Order for LGBT Bruneians' [2019] 20.1 Australian Journal of Asian Law 247

Brah, A, and Phoenix, A, 'Ain't I a Woman? Revising Intersectionality [2004] 5(3) Journal of International Women's Studies 75

Bronstema, R, 'A Queer Revolution: Reconceptualisation the Debate over Linguistic Reclamation' [2004] 17.1 Colorado Research in Linguistics 4

Bryant, K, 'Making Gender Identity Disorder of Childhood: Historical Lessons for Contemporary Debates' [2006] 3.3 Sexuality Research and Social Policy 23

Bryant, K, 'In Defence of Gay Children? 'Progay' Homophobia and the Production of Homonormativity' [2008] 11(4) Sexualities 455

Carpenter, M, 'The human rights of intersex people: addressing harmful practices and rhetoric of change' [2016] 24:47 Reproductive Health Matters 74

Carrillo-Santarelli, N, 'Gender Identity, and Equality and Non-Discrimination of Same Sex Couples' [2018] 112.3 The American Journal of International Law 479

Chakrabarty, D, 'Subaltern Studies and Postcolonial Historiography' [2000] 1.1 Nepantla: Views from the South 9

Chambers, S, A, 'Telepistemology of the Closet; or The Queer Politics of Six Feet Under' [2003] 26(1) The Journal of American Culture, 24

Chambers, S, A, 'An Incalculable Effect': Subversions of Heteronormativity' [2007] 55 Political Studies 656

Chase, A. T. 'Human right contestations: sexual orientation and gender identity' [2016] 20:6 The International Journal of Human Rights 703

Cheny, K, 'Locating neo-colonialism, "tradition," and human rights in Uganda's "gay death penalty" (2012) 55(2) African Studies Review 77

Chow, P, Y, S, 'Has intersectionality Reached its limits? Intersectionality at the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' [2016] 16.3 Human Rights Law Review 435

Cismas, I, Mahon, C, Golay C, 'The Impact of UN special procedures on the development of economic, social and cultural rights' [2011] 15.2 The International Journal of Human Rights 299

Clérico, L, 'Discriminacion por orientacion sexual y derechos de la seguridad social en la jurisprudencia de la Corte Interamericana de Derechos Humanos (Corte IDH) y del Tribunal

Europeo de Derechos Humanos (TEDH) Una historia de divergencias? [2019] 47 Revista de la Facultad de Derecho available at: <http://dx.doi.org/10.22187/rfd2019n47a5>>;

Cobb, M, 'Childlike: Queer Theory and Its Children' [2005] 47.1 Criticism 119

Coleman, M, and Grove, K, 'Biopolitics, biopower and the return of sovereignty' [2009] 27 Environment and Planning D: Society and Space 489

Crenshaw, K, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U. Chi.Legal.F 140

Crenshaw, K, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour' [1991] 43.6 Stanford Law Review 1242

Davis, K, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful' [2008] 9(1) Feminist Theory 67

de Lauretis, L, 'Queer theory: Lesbian and Gays sexualities, An Introduction' (1991) 3 Differences: A Journal of Feminists Cultural Studies iii, iv

Dirlik, A, 'The postcolonial aura: Third World Criticism in the Age of Global Capitalism [1994] 20.2 Critical Inquiry 32

Dominguez-Redondo, E, 'Rethinking the legal foundations of control in international human rights law- the case of special procedures' [2011] 29/3 Netherlands Quarterly of Human Rights 261

Drescher, J, Cohen-Kettenis, P, and Winter, S, 'Mining the body: Situating gender identity diagnosis in ICD-11' [2012] 24 (6) International Review of Psychiatry 568

Duffy, S, 'Contested Subjects of Human Rights: Trans and Gender-variant Subjects of International Human Rights Law' [2021] 84.5 MLR 1

Dyer, H, 'Queer futurity and childhood innocence: Beyond the injury of development' [2017] 7(3) Global Studies of Childhood 290

Ekins, R, and King, D, 'Towards a sociology of transgender bodies' [1999] 47.3 The Sociological Review (Keele) 580

Ekins, R, 'Science, Politics and Clinical Intervention: Harry Benjamin, Transsexualism and the Problem of Heteronormativity' [2005] 8(3) Sexualities 306

El-Tayed, F, "Gays who cannot properly be gay': Queer Muslims in the neoliberal European city' 2012] 19 (1) European Journal of Women's Studies 79

- Fausto- Sterling, A, 'Why male and female are not enough' [1993] *The sciences* 20
- Fraser, B, Pierse, N, Chisholm, E, Cook, H, 'LGBTIQ+ homelessness: A review of the literature' [2019] 16 (15) *International Journal of Environmental Research and Public Health* 1677.
- Freeman, R, Mchangama, J, 'Expanding or Diluting Human Rights? The Proliferation of United Nations Special Procedures Mandates' [2016] 38.1 *Human Rights Quarterly* 164
- Fuss, F, 'Interior Colonies: Frantz Fanon and the Politics of Identification' [1994] 24.2 *diacritics* 20
- Gaines, K, K, 'Reflections on Ben Okri, Geonawan Mohamad, and the 2020 Global Uprisings' [2021] 12.1 *Journal of Transnational American Studies* 9.
- Garcia, L, 'Intersectionality' [2016] 3(1) *Kalfou* 102
- Gathii, J, T, 'Writing Race and Identity in a Global Context: What CRT and TWAIL can learn from each other' [2021] 67.6 *UCLA Law Review* 1610.
- Ghanea, N, 'From the UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Step Sideways?' [2006] 55.3 *The International and Comparative Law Quarterly* 695
- Ghattas, D, C, 'Human Rights Between the Sexes: A preliminary study of the life situation of inter* individuals' [2013] 34 *Henrich Boll Foundation Publication Series on Democracy* available at https://www.boell.de/sites/default/files/endf_human_rights_between_the_sexes.pdf?dimension1=ds_feminismus >
- Giami, A, 'Between DSM and ICD: Paraphilias and the Transformation of Sexual Norms' [2015] 44 *Arch Sex Behav* 1127
- Golay, C, Mahon, C, and Cismas, I, 'The Impact of the UN special procedures on the development and implementation of economic, social and cultural rights' [2011] 15.2 *The International Journal of Human Rights*, 299
- Gonzalez-Salzberg, D, A, 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of the Sex/Gender binary by the European Court of Human Rights' [2014] 29.4 *American University International Law Review* 797
- Gonzalez-Salzberg, D, A, 'An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of *Ap, Garçon and Nicot v France*' [2018] 81 (3) *Modern Law Review* 526
- Graham, T, C, 'Conversion Therapy: A Brief Reflection on the History of the Practice of and Contemporary Regulatory Efforts' [2019] 52 *Creighton L. Rev* 419

- Green, R, 'The Significance of Feminine Behaviour in Boys' [1975] 16(4) *Journal of Child Psychology and Psychiatry and Allied Disciplines* 341
- Gressgård, R, 'Asexuality: from pathology to identity and beyond' [2013] 4:2 *Psychology and Sexuality* 179
- Gross, A, 'Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation' [2007] 101 *Proceedings of the Annual Meeting (American Society of International Law)* 129
- Gutter, J, 'Special Procedures and Human Rights Council: Achievements and Challenges Ahead' [2007] 7 *Hum. Rts. L. Rev.* 93 – 65
- Halley, I, 'Queer theory by men' [2004] 11 *Duke Journal of Gender Law and Policy* 7
- Halperin, D, 'The Normalization of Queer Theory' [2003] 45.2-4 *Journal of Homosexuality* 399
- Han, E, and O'Mahoney, J, 'British colonialism and the criminalisation of homosexual conduct' [2014] 27:2 *Cambridge Review of International Affairs* 268
- Helfer, L, & Voeten, E, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' [2014] 68(1) *International Organizations* 77
- Hirst, J,A, Nicola, G, McGinty, G, Liu, R, W, Barr, R, M, Chittle, M, D, and Manchikanti, L, 'ICD-10: History and Context' [2016] 37.4 *American journal of neuroradiology* 596
- Hodson, L, 'Sexual Orientation and the European Convention on Human Rights: What of the L in LGBT?' [2019] 23:3 *Journal of Lesbian Studies* 383
- Hossain, A, 'The paradox of recognition: hijra, third gender and sexual rights in Bangladesh' [2017] 19.2 *Culture Health and Sexuality* 1418
- Hunter, R, 'Can feminists judges make a difference?' [2008] 15.1-2 *International Journal of the Legal Profession* 7
- Hunter, R, 'The power of feminists judgements' [2012] 20 *Feminist Legal Studies* 135
- Ibhawoh B, 'Human rights for some: sexual minorities and the exclusionary impulse' [2014] 69 (4) *International Journal* 612
- Iyer, N, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' [1993] 19 (1) *Queens Law Journal* 179
- Jones, M, 'Intersex Genital Mutilation – A Western Version of FGM' [2017] 25 *International Journal of Children's Rights* 306

- Jordaan, E, 'The Challenge of Adopting Sexual Orientation Resolutions at the UN Human Rights Council' [2016] 8 *Journal of Human Rights Practice* 298
- Jordan-Zachery, J, S, 'Am I a Black Woman or a Woman Who is Black? A Few Thoughts on the Meaning of Intersectionality' [2007] 3(2) *Politics and gender* 254
- Jungar, K, and Peltonen, S, 'Acts of homonationalism: Mapping Africa in the Swedish media' [2017] 20 (5-6) *Sexualities* 715
- Kapur, R, 'Cultural Politics of Fire' [1999] 34.21 *Economic and Political Weekly* 1297
- Kapur, R, 'In the Aftermath of Critique We Are Not in Epistemic Free Fall: Human Rights, the Subaltern Subjects and Non-liberal Search for Freedom and Happiness' [2014] 25 *Law and Critique* 25
- Kennedy, A, 'Fixed at Birth: Medical and Legal Erasure of Intersex Variations' [2016] 39.2 *UNSW Law Journal* 813
- Krueger, R,B, Reed, G, M, First, M, B, Marais, A, Kismodi, E, and Birken, P, 'Proposal for paraphilic disorders in the International Classification of Disease and Related Health Problems, eleventh revision (ICD-11) [2017] 45.5 *Archives of Sexual Behaviours* 1529
- Kumar, M, P, '(An)other Way of Being Human: 'indigenous' alternatives (s) to postcolonial humanism' [2011] 32.9 *Third World Quarterly* 1557
- Lalor, K, 'Making a Different Differences: Representation and Rights in Sexuality Activism' [2015] 23 *Fem Leg Stud* 7
- Lalor, K, 'Encountering the Past: Grand Narratives, Fragmented Histories and LGBTI Rights 'Progress' [2019] 30 *Law and Critique* 21
- Lauren, P, G, 'To Preserve and Build on its Achievements and to Redress its Shortcomings': The Journey from the Commission on Human Rights to the Human Rights Council' [2007] 29.2 *Human Rights Quarterly* 307
- Lauzon, J, T, 'Parental Rights for Lesbian, Gay, Bisexual and Transsexual Persons: A Comparison Between the European and Inter-American Systems of Human Rights' [2019] 49 *Revue générale de droit* 207
- Lazarus, N, 'Disavowing Decolonization: Fanon, Nationalism and the Problematic of Representation in Current Theories of Colonial Discourse' [1993] 24.4 *Research in African Literatures* 69
- Long, S, 'Unbearable witness: how Western activists (mis) recognize sexuality in Iran' [2009] 15.1 *Contemporary Politics* 119

Louai, E, H, 'Retracting the concept of the subaltern from Gramsci to Spivak: Historical developments and new applications' [2012] 4(1) African Journal of History and Culture 4

Medina-Martínez, J, Saus-Ortega, C, Montserrat Sánchez-Lorente, M, Sosa-Palanca, E, M, García-Martínez, P, and Mármol-López, M,I, 'Health Inequities in LGBT People and Nursing Interventions to Reduce Them: A Systematic Review [2021] 18(22) Int J Environ Res Public Health 11801.

McClintock, A, 'The Agnel of Progress: Pitfalls of the Term 'Post-Colonialism'' [1992] 31/32 Social Text 84

McEwen, H, 'Inventing the Family: Colonial Knowledge of the Politics of "Family" and the Coloniality of "Pro-Family" Activism in Africa' [2021] 67.4 Africa Today 31

McGoldrick, D, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' [2016] 16 Human Rights Law Review 61

McGrogan 'The Problem of Causality in International Human Rights' [2016] 65.3 The International and Comparative Law Quarterly 615

Meoded-Danon, L, and Yanay, N, 'Intersexuality: On Secret Bodies and Secrecy' [2016] 17:1 Studies in Gender and Sexuality 57

Merry, S, E, 'Measuring the World: Indicators, Human Rights and Global Governance' [2011] 52.S3 Current Anthropology S83

Money, J, Hampson, J, G, and Hampson, J, L, 'Hermaphroditism: Recommendations Concerning Assignment of Sex, Change of Sex and Psychological Management (1955) 97(4) Bulletin of the Johns Hopkins Hospital 284

Morin, S, F, and Shultz, S, J, 'The Gay Movement and the Rights of Children' [1978] Journal of Social Issues 142

Mutua, M, 'Savages, Victims and Saviours: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law 201

Namaste, K, 'The politics of Inside/Out: Queer theory, Poststructuralism, and a Sociological Approach to Sexuality [1994] 12.2 Sociological Theory 220

Naples-Mitchell, J, 'Perspectives of the UN Special Rapporteurs on their role: inherent tensions and unique contributions to human rights; [2011] 15:2 The International Journal of Human Rights 232

Natarajan, U, Reynolds, J, Bhatia, A, and Xavier S, Xavier 'Introduction: TWAIL- on praxis and the intellectual' [2016] 37:11 Third World Quarterly 1946.

- Nifosi, I, 'The UN Special Procedures in the field of human rights. Institutional history, practice and conceptual framework [2017] 2 Deusto Journal of Human Rights 131
- Noxolo, P. 'Decolonial theory in a time of re-colonisation of UK research' [2017] 42.3 Transactions 342.
- Obendorf, S. Homosexual Rights and the Non-Western World: A Postcolonial Reading of Homosexual Rights in International Human Rights Law' [2000] 15.7 Third World Legal Studies 179
- Pagden, A, 'Human Rights, Natural Rights and Europe's Imperial legacy' [2003] 31.2 Political Theory 171
- Pathak, Z, Sengupta, S, & Purkayastha, S, ' The prison house of Orientalism [1991] 5:2 Textual Practice 195
- Pereira, P, P, G, 'Reflecting on the Decolonial Queer' [2019] 25.3 GLQ 403.
- Piccone, T, 'The Contribution of UN's special procedure to national level implementation of human rights norms' [2011] 15.2 The International Journal of Human Rights 206
- Puar J, Rai, A, 'Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots' [2002] 72 Social Text 117
- Puar J, Rethinking homonationalism' [2013] 45.02 International Journal of Middle East Studies 336
- Rahman, M. 'Queer Rights and the Triangulation of Western Exceptionalism' [2014] 13:3 Journal of Human Rights 274
- Reed, G, M, Drescher, J, Krueger, R, B, Atalla, E, Cochran, S, D, First, M, B, Cohen-Kettenis, P, T, Arango-de Montis, I, Parish, S, J, Cottler, S, Birken, P, and Saxena, S, 'Disorders related to sexuality and gender identity in the ICD-11: Revising the ICD-10 Classification based on current scientific evidence, best clinical practices and human rights considerations' [2016] 15.3 World Psychiatry 205
- Repo, J, 'The Biopolitical Birth of Gender: Social Control, Hermaphroditism, and the New Sexual Apparatus' [2013] 38 (3) Alternatives 228
- Rich, A, 'Compulsory Heterosexuality and Lesbian Existence' [1980] 5.4 Sings: Journal of women in culture and society 631.
- Richardson, D, 'Locating Sexualities from here to Normality' [2004] 7(4) Sexualities 397
- Sabsay, L, 'The emergence of the other sexual citizen: orientalism and the modernisation of sexuality' [2012] 16.5-6 Citizenship Studies 605

- Santos, C, 'Are we there yet? Queer sexual encounters, legal recognition and homonormativity' [2013] 22.1 *Journal of Gender Studies* 59
- Saiz, I, 'Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN' [2004] 7.2 *Health and Human Rights* 48
- Sedgwick, E, K, 'How to Bring Your Kids Up Gay' [1991] 29 *Social Text* 18
- Sokhi-Bulley, B, 'Governing (Through) Rights: Statistics as Technologies of Governmentality' [2011] 20 (2) *Social & Legal Studies* 139
- Stein, A, and Plummer, K, "I Can't Even Think Straight" "Queer" Theory and the Missing Sexual Revolution in Sociology' [1994] 12.2 *Sociological Theory* 176
- Spivak, G, C, 'Can the Subaltern Speak? Speculations on Widow Sacrifice' [1985] *Marxism and the Interpretation of Culture* 271
- Stryker, S, 'Transgender History, Homonormativity, and Disciplinarity' [2008] 100 *Radical History Review* 145
- Sundstrom, L, M, & Sperling, V, 'Seeking better judgement: LGBT discrimination in cases in Russia and at the European Convection of Human Rights [2020] 24:6 *The International Journal of Human Rights* 750
- Tell, S, 'Intersex Management in the United States and Non-Western Cultures' [2015] 30 *EJBM* 6
- Towle, E, B, and Morgan, L, M, 'Romancing the Transgender Native: Rethinking the Use of 'Third Gender' Concept [2002] 8.4 *GLQ* 469
- Tyagi, R, 'Understanding Postcolonial Feminism in relation with Postcolonial and Feminists Theories' [2014] Vol. 1.2 *International Journal of Language and Linguistics* 45.
- Villadsen, K, and Wahlberg, A, 'The government of life: managing populations, health and scarcity' [2015] 44:1 *Economy and Society* 1
- Voss M. J. 'Contesting Sexual Orientation and Gender Identity at the UN Human Rights Council' [2018] 19:1 *Human Rights Rev* 1
- Wahab, A. 'Homosexuality/Homophobia is Un-African?: Mapping Transnational Discourse in the Context of Uganda's Anti-Homosexuality Bill/Act' [2016] 63.5 *Journal of Homosexuality* 685
- Wahab, A, "The Darker Fruit"? Homonationalism, racialised homophobia, and neoliberal tourism in St Lucian-US contact zone' [2021] 23:1 *International Feminist Journal of Politics* 80

Wahab, A, 'Affective Mobilizations: Pinkwashing and Racialized Homophobia in Out There' [2021] 68:5 *The Journal of Homosexuality* 849

Waites M. and Kollman Kelly 'The global politics of lesbian, gay, bisexual and transgender human rights: an introduction' [2009] 15:1 *Contemporary Politics* 1

Waites 'Critique of 'sexual orientation' and 'gender identity' in human rights discourse: global queer politics beyond the Yogyakarta Principles' [2009] 15.1 *Contemporary Politics* 137

Warner, M, 'Introduction: Fear of a Queer Planet' [1991] 93 *Social Text*, 3, 16.

Wittig, M, 'The Straight Mind' [1980] 1 *Feminist Issue* 103

Yeşilkaya, N 'The Question of Subject in Descartes and Foucault' [2021] 5(1) *Entelekyia Logico-Metaphysical Review* 17

Yuval-Davis, N, 'Intersectionality and Feminists Politics' [2006] 13.3 *European Journal of Women's Studies* 193

Zanghellini, A, 'Are Gay Rights Islamophobic? A Critique of Some Uses of the Concept of Homonationalism in Activism and Academia' [2012] 21 (3) *Social & Legal Studies* 357.

Zanghellini, A, 'Queer, antinormativity, counter-normativity and abjection' [2009] 18.1 *Griffith Law Review* 1

Blogs, online news reports and platforms

Akinwotu, E, 'Ghanaian LGBTQ+ centre closes after threats and abuse' (*The Guardian* 25 of February 2021) < <https://www.theguardian.com/global-development/2021/feb/25/lgbtq-ghanaians-under-threat-after-backlash-against-new-support-centre> >

Amnesty International UK 'COVID-19: G20 leaders must 'put aside greed and selfishness' to end vaccine inequality' (*Amnesty International UK* 16 of October 2021) < https://www.amnesty.org.uk/press-releases/covid-19-g20-leaders-must-put-aside-greed-and-selfishness-end-vaccine-inequality?utm_source=google&utm_medium=grant&utm_campaign=&utm_content=covid%20vaccine%20inequality >

BBC News 'Hungary LGBT: Content aimed at children to be banned' (*BBC News* 11 of June 2021) < <https://www.bbc.co.uk/news/world-europe-57439699> >

BBC News 'Chinese sites accused of censoring LGBT content from Friends' (*BBC News* 13 of February 2022) < <https://www.bbc.co.uk/news/world-asia-china-60366628> >

Bhalla, N, 'Anti-gay rhetoric ramps up fear among LGBT+ Ugandans ahead of polls' (Thompson Reuters 6 of January 2021) available at: <<https://www.reuters.com/article/us-uganda-lgbt-election-idUSKBN29B22W>>

Commissioner for Human Rights 'Pride vs. indignity: political manipulation of homophobia and transphobia in Europe' (*Council of Europe Commissioner for Human Rights* 16 of August 2021) <<https://www.coe.int/en/web/commissioner/-/pride-vs-indignity-political-manipulation-of-homophobia-and-transphobia-in-europe?inheritRedirect=true>>

Elder, M, 'Russia passes law banning gay 'propaganda'' (*The Guardian* 11 June 2013) <<https://www.theguardian.com/world/2013/jun/11/russia-law-banning-gay-propaganda>>

France 24 'LGBTQ right groups blocked on China's biggest social media app' (*France 24* 7 of July 2021) <<https://www.france24.com/en/live-news/20210707-lgbtq-rights-groups-blocked-on-china-s-biggest-social-media-app>>

Gayle, D, 'BLM protesters cleared over toppling of Edward Colston statue' (*The Guardian* 5 January 2022) <<https://www.theguardian.com/uk-news/2022/jan/05/four-cleared-of-toppling-edward-colston-statue>>

Hill, R, and Narayan, A, 'What COVID-19 can mean for long-term inequalities in developing countries' (*World Bank Blogs* 7 of January 2021) <<https://blogs.worldbank.org/voices/what-covid-19-can-mean-long-term-inequality-developing-countries>>

Human Dignity Trust 'A History of LGBT Criminalisation' <<https://www.humandignitytrust.org/lgbt-the-law/a-history-of-criminalisation/>>

Human Dignity Trust 'Transgender people say law enforcement officials are main perpetrators of harassment, violence and abuse against them' <<https://www.humandignitytrust.org/news/transgender-people-say-law-enforcement-officials-are-main-perpetrators-of-harassment-violence-and-abuse-against-them/>>

Human Rights Campaign 'Research on LGBTQ People and the COVID-19 Pandemic' <<https://www.hrc.org/resources/research-on-lgbtq-people-and-the-covid19-pandemic>>

International Commission of Jurists (ICJ) 'Living Like People Who Die Slowly: The Need for Right to Health Compliant Covid-19 Responses' (ICJ September 2020) 63 <<http://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>>

International Labour Organization 'Discrimination at work on the basis of sexual orientation and gender identity: Results of the ILO's PRIDE Project' (*International Labour Organisation* 15 of May 2015) <https://www.ilo.org/gender/WCMS_368962/lang--en/index.htm>

International Organization for Migration 'International Standards for the Protection of People with Diverse Sexual Orientation, Gender Identity, Gender Expression and Sex

Characteristics (SOGIESC) in the Context of Migration' (*International Organization for Migration* May 2021) < <https://www.iom.int/sites/g/files/tmzbdl486/files/documents/InfoNote-International-Standards-Protection-of-People-with-Diverse-SOGIESC.pdf> >

International Service for Human Rights 'HRC47 I Call for UN inquiry into police violence and systematic racism in the United States' (*International Service for Human Rights* 25th of June 2021) <https://ishr.ch/latest-updates/hrc47-call-for-un-inquiry-into-police-violence-and-systemic-racism-in-the-united-states/>

ITV News "Being oneself is not a crime': France bans gay conversion therapy with new law' (*ITV News* 26 of January 2022) < <https://www.itv.com/news/2022-01-26/france-bans-gay-conversion-therapy-with-new-law>

ITV News 'New Zealand passes law banning LGBT+ conversion therapy' (*ITV News* 15 of February 2022) < <https://www.itv.com/news/2022-02-15/new-zealand-bans-lgbt-conversion-therapy>> accessed 16 of February 2022

Jones, A, 'Visualizing the unequal treatment of LGBTQ people in the criminal justice system' (*Prison Policy Initiative* 2 March 2021) < <https://www.prisonpolicy.org/blog/2021/03/02/lgbtq/> >

Karsay, D, 'How far has SOGII advocacy come at the UN and where is it heading?' [2014] ARC International 23 available at: <<https://arc-international.net/wp-content/uploads/2013/09/How-far-has-SOGII-for-web.pdf>>

Kim, N, 'South Korea struggles to contain new outbreak amid anti-gay backlash' (*The Guardian* 11 of May 2021) < <https://www.theguardian.com/world/2020/may/11/south-korea-struggles-to-contain-new-outbreak-amid-anti-lgbt-backlash> >

Kirby, J, "Black Lives Matter" has become a global rallying cry against racism and police brutality' *Vox* (12 June 2020) <https://www.vox.com/2020/6/12/21285244/black-lives-matter-global-protests-george-floyd-uk-belgium>

Kobzin, K and Scherban, S, 'Problems of discrimination and violence by law enforcement bodies against LGBT people. The results of qualitative research' (*Kharkiv Institute for Social Research, Karkiv Human Rights Group* 2021) < <https://khpg.org/files/doc/1608811305.pdf> >

Kurtanidze, E, 'Dismantling LGBT+ rights as a means of control in Russia' (*Perspectives* 30 April 2021) < <https://freedomhouse.org/article/dismantling-lgbt-rights-means-control-russia>>

Maynard, S, 'Swimming Against the Current: Sexual Citizenship After Harper and Homonationalism' (*Active History Canada* 7 November 2012) available at: <<https://activehistory.ca/2012/11/swimming-against-the-current-sexual-citizenship-after-harper-and-homonationalism/>>

Mendos, L, R, 'Curbing Deception: A world survey on legal regulation of so-called "conversion therapies" [2020] ILGA World available at < https://ilga.org/downloads/ILGA_World_Curbing_Deception_world_survey_legal_restrictions_conversion_therapy.pdf>

Moreu, J, 'Anti-LGBTQ hate groups on the rise in U.S., report warns' (NBC News 30 March 2020) available at: <<https://www.nbcnews.com/feature/nbc-out/anti-lgbtq-hate-groups-rise-u-s-report-warns-n1171956>>

Okiror, S, 'Uganda passes bill criminalising same-sex relationships and sex work' *The Guardian* (5th May 2021) available at: < <https://www.theguardian.com/global-development/2021/may/05/uganda-passes-bill-criminalising-same-sex-relationships-and-sex-work>>

Olson, M, 'Human Rights Campaign Foundation Releases List of LGBTQ+ Affirming Books In the Wake of Discriminatory Book Bans Across the Country' (*Human Rights Campaign* 16 of February 2022) <<https://www.hrc.org/press-releases/human-rights-campaign-foundation-releases-list-of-lgbtq-affirming-books-in-the-wake-of-discriminatory-book-bans-across-the-country>>

OutRight Action International '689 NGOs from 151 Countries Call for a SOGI Independent Expert at the United Nations' (*Outright Action International* 28 June 2016) <<https://outrightinternational.org/content/628-ngos-151-countries-call-sogi-independent-expert-united-nations>>

Outright International, The Citizen Lab and OONI 'NO ACCESS. LGBTIQ Website Censorship in Six Countries' (*Outright International, The Citizen Lab and OONI* 10 of August 2021) < <https://outrightinternational.org/content/no-access-lgbtiq-website-censorship-six-countries>>

Parmar, S, 'The Internationalisation of Black Lives Matter at the Human Rights Council' (*EJIL: TALK!*, 26 of June 2020) < <https://www.ejiltalk.org/the-internationalisation-of-black-lives-matter-at-the-human-rights-council/>>

Pinheiro, E, 'Brazil continues to be the country with the largest number of trans people killed' (translated by Ana Paula Rocha, *Brasil de Fato* 23 January 2022) available at: <https://www.brasildefato.com.br/2022/01/23/brazil-continues-to-be-the-country-with-the-largest-number-of-trans-people-killed>

Porterfield, C, 'Anti-LGBTQ Rhetoric Is Ramping Up In Eastern Europe, Human Rights Advocates Say' (*Forbes* 10 June 2020) available at: <<https://www.forbes.com/sites/carlieporterfield/2020/06/10/anti-lgbtq-rhetoric-is-ramping-up-in-eastern-europe-human-rights-advocates-say/?sh=3aea4436231e>>

Reid, G, 'LGBTQ Inequality and Vulnerability in the Pandemic' (*Human Rights Watch* 18 June 2020) < <https://www.hrw.org/news/2020/06/18/lgbtq-inequality-and-vulnerability-pandemic>>

Reid, G, 'Global Trends in LGBT Rights During the Covid-19 Pandemic' (Human Rights Watch 24 of February 2021) < <https://www.hrw.org/news/2021/02/24/global-trends-lgbt-rights-during-covid-19-pandemic> >

Shelton, J, Ritosa, A, Roozendaal B Van, Hugendubel, K, and Todd, S.J. 'Perceptions: Addressing LGBTIQ Youth Homelessness in Europe and Central Asia – Findings from a Survey of LGBTI Organisations' (*ILGA-Europe, True Colors United and Silberman Center for Sexuality and Gender at Hunter College* 2021) < <https://www.ilga-europe.org/sites/default/files/Perceptions%20-%20ILGA%20Europe%20Compressed.pdf>>

Snip, I, 'I was afraid I was going to die': Kenyan Survivor of 'conversion therapy' (*OpenDemocracy* 12 of July 2021) <<https://www.opendemocracy.net/en/5050/conversion-therapy-africa-lgbtqi-survivors/>>

Stonewall 'Stonewall report reveals impact of discrimination on health of LGBT people' (*Stonewall* 2018) < <https://www.stonewall.org.uk/about-us/media-releases/stonewall-report-reveals-impact-discrimination-health-lgbt-people> >

Stonewall 'Which countries have already banned conversion therapy?' (*Stonewall* November 2021) <<https://www.stonewall.org.uk/about-us/news/which-countries-have-already-banned-conversion-therapy>>

Treisman 'New Zealand just became the latest country to outlaw conversion therapy' (*National Public Radio* 16 of February 2022) <<https://www.npr.org/2022/02/16/1081139566/new-zealand-ban-conversion-therapy?t=1645531771189>>

Transrespect Versus Transphobia (TVT) 'Trans Murder Monitoring Update- Trans Day of Remembrance 2021' (TVT 11th of November) available on < <https://transrespect.org/en/tmm-update-tdor-2021/#>

UN News 'COVID vaccines: Widening inequality and millions vulnerable' (*UN News* 19 of September 2021) <<https://news.un.org/en/story/2021/09/1100192>>

Wareham, J, '375 Transgender People Murded In 2021- 'Deadlies Year' Since Records Began' (*Forbes* 11 November 2021) available at: < <https://www.forbes.com/sites/jamiewareham/2021/11/11/375-transgender-people-murdered-in-2021-deadliest-year-since-records-began/?sh=1fc5e99e321c>>

Yackley, A, J, 'Turkey's LGBTQ community at risk amid rise in homophobic rhetoric' (*Politico* 24 July 2020) available at: <<https://www.politico.eu/article/turkey-lgbtq-community-risk-rise-in-homophobic-rhetoric/>>

Younes, R, 'The Pride Month, Shame on You: Exposing Anti-LGBT Government Strategies in MENA' (Human Rights Watch 8 June 2020) available at:

<<https://www.hrw.org/news/2020/06/08/pride-month-shame-you-exposing-anti-lgbt-government-strategies-mena>>

Website of the UN Office of the High Commissioner on Human Rights available at:
<<https://www.ohchr.org/EN/pages/home.aspx> >

Other references

ARC International ‘Appointing an Independent Expert on Sexual Orientation and Gender identity: An Analysis of Process Result and Implications’ (2016) ><http://arc-international.net/research-and-publications/research-and-analysis/>>

Allied Rainbow Communities International, ILGA World, ‘International Service for Human Rights Compilation of the Adoption of the 2019 SOGI Resolution 41/18 (Renewal of the Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity)’ [2019] ILGA available:
<https://ilga.org/downloads/RenewIESOGI_report.pdf >

Mendos, L, M, *Curbing Deception: A world survey on legal regulation of “conversion therapies”* (Geneva: ILGA World 2020) available at: <<https://ilga.org/Conversion-therapy-global-research-ILGA-World-curbing-deception-february-2020> >