

**NGO Public Foundation “Erkindik Qanaty”
(Wings of Freedom), Kazakhstan**

Submission regarding the Call for inputs: Report on colonialism and sexual orientation and gender identity, Independent Expert on sexual orientation and gender identity

The present submission highlights a number of issues pertaining to the historic and ongoing impacts of the Soviet colonialism, as well as Russian neo-colonialism, on the enjoyment of human rights by lesbian, gay, bisexual, trans and gender diverse (LGBT) persons in the Republic of Kazakhstan, as well as the region of Central Asia. The information is given vis-a-vis the questions formulated in the Call for Inputs¹.

Authorship. *The submission was prepared by Rustam Kypshakbayev, MSc, independent human rights consultant whose work focuses on UN human rights mechanisms, human rights education, discrimination, in particular of LGBTQ+ people, civil activism, and activists’ security. Public Foundation “Erkindik Qanaty” is an independent human rights NGO registered in Kazakhstan that focuses on promotion of human rights, including political freedoms, human rights education, human rights research, human rights monitoring, including monitoring of court trials, as well as participation in legislative process.²*

General information on the country. *The Republic of Kazakhstan has been an independent state since 1991. It is a legal continuation of the Kazakh Soviet Socialist Republic (KazSSR) - a constituent state of the Union of the Soviet Socialist Republics (USSR). The KazSSR in its current administrative form was organised by the USSR government on significant parts of territories historically belonging to the Kazakh Khanate that had been colonised by the Russian Empire during 18-19 centuries. The present document considers the political relationship between the central authorities of the USSR and the Kazakh Soviet Socialist Republic as colonial. It recognises that the power dynamic between the central administration of the Soviet Union and the Republic of Kazakhstan represents continuity of the relationship between the pre-1917 Russian Empire and its colonial possessions in modern Kazakhstan. It assumes that exceptional political and cultural influence of Russia over Kazakhstan accounts for a relationship of neo-colonialism.*

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

As a post-colonial legal relic, Kazakhstan retains the USSR-era terms of “sodomy and lesbianism” in its Criminal Code³, although it currently refers only to acts involving violence

¹ List of the questions available online: <https://www.ohchr.org/en/calls-for-input/2023/call-inputs-report-colonialism-and-sexual-orientation-and-gender-identity>

² See Erkindik Qanaty website: <https://erkindikqanaty.com/en>

³ Article 121 “Article 121. Violent acts of sexual nature”. Penal Code of the Republic of Kazakhstan. Unofficial translation published by government. Available online: <https://adilet.zan.kz/eng/docs/K1400000226>

thus effectively meaning same sex conduct is not criminalised. However, the Russian version of the Criminal Code retains the derogatory legal term “muzhelozhstvo” (lit. “laying a man down”) unchanged from the USSR-era criminal legislation that criminalised consensual same sex conduct. While technically decriminalised, the legal distinction and use of the pejorative terms is part of discriminatory attitudes towards homosexuality.

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

Kazakhstan decriminalised same sex conduct with the adoption of its first independent criminal code in 1997. This replaced the previous criminal code, adopted by the KazSSR in 1959⁴ under the guidelines of the USSR.

6. How has the legal and social regulation of gender, sexual orientation and gender identity been relevant for imposing and maintaining colonial power?

Same sex acts were criminalised in the jurisdiction of modern Kazakhstan by the Soviet Union in 1933 by the order of the USSR central administration following OGPU's (KGB predecessor) backlash against hundreds of alleged gay men. Communism - the officially established ruling ideology of the Soviet Union⁵ was used to ideologise same sex conduct, presenting it as a phenomenon of alien, non-socialist world and part so-called corrupting influence of the West⁶.

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

Not only do the modern political narratives within Kazakhstan often follow the USSR-era-produced trope of ideologisation of LGBTI people's lives and identities, labeling those lives and identities as “Western ideology”⁷. Moreover, laws of modern Russia regulating LGBT rights continue to deeply impact the laws of Kazakhstan due to profound historical, political, cultural and demographic connections and geographic proximity.

⁴Criminal Code of the Kazakh Soviet Socialist Republic [original in Russian]. Available online: <https://adilet.zan.kz/rus/docs/K590002000>

⁵ Article 6, Constitution of the Soviet Union (1977): “The leading and guiding force of the Soviet society, the nucleus of its political system, state organisations and public organisations is the Communist Party of the Soviet Union”. Russian original available online: <https://www.hist.msu.ru/ER/Text/cnst1977.htm>.

⁶ See for example: “There Are No Homosexualists [sic] in This Country” [Original in Russian: V etoy strane gomoseksualistov net]. Meduza. 2022. Available online: <https://meduza.io/feature/2022/10/12/nikakih-gomoseksualistov-v-etoy-strane-net>

⁷ See for example: “In Kazakhstan they are trying to ban LGBT again”: <https://rus.azattyq.org/a/kazakhstan-various-calls-to-limit-lgbt-rights/32377014.html>; “Western NGOs cultivate LGBT agenda in Central Asia”: <https://eurasia.expert/zapadnye-npo-nasazhdayut-v-tsentralnoy-azii-lgbt-povestku/>; Intolerance and aggression to LGBT+. What are the reasons of homophobia in Kazakhstan?: <https://rus.azattyq.org/a/kazakhstan-homophobia-causes-of-aggression/31292952.html>

65.7% of Kazakhstan's population use the Russian language in searching information on the Internet, while 90.4% report being able to speak Russian. Research suggests around every 5th person in Kazakhstan prefers Russian media, with the 23.3%⁸ preferring Russian television which is notorious for transmitting LGBT-phobic narratives under absolute state content control.

Proving this connection, following Russia's adopting of the laws against gay-propaganda, continuous attempts were made in Kazakhstan to adopt legislation that was identical in essence and even wording. The political narrative of "propaganda of a non-traditional sexual orientation" having been born in the Russian political discourse, became part of the LGBT-phobic narrative in Kazakhstan. Thus, in 2015 the Constitutional Council repealed, although on technical grounds, the just-adopted Law "On Protection of Children from Information Harming their Health and Development" (the name identical to the Russian law) that banned so-called "propaganda of a non-traditional sexual orientation"⁹ after it was criticised internationally and by civil society. In 2018 the Ministry of Information and Communication drafted bylaw that would declare homosexuality as "a perversion" thus effectively banning dissemination of information about LGBT to Kazakhstanis under the age of 18 but repealed it after civil society's backlash and the SOGI Expert's intervention¹⁰. Later, different members of Parliament proposed banning "gay propaganda" in 2021 and, most recently, in 2023¹¹.

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⁸ Sociological Research on Media Consumption and Media Information Literacy in the Countries of Central Asia: Kazakhstan [Original in Russian: Sotsiologicheskoye issledovaniye po mediapotrebleniyu i mediainformatsionnoy gramotnosti v stranah Tsentral'noy Azii: Kazakhstan]. Available online: https://drive.google.com/file/d/1eisEUbjkPUHn8yljq_9RqtSGKuie6ANs/view

⁹ See the Ruling of the Constitutional Council. 2015. Kazakh and Russian versions available online: <https://adilet.zan.kz/rus/docs/S1500000003>

¹⁰ Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. Reference: OL KAZ 5/2018. 2018. Available online: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24175>

¹¹ They Are Trying to Ban LGBT in Kazakhstan Again [Original in Russian: V Kazahstane vnov' pytayutsya zepretit' LGBT]. Azattyq (Radio Freedom Kazakhstan). 2023. Available online: <https://rus.azattyq.org/a/kazakhstan-various-calls-to-limit-lgbt-rights/32377014.html>